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(2) ASSAM L. R.

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ASSAM AND NAGALAND HIGH COURT

1972

CHIEF JUSTICE :

The Hon'ble Mr. Justice P. K. Goswami, B.A. (Hons), B.L. (upto 20-1-72)

PUISNE JUDGES :

The Hon'ble Mr. Justice M. C. Pathak, B.A. (Hons), B.L. (upto 20-1-72)

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REPORTER :

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EDITOR :

Shri S. Appu Rao, B.A., B.L., Advocate (Madras), *Chief Editor*.

NOMINAL TABLE

Associated Industries (Assam) Ltd. v. Bipin Behari Singh	(Feb) 31	Francis, T. O. v. State of Assam	(Feb) 22
Associated Industries (Assam) Ltd. v. Sub-Divisional Officer (Sadar), Gauhati	(Jan) 4	Jalaluddin Ahmed v. State of Assam	(Jan) 14
Bandhana Goala v. Assam Board of Revenue	(Jan) 11	Mahendra Chandra v. Chandra Kanta	(Feb) 27
Banikanta Sarma v. State of Assam	(Feb) 19	Mangal Ram v. Premananda	(Jan) 8
Bhutkani Nath v. Mt. Kamaleswari Nath	(Jan) 15	Sawkat Ali v. Sup. of Police Sibsagar	(Feb) 29
		Sudhansu Ranjan Dasgupta v. Manindra Kumar Paul	(Jan) 1
		Sunahar Ali v. Sythendra Suklobaidya	(Feb) 25

SUBJECT INDEX

Assam Fixation of Ceiling on Land Holdings Act (1 of 1957)
See under Tenancy Laws.

Assam Fixation of Ceiling on Land Holdings Rules (1957)
See under Tenancy Laws.

Assam Land and Revenue Regulation (1 of 1886)
See under Tenancy Laws.

Assam Panchayats Act (24 of 1959)
See under Panchayats.

Civil Procedure Code (5 of 1908), S. 80 read with Order 7, Rule 11 (d) — Plea as to waiver of notice under S. 80 in plaint — Court has no power to reject plaint under Order 7, Rule 11 (d) straightway — Court has to try issue of waiver if denied by defendant in written statement (Feb) 29
Constitution of India, Art. 14—See Tenancy Laws — Assam Land and Revenue Regulation (1886), S. 12 (Jan) 11

Contract Act (9 of 1872), S. 55 — Time when essence of contract—Contract relating to sale of immovable property — Presumption (Jan) 8

Evidence Act (1 of 1812), S. 67—See Registration Act (1908), S. 60 (2) (Jan) 15A

Industrial Employment (Standing Orders) Act (20 of 1948), S. 5—See Limitation Act (1963), S. 14 (2) (Feb) 31A

—S. 6 — See Limitation Act (1963), S. 14 (2) (Feb) 31A

—S. 10 — Standing Orders are immutable for the first six months from the date on which they come into operation—Standing Orders can be modified after the said period (Feb) 31B

—S. 11 — See Limitation Act (1963), S. 14 (2) (Feb) 31A

Limitation Act (9 of 1908), Art. 47 — Suit for possession of immovable property—Comprised in a proceeding under S. 145, Cr. P. C., filed by a person bound by the order—Art. 47 applies (Feb) 27

—Art. 142—See Ibid, Art. 144 (Jan) 15C

—Art. 144 — Adverse possession — Husband's possession of wife's property —Suit by wife—Applicability of Art. 142 (Jan) 15C

Limitation Act (36 of 1963), S. 14 (2) — Proceedings before certifying officer under S. 5, Industrial Employment (Standing Orders) Act (1946), is not a "civil proceeding"—Labour Court exercising power of appellate authority under S. 6 of that Act is not a "Court" (Feb) 31A

Motor Vehicles Act (4 of 1939), S. 36 (as amended by Act 100 of 1956) — State Government can alter the laden capacity of a vehicle in appropriate cases (Feb) 22

PANCHAYATS

—**Assam Panchayat Act (24 of 1959), S. 27 (3) Second Proviso** — Power of the State Government to suspend a president pending his removal under S. 27 (3) — Existence of a prior order of disqualification of the president not necessary (Feb) 19

Registration Act (16 of 1908), S. 35 — "Execution of the document" — Meaning of — Mere signing not sufficient solemn act of the executant owning up recitals fully knowing the contents is necessary (Jan) 15B

—S. 60 (2)—Presumption under — When registration is not sufficient proof of due execution of document—Proof of execution complying with S. 67, Evidence Act necessary (Jan) 15A

TENANCY LAWS

—**Assam Fixation of Ceiling on Land Holdings Act (1 of 1957), S. 3 (f)** — See Ibid, S. 7 (1) (Jan) 14

—S. 4 — See Tenancy Laws — Assam Land and Revenue Regulation (1886), S. 3 (Jan) 1A

—S. 7 (1) — Act aims at only agricultural land — Fishery and stone quarry lands are not "land" (Jan) 14

—S. 7 (2) — Service of draft statement on person concerned — Is mandatory — Failure is fatal (Jan) 4

—S. 20 — See Tenancy Laws — Assam Land and Revenue Regulation (1886), S. 3 (Jan) 1A

—S. 23(b)—Suit by landlord possessing less than 10 bighas of land for eviction of

- Tenancy Laws—Assam Fixation of Ceiling on Land Holdings Act (contd.)**
 tenant possessing more than ten bighas of land — Non-compliance with S. 27 and Rule 25 of the Rules by landlord before institution of suit — Suit is liable to be dismissed (Feb) 25
 — S. 27—See Ibid, S. 23 (b) (Feb) 25
 — S. 32 — Settlement of excess land — Suit to set aside — Is maintainable (Jan) 1B
 — **Assam Fixation of Ceiling on Land Holdings Rules (1967)**, Rule 6 (2)—See Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957), S. 7 (2) (Jan) 4
- Tenancy Laws—Assam Fixation of Ceiling on Land Holdings Rules (contd.)**
 — R. 25 — See Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1956), S. 23 (b) (Feb) 25
 — **Assam Land and Revenue Regulation (1 of 1886)**, Ss. 3 and 84, Proviso (c) — Accretion of land — When allowed (Jan) 1A
 — S. 12—Settlement Rules under, R. 18 — Validity—Rule is ultra vires Art. 14 of the Constitution (Jan) 11
 — S. 34, Proviso (c)—See Ibid, S. 8 (Jan) 1A
 — S. 34 — See Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957), S. 32 (Jan) 1B

ASSAM CASES OVERRULED, REVERSED AND

DISSENTED FROM ETC., IN A. I. R. 1972

'Diss. = Dissented from in; Over. = Overruled in, Revers. = Reversed in.

- AIR 1961 Assam 80, Mahendra Lal v. Ramprasad — Over. AIR 1972 Gauhati 25 (July).
 AIR 1966 Assam 29, Ka Byrheir Kurkalang v. State of Assam — Revers. AIR 1972 S C 223 (Jan).
 ILR (1966) 18 Assam 417, Satyendra Nath Sen v. State of Assam—Revers. AIR 1972 S C 1028 (May).
 (1968) Civil Rule No. 28 of 1966, D/- 16-2-1968 (Assam)—Revers. AIR 1972 S C 154 (Jan).
 (1968) Cri. Revn. No. 73 of 1968, D/- 12-11-1968 (Assam)—Revers. AIR 1972 S C 2166A (Oct).
 (1968) Cri. Appeal No. 73 of 1966, D/- 13.11.1966 (Assam) — Revers. AIR 1972 S C 635A, B (Mar).
 (1970) Ele. Petn. No. 2 of 1969, D/- 26.3.1970 (Assam)—Revers. AIR 1972 S C 2367 (Nov).
 AIR 1971 Assam 19 = (1971) 1 Lab L J 278, Prafulla Chandra Sharma v. Oil India Ltd.— Diss. AIR 1972 Delhi 292B (Dec).

COMPARATIVE TABLES

Supplement to Comparative Tables of Previous Years

Owing to late receipt of Other Journals the following Supplement to Comparative Tables of A.I.R. = Other Journals is issued.

A. I. R. 1971 Assam = Other Journals

AIR	Other Journals
82	40 F J R 189
186	1972 Serv L R 49

A.I.R 1972 Assam = Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	...	11	Assam L R (1971) Assam 271	19	...	27	Assam L R (1971) Assam 310
4	Assam L R (1972) Assam 85	14	Assam L R (1971) Assam 801	22	...	29	Assam L R (1971) Assam 76
8	Assam L R (1971) Assam 17	15	Assam L R (1971) Assam 140	25	Assam L R (1971) Assam 295	31	...

Other Journals = All India Reporter

Assam L R (1971) SC	Assam L R (1972) Assam	Assam L R (1972) Gauhati	Assam L R (1972) Gauhati
Assam L R AIR	Assam L R AIR	Assam L R AIR	Assam L R AIR
22 1972 SC 2887	85 1972 Assam 4	1 1972 Gauh 61	41 1972 Gauh 18
54 1971 SC 813		19 " " 6	75 " " 127
		21 " " 85	85 " " 49
		80 " " 19	87 " " 50

THE All India Reporter 1972

Assam & Nagaland High Court

AIR 1972 ASSAM & NAGALAND 1
(V 59, C 1)

**P. K. GOSWAMI, C. J. AND
M. C. PATHAK, J.**

Sudhangsu Ranjan Dasgupta and others, Appellants v. Manindra Kumar Paul and others, Respondents.

Second Appeal No. 177 of 1966, D/- 4-6-1971, from order of Sub. J., Cachar, at Silchar, D/- 25-5-1966.

(A) Tenancy Laws — Assam Land and Revenue Regulation (1 of 1886), Sec. 3 and 34 Proviso (c) — Land accreted to plaintiff's periodic patta land by recession of river contiguous to such land held automatically became part of plaintiff's land not being khas land could not be allotted to any other person on ground that plaintiff had land in excess of ceiling fixed by Assam Act 1 of 1957 — AIR 1958 Assam 34, followed — (X-Ref: Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957), Sections 20 and 4).

Entitlement to land being by operation of law, the provisions of the Ceiling Act did not apply. (Paras 6 and 7)

(B) Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957) Section 32 — Suit to set aside settlement of land made in favour of defendant on mistaken assumption that it was khas land of the plaintiff and on ground that plaintiff already owned land in excess of ceiling was not barred — (X-Ref: Tenancy Laws — Assam Land and Revenue Regulation (1 of 1886) Section 34.

The reason was that the impugned settlement made by the Deputy Commissioner was one in the usual course under the provisions of the Assam Land and Revenue Regulation and not in exercise

of powers under the Ceiling, on Land Holdings Act. (Para 8)

Cases Referred: Chronological Paras (1958) AIR 1958 Assam 34 (V 45) Boroji Manipurini v. State of Assam 6

S. K. Ghose, Advocate General, Nagaland and B. K. Das, for Appellants; K. P. Bhattacharjee, for Respondents.

GOSWAMI, C. J.:— This second appeal is by the plaintiffs against the decree of the learned Subordinate Judge, Silchar reversing that earlier decision of the learned Munsiff.

2. One Surendra Chandra Das Gupta, the original plaintiff in the suit, was the owner and possessor of the land in Dag No. 180 appertaining to second R. S. Patta No. 71 of village Saidpur Part II, Pargana Leverputa, District-Cachar. The river Surma was originally flowing contiguous West of the land. The river gradually and imperceptibly receded towards west and the Schedule land gradually and imperceptibly accreted to the aforesaid dag, of which the plaintiff was admittedly the owner in possession. Both the plaintiff and the defendant No. 2 applied for settlement of the schedule land and the Collector settled the land in Settlement case No. 177 of 1957-58 in favour of the defendant No. 2 on 8th October, 1958. The plaintiff thus brought this suit for declaration that the accreted schedule land forms part and parcel of his land in Dag No. 180 and that he is the settlement holder of the accreted land. He also prayed for a decree for confirmation of possession and in case he is out of possession, for khas possession of the land. He also prayed for a direction to the defendant No. 1 for assessing revenue of the suit land.

3. The State of Assam (defendant No. 1) resisted the plaintiff's claim. It

averred in the written statement that the disputed land was lying khas from a very long time and cannot be considered as part and parcel of Dag No. 180. It further stated that both the plaintiff and the defendant No. 2 applied for settlement and "as the plaintiff was found to hold land measuring more than 150 bighas his prayer was rejected and the settlement of the land in question i. e. dag 833 was granted in favour of Shri Manindra Kumar Pal by the Deputy Commissioner's order dated 3-5-1958 in Settlement Case No. 177 of 1957-58". (Paragraph 12 (2) of the written statement). The State also denied that the land was gained by alluvion. The defendant No. 2 also similarly denied the plaintiff's claim.

4. The trial court held that the "suit land is an accreted land that has been thrown up within 4/5 years by the gradual recession of river Surma according to Government patwari." It also found that the land of the plaintiff is contiguous east of the disputed land. The court therefore held that under Section 34 (b) of the Assam Land and Revenue Regulation the plaintiff is entitled to the settlement of the land. The trial court rejected the plea of the State that the plaintiff was owner of more than 150 bighas of land in absence of any evidence to that effect. Besides, the Government Patwari (D. W. 2) did not state in his evidence that the settlement was refused on the ground of the plaintiff owning more than 150 bighas of land. The trial court also rejected the contention of the defendants that the suit was barred under Section 154 of the Assam Land and Revenue Regulation. The learned Munsiff, therefore, decreed the suit.

5. The learned Subordinate Judge held the land to be accreted land and also contiguous east of the plaintiff's periodic patta land covered by Dag No. 180. He also found that the defendant No. 2 has no land contiguous to the disputed land. He therefore agreed with the learned Munsiff that "the suit land must have been settled with the plaintiff and the State is entitled to assessment of revenue for the suit land if otherwise not barred." The learned Judge, however, on the admission of P. W. 1 (son of the original plaintiff) that the Collector refused to settle the suit land as he had more than 150 bighas of land, held that the settlement was rightly refused under the provisions of the Assam Fixation of Ceiling on Land Holdings Act, 1956 (hereinafter referred to as the Ceiling Act') as specifically averred in the written statement of the defendant No. 1.

He found that the plaintiff had more than 150 bighas of land and since under Section 4 of the Ceiling Act no person

shall be entitled to hold as owner or tenant lands which exceed the limit of 150 bighas in aggregate. He held that the Collector was justified in refusing settlement of the land in favour of the plaintiff. He also held that as the Collector refused settlement of the suit land under the provisions of the Ceiling Act, the plaintiff could not challenge the order of the Collector in a Civil Court under Section 32 read with section 20 of the Ceiling Act. He held that the civil Court's jurisdiction was barred. As a result, the learned Subordinate Judge dismissed the plaintiff's suit. Hence, this second Appeal.

6. Dealing with section 20 of the Ceiling Act, the learned Judge observed as follows:—

"So though under the law of alluvion read with Section 34, proviso (b) and the Explanation to clause (b) of Section 3 of the Assam Land and Revenue Regulation, the plaintiff was entitled to the suit land as accreted land, plaintiff's acquisition of the suit land was barred under Section 20 of the Assam Fixation of Ceiling on Land Holdings Act, 1956, and so the learned Collector was justified in refusing settlement of suit land to the plaintiff." Section 20 may be read:

"(1) Notwithstanding anything to the contrary in any law, usage, contract or agreement, from and after the commencement of this Act, no person as owner or tenant shall acquire or possess by transfer, exchange, lease agreement or settlement any land which with or without the lands already held by him or any member of his family, shall in the aggregate exceed the limit fixed under Section 4 of this Act.

x x x x

From the finding of the learned Judge, it is clear that the land accreted to the periodic patta of the plaintiff. If that is so although the Bengal Alluvion and Diluvion Regulation, 1825 (Bengal Regulation 11 of 1825) is admittedly not applicable in the Cachar district, the principles of justice, equity and good conscience will be easily invoked and under those principles even in absence of a provision like Section 4 of the Bengal Regulation, the principle of that Section will apply.

We may, therefore, read Section 4:

"When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from the Government by a zamindar or other superior land-holder, or as a subordinate tenure, by any description of under-tenant whatever"

Explanation to Section 3 of the Assam Land and Revenue Regulation is directly applicable to this case. That Explanation reads:

"Any land gained by alluvion or by dereliction of a river to any estate as here defined, which under the laws in force is considered an increment to the tenure to which the land has accreted, shall be deemed to be part of that estate."

This Explanation clearly shows that any land gained by alluvion, as in this case, shall be deemed to be part of the main estate to which it has accreted, provided under the laws in force such alluvion is considered an increment to the tenure to which the land has accreted.

In this context, reference to Section 34 of the Regulation may be apposite. By that sec. "when a settlement has been accepted, the revenue fixed thereby and no more shall be payable from such date and for such term, as the State Government may fix in this behalf:

"Provided that—

(a) x x x x

(b) x x x x

(c) in the case of gain by alluvion or by dereliction of a river, or loss by deluvion, during the currency of the settlement, increment shall be assessed and reductions granted by the Deputy Commissioner according to such limitations as to the extent of gain or loss and such other conditions as may be prescribed....."

Proviso (c) to Section 34 of the Regulation, therefore, clearly indicates that by operation of this provision of law, the accreted land becomes a part of the tenure to which it is annexed and the main estate with this addition will be liable to increased assessment of land revenue.

The Explanation set out above may, therefore, be referable to the provision under Section 34, proviso (c) of the Regulation, in addition to the principles of justice, equity and good conscience. The result is that the accreted land having already formed part of the periodic patta land of the plaintiff, viz., dag No. 180 to which it is immediately contiguous, is not available for settlement in favour of the defendant No. 2 on the erroneous assumption that it is a khas land. There is no evidence on record that this land is khas as claimed by the defendants. There is no finding of the court below to the effect that the disputed land is khas land of the Government. The settlement in favour of the defendant No. 2 is therefore invalid as the land, under the Regulation, formed part of Dag No. 180 which automatically

became the estate of the plaintiff unless the plaintiff refused to accept the same.

The plaintiff in this case applied to the Government for settlement of the accreted land although such an application was not necessary as he was entitled to it under the law. We are, therefore, clearly of opinion that settlement in favour of the defendant No. 2 is unauthorised and invalid and the plaintiff is entitled to the settlement of the disputed land and also to khas possession of the same. The view we have taken receives support from a Division Bench decision of this Court in AIR 1958 Assam 34 (Boroji Manipurini v. State of Assam).

7. From the above conclusion, we will presently show that Section 20 of the Ceiling Act is not at all attracted in the present case. It is not a case where the plaintiff has acquired or possessed this land by transfer, exchange, lease, agreement or settlement. He is entitled to this land by operation of the law as shown above and he should get an opportunity under the provisions of the Ceiling Act to either retain it or to surrender the same in accordance with law and the procedure laid down therein.

8. The learned Judge also relied upon Section 32 of the Ceiling Act as a bar to jurisdiction of a civil court in entertaining such a suit. That section may be quoted:

"Except as otherwise expressly provided in this Act, no decision or order made in exercise of any power conferred by or under this Act shall be called in question in any Court."

It is enough to state that this section is not in the way of the plaintiff. The plaintiff in this suit has not challenged any decision or order of any authority made in exercise of the powers under the Ceiling Act. The Deputy Commissioner settled the land in favour of the defendant No. 2, as we have found above, on the mistaken assumption that it was khas land available for settlement under the Assam Land and Revenue Regulation. It is true that he settled the land in favour of the defendant No. 2 in preference to the plaintiff who has more than 150 bighas of land. Even so, the order of settlement in favour of the defendant No. 2 is not an order made in exercise of the powers under the Ceiling Act. It is an order in the usual course under the provisions of the Assam Land and Revenue Regulation. That being the legal position, Section 32 of the Ceiling Act is no bar to the institution of the suit.

9. In the result, the appeal is allowed. The judgment and decree of the learned Subordinate Judge are set aside and the decree of the learned Munisiff is restored. We will, however,

make no order as to costs here as well as in the trial court.

M. C. PATHAK, J.:— 10. I agree.
Appeal allowed.

AIR 1972 ASSAM & NAGALAND 4
(V 59 C 2)

P. K. GOSWAMI, C. J. AND
M. C. PATHAK, J.

Associated Industries (Assam) Ltd.
Petitioner v. Sub-Divisional Officer
(Sadar), Gauhati and others, Respondents.

Civil Rule No. 309 of 1968, D/- 16-6-1971.

Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957), Section 7 (2) — Service of draft statement.— Person whose name has been mutated in respect of the disputed land and against whom the proceedings are directed is "person concerned". Even if he is not the recorded pattadar service of draft statement on him is mandatory and failure is fatal to further proceeding — (X-Ref:— Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Rules (1957), Rule 6 (2)).

(Paras 10 and 11)

K. Lahiri and M. Sarma, for Petitioner; A. M. Mazumdar, Jr. Govt. Advocate, J. P. Bhattacharji and D. K. Hazarika, for Respondents.

GOSWAMI, C. J.:— The petitioner's case is that it is a company incorporated under the Indian Companies Act, having its place of business in Assam. its authorised capital is Rs. 1,00,00,000/- and the paid-up capital stands at present at Rs. 59,74,000/-. The Government of Assam has Rs. 15,00,000 Preferential Shares and Rs. 8,19,500/- Equity Shares in the Company and the Secretary to the Government of Assam for the Department of Industries is a permanent Director of the Board of Directors of the Company. All the share-holders and the Directors of the Company, except two who are of British and Greek nationality, are Indian citizens. The Company was formed for production of various things, mainly Oxygen, Petro-Chemicals, Sulphuric Acid, Liquid Sulphur Dioxide, Fertilizers and Alum. Out of these, the Company has already started two sections and has decided to start others one after another. Its main section is Chemical Unit which produces fertilizers, essential for improvement of agriculture.

The Company impleaded the Sub-Divisional Officer, Gauhati, Secretary to the Government of Assam, Revenue Department and the State of Assam as Respondents 1, 2 and 3 respectively and

added the Industrial Finance Corporation of India, New Delhi as the respondent No. 4, by an order of the Court dated 3rd August 1970 on its application as the entire land of the company including the subject-matter of the present Civil Rule was mortgaged to the Corporation in December 1961.

By a registered sale deed executed on 21st November, 1959 the petitioner purchased from the recorded pattadar, Radhikananda Chowdhury, the three grants, namely Chandrapore Satpukuri Fee Simple Grant 24/3 with an area of 2285 B. 2K, 15L. Chandrapore Tantee-mara Grant Fee Simple grant No. 35/8 with an area of 311 B. O. K. 13L. and Ahorigog Fee Simple Grant 16/12 with area of 863B. 3K. 13½L, totalling 3460B. 2K. 1½L. The consideration for the sale deed was Rs. 1,25,000/-. Although it is claimed that the Company's name was mutated in the grants on 6th October 1961, records appear not to have been corrected even till 1963. It also appears that the Company as well as the recorded pattadar wrote to the Government in the Revenue Department for permission for the transfer of the land, as the Assam Fixation of Ceiling on Land Holdings Act, 1956, hereinafter called 'the Ceiling Act' had already been brought into force on 15th February 1958. The petitioner produced an order of the Government communicated by the Revenue Secretary on 20th November, 1959 (Annexure 10 to the petition), which is relied upon by the petitioner as exempting the three grants from operation of the Ceiling Act. This order of the Government appears to have been cancelled by an order of 22nd October, 1965, which, however, is not produced before us.

2. A Land Ceiling Case, being Case No. 205/63 was started by the Collector on 25th May 1963 and it is stated therein inter alia:

D. S. (meaning Draft Statement) was prepared and signed and serve copies as per Rule."

It appears, originally Radhikananda Choudhury was served with the draft statement in his Calcutta address and on 14th August 1963 he returned the draft statement with an application stating that he had already sold his land to the petitioner-company and some other persons in 1959 and that he had no interest in the land. Then, it appears from the ordersheet that the office made enquiries about the transfers and the Collector passed the following order on 2nd January, 1964:

"Seen A. S.O's report. Issue a notice on Associated Industries and the other recorded pattadars that the lands are going to be acquired under the Ceiling Act, Fixing 30-1-64."

It appears that notices were not issued and the same were issued on 25th April 1964 to the petitioner and others by registered post with acknowledgment due. A notice dated 30th January 1964 was issued to the Manager of the petitioner company at Shillong to appear before the Collector on 22nd February 1964 in regard to the Ceiling Case No. 205/63 of Sri R. Choudhury. This notice was repeated on 28th April 1964 adding a further direction in the following terms:

"You are hereby directed to appear before the Collector, Gauhati on 25-5-64 at 10 A. M. in regards (sic) to the Ceiling Case No. 205/63 of Radhikananda Choudhury of Panbazar, Gauhati with all connected records regarding purchase of the land in question." (Annexure 1.).

3. In answer to this notice, the petitioner submitted an application on 4th July 1964 particularly referring to the Government letter of 20th November 1959 (not 28th November 1959), a copy of which was enclosed with the application. On receipt of this representation, the following order was passed by the Collector in the order-sheet of the case:

"Seen objection petition filed by M. C. Burman for Associated Industries on 4th July 1964.

Request Government to send us a copy of the Government letter, a copy of which has been filed by the objector. In the meantime, request A. S. O. to enquire and report as to how the area has at present been utilised and what area has been actually used for industrial purpose. Fix 3-8-64."

Although it appears enquiry could not be held for quite a length of time and a report from the Assistant Settlement Officer, Gauhati has received on 7th May 1965, the Collector heard the learned advocate for the petitioner on 28th July 1965 and passed his order on 23rd August 1965 in the following terms:

"The report submitted by A. S. O. do not (sic) clearly show

1) the area and days in which industries have been established including industrial buildings and other buildings in connection with the industries including roads, public places like bazars, playgrounds staff quarters etc.

2) The day nos. in areas under possession of tenants with khatian and without khatian with or without permission of land owners.

3) The land on which the company has started construction but not completed.

Call for a report on these points from the A. S. O. urgently. Fix 9-9-65." Nothing substantial has happened between 23rd August 1965 and 18th May,

1966 on which date it appears from the order-sheet that the petitioner's counsel submitted that according to Section 2 Clause (c) (iv) introduced by the Amendment Act of 1962, the provisions of the Ceiling Act do not apply to the petitioner's land. The Collector, therefore, called for a report from the A. S. O. on the points raised by the petitioner. The next order of importance is dated 31st October 1966 which may be quoted:

"Party present. Heard argument. In order to appreciate the future and also ancillary requirements of the factory it is necessary to know the actual present position regarding utilisation of lands and persons employed as well as scheme of future expansion. The applicant is therefore directed to submit any information in this regard by 30-11-1966. Party informed in office."

It appears on 30th December 1966 some documents were filed and arguments were heard. An enquiry was also made in the meantime regarding acquisition of some portion of the grant land for the purpose of the Assam State Electricity Board, and the same was admittedly exempted from the operation of the Act. (Paragraph 11 of the counter-affidavit). It is also necessary to refer to an intermediate order dated 30th June 1966 in the order-sheet which has taken note of a petition submitted by the petitioner on 10th June 1966, where amongst other objections, the following were mentioned in paragraphs 2 and 3 of the petition:

"That perhaps under mistaken notion that Radhikananda Choudhury still owns the land this Ceiling case was started. Shri Radhikananda Choudhury owns more than this land and it is possible that the Ceiling Act is applicable to his case. The Ceiling case was not started against the petitioner. The petitioner's name has been recorded afterwards and how it was recorded it is not known to the petitioner. They were never asked to submit returns and no return need be submitted by the petitioner as Land Ceiling Act is not applicable to them." (Para. 2)

"That the petitioner wants the land for the purpose of extension of the industries and other ancillary purposes as envisaged in the amending Act namely Act No. 20 of 1962 which excludes "Land held by Mill, Factory or Workshop as may be required for the purpose of extension of the Mill, factory, workshop or for ancillary purposes of the Mill, factory or workshop such as school, dispensary or roads." (Para 3)

At paragraph 4 of this petition, the petitioner gave a detailed list of his requirements claiming 588 acres for various purposes mentioned therein. It was also mentioned that:

"So far Chandrapur (Tatimara) Grant is concerned that has been reserved for future colony, schools and hospitals. Ahorigog 285 acres are necessary for further expansion of the factory.

x x x x

The aforesaid order dated 30th June 1966, on perusal of the petition dated 10th June 1966, notes as follows:

"As regards the principle of determining the excess land a reference has already been made in Ceiling Case No. 79 of 1960 (Assam Hard Board Ltd.). We may await reply to that reference as the principle will be the same."

Finally, the impugned order dated 3rd July 1967 was passed by the Collector. The petitioner appealed to the Government under Section 7 (3) of the Ceiling Act without success.

4. We have ourselves gone through the original records in the Land Ceiling Case to find out the above position in order to ascertain how the matter was dealt with by the Collector under the provisions of the Ceiling Act.

5. The Deputy Secretary, Revenue, submitted the counter-affidavit on behalf of the first three respondents. He states that "the land in question is ideal for the purpose of Horticulture and hence comes within the purview of the Assam Fixation of Ceiling on Land Holdings Act, 1956" (Para 4). It is further stated that the "company, not being a recorded pattadar in respect of the land in question, no draft statement was required to be served on them" (Para. 6). It has also been shown that the Sub Divisional Officer was duly empowered to deal with the matter and this point is not questioned before us by the petitioner. Paragraphs 33 and 34 of the petition challenging the constitutional validity of Sections 5, 6, 7 (1) and 7 (2) of the Ceiling Act are denied in this counter-affidavit.

6. Since the above sections were sought to be declared as ultra vires and void by the petitioner, the Court issued notice to the Advocate-General, Assam, at the time of the issuing of the Rule on 9th September 1968, after hearing Dr. J. C. Medhi for the petitioner under Order XXVII-A Rule 1 of the Code of Civil Procedure, and although notice was received by him on 9th October, 1968, neither the Advocate General nor any one on his behalf is appearing before us. Besides the learned counsel for the petitioner, we have however, heard the learned Junior Government Advocate on behalf of the respondents 1 to 3 and Mr. J. P. Bhattacharjee on behalf of the respondent No. 4.

7. During the hearing, no arguments were addressed regarding the constitutional invalidity of any of the sec-

tions of the Act. We are, therefore, not required to consider the same.

8. It is strenuously contended that no draft statement was served on the petitioner as required under Sec. 7 (2) of the Act. Section 7 (2) may be read:-

"The draft statement shall be published in the office of the Deputy Commissioner, the Sub-Divisional Officer, the Circle Sub-Deputy Collector and the Mouzadar, and a copy thereof shall be served on the person or persons concerned in the manner prescribed. Any objection received within 30 days of the service shall be duly considered by the Collector and after giving the objector an opportunity for hearing order shall be passed on these objections."

Rule 6 of the Assam Fixation of Ceiling on Land Holdings Rules, 1957 shows the manner of service of the draft statement under sub-section (2) of Section 7 and the rule so far as material for our purpose may be quoted:

"(1) The draft statement prepared by the Collector under sub-section (1) of Section 7 shall, as far as practicable, be in Form A.

(2) The Collector shall serve the draft statement on the person holding the excess land by tendering and delivering a copy thereof to him or to his duly authorised agent, x x x x x."

It is found as admitted in paragraph 5 of the counter-affidavit of the Deputy Secretary that the Land Ceiling Case was started in the name of the original grant-holder Radhikananda Choudhury. We have also found that the said landholder on being served with a draft statement, returned the same disclaiming any connection with the land in these three grants sold to the petitioner on 21st November, 1959. This was accepted by the Collector by his order of 2nd January 1964 set out above and notice was given to the petitioner, and it appears the petitioner's company was added in the Land Ceiling Case and the proceeding thereafter was directed against it. Even so, we find the Collector did not serve a copy of the draft statement on the petitioner although one which had been sent to the recorded pattadar had been returned to him.

This is therefore a case where the Collector has accepted the petitioner as the owner of the three grants after the purchase and it cannot be now argued that the petitioner is not a person concerned in the proceeding, as has been sought to be made. The petitioner also produced a photostat copy of the order of the Settlement Officer dated 6th October 1961 allowing mutation in respect of the land in favour of the petitioner (Para. 1 of his petition dated 10th June 1966 before the Collector). The petitioner, therefore, is definitely concerned

in the land as well as in the proceedings before the Collector and the Collector has violated the provisions of Section 7 (2) of the Act read with Rule 6 (2) of the Rules in not serving on the petitioner a copy of the draft statement. It is true that it was possible for the petitioner to know what was happening in the proceeding and indeed presented its version of the case before the Collector. But we find that the petitioner was originally notified by the Collector to appear before him as if only "regarding purchase of the land in question." Be that as it may, service of a copy of the draft statement on the petitioner was mandatory legal requirement under Section 7 (2) of the Ceiling Act.

9. The scheme of ceiling under the Act and acquisition of land as appearing in Chapter II, which opens with Section 4, may briefly be noticed. While Section 4 fixes the limit of the ceiling, Section 5 requires any person who holds land as owner or tenant in excess of the limit fixed under Section 4, within the prescribed period, to submit a return to the Collector. By Section 6 if such a person fails to submit the return, the Collector may himself obtain the necessary information required to be shown in the return through the prescribed agency. By Section 7 (1), on the basis of the return which has to be verified through an appropriate agency or when no such return is given, on the information obtained by the Collector under Section 6, he has to prepare a draft statement in form A. By Section 7 (2), service of the notice is essential as the person concerned is given a right to lodge objection within 30 days of the service of the notice before the Collector and a hearing has to take place on the objections. Any order by the Collector is appealable under Section 7 (3) to the State Government within 30 days of that order.

By Section 7 (4), the State Government may of its own motion call for any record relating to the draft statement and after giving the persons concerned an opportunity for hearing may pass such orders as it deems fit. There is also a period of limitation under this sub-section. By Section 7 (5), any order of the State Government under sub-section (3) or (4) of the Collector under sub-section (2), when no appeal is preferred under sub-section (3) or a revision is made under sub-section (4), shall be final. It is only after all this process is gone through that under Section 7 (6) the draft statement "shall then be made final" and has to be republished and thereupon "no person shall then be entitled to question it in any court of law." By Section 8 the State Government shall then acquire such excess lands by

publishing an appropriate notification to the effect and such publication shall be conclusive evidence of notice of acquisition to the person or persons holding such lands. By Section 9, on publication of this notification all rights, title and interest of such person or persons in such excess land shall stand transferred to the State Government with effect from the date of the publication of the notification free from encumbrances created by it or them.

10. From the above scheme which is disclosed in the summary of the provisions already set out, it is clear that the procedure for preparation of the draft statement and its service on the person or persons concerned is not an idle formality and must be carried out strictly in accordance with the provisions of the Act and the Rules. We are not required in this case to consider whether such service can be waived by a person concerned, as that plea has not been taken by the State as, according to it, no statement was required to be served on the petitioner under law.

11. We are clearly of opinion that the petitioner in this case is a person concerned within the meaning of Section 7 (2) of the Act and non-service of the draft statement under that sub-section is fatal to the proceeding. Besides, we found that the petitioner had raised several legal objections before the Collector which he pressed later before the appellate authority. From a perusal of the impugned orders, we are not satisfied that these objections have been properly considered in accordance with the law. There appears to be (no?) application of the mind of the Collector as well as of the appellate authority to give an appropriate decision in the merits of the legal objections.

12. We are, therefore, constrained to quash the impugned orders, namely the order of the Collector dated 3rd July 1967 and also the appellate order dated 2nd July 1968. It will be open to the Collector to serve a copy of the draft statement on the petitioner and dispose of the matter after considering any objections which may be made before him in accordance with law.

13. In the result, the application is allowed. The impugned orders are quashed. We will, however, make no order as to costs. We have refrained from expressing any opinion on the merits of the legal objections.

M. C. PATHAK, J.— 14. I agree
Petition allowed.

AIR 1972 ASSAM & NAGALAND 8
(V 59 C 3)**M. C. PATHAK J.****Mangal Ram Namasudra, Appellant**
v. Premananda Namasudra, Respondent.Second Appeal No. 115 of 1967 D/-
4-12-1970, from order of Md. G. Hussain,
Sub. J. Cachar, at Silchar D/- 31-1-1967.**Contract Act (1872), Section 55. —**
Time when essence of contract — Con-
tract relating to sale of immovable pro-
perty — Presumption is that time is not
essence of contract — Mere incorpora-
tion in written agreement of a clause im-
posing penalty in case of default does
not make time of the essence of con-
tract — AIR 1967 SC 868 Followed.

(Para 8)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 868 (V 54) =(1967) 1 SCR 227, Gomathinayagam
Pillai v. Palaniswami Nadar 6, 8

(1915) AIR 1915 PC 83 (V 2) =

ILR 40 Bom 289 = 43 App 26,
Kodaram Irani v. Burjorji Dhunji-
bhai 6, 7(1915) 1915 AC 386 = 84 LJ Ch 259,
Stickney v. Keeble 7(1867) (1867) 3 Ch A 61 = 17 LT
422; Tilley v. Thomas 6(1853) (1853) 3 De. G. M. and G.
284 = 43 ER 112, Roberts v. Berry 6**K. P. Bhattacharjee, for Appellant;**
M. H. Choudhury, M. A. Laskar, for Res-
pondent.

JUDGMENT:— This appeal by the defendant is from the judgment and decree of the learned Subordinate Judge, Cachar at Silchar. The plaintiff filed that suit for specific performance of an agreement dated 10-3-1962. The plaintiff sold the jote right of the suit land by a registered sale deed on 10-3-1962 to the defendant and delivered possession thereof. On the same date there was an agreement between the plaintiff and the defendant to the effect that within three years the defendant would reconvey the suit land in favour of the plaintiff on receiving the sale price and accordingly the defendant executed a registered Ekranama on 10-3-1962. Notwithstanding repeated demands the defendant failed to reconvey the suit land. The plaintiff tendered the consideration but the defendant did not accept the same. Hence the plaintiff filed the suit for specific performance.

2. The defendant contested the suit on grounds inter-alia that the plaintiff never approached the defendant and made no demand for reconveyance of the suit land and that the plaintiff never tendered the consideration to the defendant, but he deposited the amount in court only after the expiry of the

time of the contract. Hence according to the defendant, the plaintiff was not entitled to any decree for specific performance.

3. Several issues were framed on the pleadings of the parties and the learned trial court dismissed the suit holding that the plaintiff made no tender of the consideration within time and his deposit in court was not valid in law.

4. An appeal was preferred before Munsiff. The learned Subordinate Judge allowed the appeal, reversed the judgment and decree of the learned trial court and decreed the plaintiff's suit. Hence this appeal by the defendant.

5. Mr. K. P. Bhattacharjee, the learned counsel appearing for the appellant submits that in the instant case time was of the essence of the contract and since the plaintiff failed to pay the consideration to the defendant or to deposit the same within the stipulated period, the contract ceased and there could be no decree for specific performance of the contract. Mr. M. H. Choudhury, the learned counsel appearing for the plaintiff respondent submits on the other hand that on a proper construction of the agreement Ext. 1 time was not of the essence of the contract and that the plaintiff was ever ready to make the payment but the defendant did not accept the same and therefore he had to deposit the consideration money in court in terms of the agreement itself. But as the challan was not passed by the court on the date of filing the suit but it was passed by the court on 15-3-1965, the plaintiff could make the required deposit in treasury on 16-3-1965 and therefore the deposit was within time.

6. The first point that arises for consideration in this case is whether time was of the essence of the contract in the instant case. In Gomathinayagam Pillai v. Palaniswami Nadar, AIR 1967 SC 868 Shah J. delivering the majority judgment observed as follows:

"Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract on or before the stipulated time provides by the first paragraph:

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract."

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance

therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable; it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, if it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In *Jamshed Kodaram Irami v. Burjori Dhunjibhai*, ILR 40 Bom 289 = AIR 1915 PC 83 the Judicial Committee of the Privy Council observed that the principle underlying Section 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed:

'Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley v. Thomas* (1867) 3 Ch A 61:—

'The construction is, and must be in equity the same as in a court of law. A Court of equity will indeed relieve against and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry*, (1853) 3 De G. M. and G 284) there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances', which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is

said that in equity time is not of the essence of the contract. Of the three grounds, mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case.'

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of parties depend on the observation of, the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the motion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the limit specified.'

7. Fixation of the period within which the contract is to be performed does not make the stipulation as to time of the essence, of the contract Intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In the present case there is no express stipulation, and the circumstances are not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled. As observed in *Stickney v. Keeble*, 1915 A. C. 386 "where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expira-

tion of which he will treat the contract as at an end..... The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit."

In his dissentient judgment Bachawat J. also held that having regard to the decision in 43 Ind App 26 = AIR 1915 PC 83 the High Court rightly held that time was not of the essence of the contract.

8. In Ext. 1 the Ekarnama in the instant case the following stipulations are found:—

"By executing this agreement I promise that if you pay me the entire consideration money in one instalment within three years, after harvesting the standing crops, from today, I will execute a sale deed in your favour and get it registered and deliver possession of the lands described in the schedule. If within the stipulated period the consideration money is offered to me and I refuse to accept the same you will be able to get the sale deed executed through court after depositing the consideration money in court. If you cannot give me the entire amount at a time, you will be able to get the first schedule land by paying half the amount and you will be able to get the second schedule land again within the stipulated period. If within the stipulated period you do not take back the land by paying the consideration money, you will have no claim at all in the lands described in the schedule after the end of the said stipulated period."

The contract in this case relates to sale of immovable property and therefore following the observations made by the Supreme Court in AIR 1967 SC 868 (supra) it may be normally presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to take time of the essence of the contract. Since the agreement is for sale of land and more particularly in view of the stipulations regarding time of executing the contract as found in Ext. 1 and quoted above, I am clearly of the opinion that in the instant case time was not of the essence of the contract. I therefore hold that the finding of the learned Subordinate Judge to the effect that time was of the essence of the contract in the instant case is erroneous.

9. Even though time was not originally of the essence of the contract, the defendant appellant could by notice served upon the plaintiff respondent call upon him to take the conveyance within the time fixed and intimate

that in default of compliance with the requisition, the contract would be treated as cancelled. No such notice was issued by the defendant to the plaintiff.

10. The next point that falls for consideration is whether the consideration money was offered or paid by the plaintiff to the defendant within the stipulated period. The plaintiff in paragraph 3 of the plaint alleged that the defendant was not accepting the consideration money and was not executing the sale deed, though he was assuring from time to time that he would accept the money and execute the sale deed. The learned Subordinate Judge found that it was proved at least that the plaintiff expressed his willingness prior to the suit to pay the consideration to the defendant but there was no corroborative evidence to show that the plaintiff made actual tender of the amount. He also found that on the date of the filing of the suit, that is, on 10-3-1965, the plaintiff carried some money but he took it back as the challan was not passed by the court on 10-3-1965 and the learned Subordinate Judge found that on the date of filing of the suit even, the plaintiff was ready to deposit the required amount but he could not do so, as the challan was passed only after five days. It appears from the record that a challan for depositing a sum of Rs. 700/- in Karimganj Sub-Treasury was filed in the court on 10-3-1965 along with the filing of the plaint. On 10-3-1965 the court ordered that on the recital in the plaint the plaintiff might deposit Rs. 700/- in court at his own risk. The challan was passed by the court on 15-3-1965 and the amount was actually deposited to the Sub-Treasury on 16-3-1965. Hence the finding of the learned Subordinate Judge that the plaintiff was ready to deposit the required amount on the date of filing the suit is correct and the plaintiff's allegation was that the defendant was not accepting the consideration money but deferring the same on some pleas. The stipulation in the agreement Ext. 1 also was to the effect that if the defendant refused to accept the money, the plaintiff might deposit the same in the court and get the sale deed executed through court. When the plaintiff filed the suit on 10-3-1965, he filed the challan also and had the challan been passed on the same date, the plaintiff could have deposited the amount on the same date.

11. On the facts alleged and found proved I hold that in the instant suit for specific performance of the agreement the plaintiff pleaded and proved that he was ready and willing to perform his part of the contract between the date of

the contract and the date of the hearing of the suit.

12. In the result I hold that the learned Subordinate Judge was correct in decreeing the plaintiff's suit. The decree of the learned Subordinate Judge is therefore affirmed and the appeal is dismissed. In the facts and circumstances of the case I make no order as to costs.

Appeal dismissed.

AIR 1972 ASSAM & NAGALAND 11 (V 59 C 4)

P. K. GOSWAMI, C. J. AND
M. C. PATHAK, J.

Bandhana Goala, Petitioner v. Assam Board of Revenue and others, Respondents.

Civil Rule No. 277 of 1968, D/- 4-6-1971

Tenancy Laws — Assam Land and Revenue Regulation (1886), Section 12 — Settlement Rules under, Rule 18 — Summary eviction of encroachers — Rule is ultra vires Art. 14 of the Constitution — (X-Ref: Constitution of India, Art. 14). AIR 1967 SC 1581 and Civil Reference Nos. 11 (M) to 27 (M) of 1968, D - 21-9-1970 (Assam and Nagaland) (SB), followed.

(Para 11)

The remedy of eviction through civil court is not barred either by the Rules or the Regulation. Therefore two alternative remedies become available to the Government without any guidance as to when each of them is to be followed. Some among the same class of encroachers may be evicted summarily under the rule while the others may be ejected through the civil court where they can have a wide opportunity of defence. Thus the rule is discriminatory.

(Para 5)

It cannot be said that the Government has no choice of remedy since the authority under the Rule alone can exercise the power thereunder and the suit can be filed only by the Government. Rule 1 (1) of Settlement Rules (as Inserted in 1967) is against such a position and that authority also is only an agent of the Government and can institute a civil suit only in the State name.

(Para 7)

Cases Referred: Chronological Paras
(1970) Civil Ref Nos. 11 (M) to 27
(M) of 1968 D/- 21-9-1970 (Assam
and Nagaland) (SB) 9

(1967) AIR 1967 SC 1581 (V 54) —
(1967) 3 SCR 399, Northern India
Caterers (Private) Ltd. v. State
of Punjab 4, 6, 7, 9, 10

GO/IO/D458/71/JRM/G

P. K. Barua, for Petitioner; Dr. J. C. Medhi, Advocate General, Assam, and G. K. Talukdar, Sr. Govt. Advocate, for Respondents.

GOSWAMI, C. J.:— This application under Article 226 of the Constitution of India is directed against an order in appeal of the Assam Board of Revenue whereby it affirmed the order of eviction of 19th November, 1965 passed by the Additional Deputy Commissioner Tezpur, under Rule 18 (3) of the Settlement Rules made under Section 12 of the Assam Land and Revenue Regulation, 1886, hereinafter called 'the Regulation'.

2. The petitioner has been in possession of 12 bighas of land held originally by Buroi Tea Company under thirty years N. L. R. grant. The said company relinquished about 1690 bighas of land including the petitioner's land in 1959 and the land vested in the State Government. The petitioner along with other occupants numbering about 225 persons applied to the Deputy Commissioner for settlement of the land in their favour in terms of their occupation. The petitioner applied for settlement of the 12 bighas of land in his occupation. While the application for settlement was pending, the Additional Deputy Commissioner started an Eviction Case No. 253 of 1965-66 and passed an order on 19th November 1965 for eviction of the petitioner as well as other occupants of the relinquished grant land. The petitioner moved the Deputy Commissioner for staying eviction which was at first granted to be thereafter vacated on 28th December 1965. The petitioner appealed to the Assam Board of Revenue without success and hence this writ application.

3. The petitioner submits that Rule 18 of the Settlement Rules is ultra vires Article 14 of the Constitution of India as it contains the germ of discrimination amongst trespassers inter se. Since the vires of the rule was challenged, we issued notice to the learned Advocate General, Assam, who has made his submission contesting the plea.

4. It is not contended that rule 18 is ultra vires Section 12 of the Regulation which empowers the State Government to make rules to provide for the ejectment of any person who has entered into unauthorised occupation of land over which no person has the rights of a proprietor, land-holder or settlement-holder under the Regulation. It is only contended that the rule is violative of Article 14 violating the principle of equality before the law or the equal protection of the law. This submission is sought to be established by relying upon the decision of the Supreme Court in AIR 1967 SC 1581 (Northern India Caterers (Private) Ltd. v. State of

Punjab), wherein by a majority decision (Hidayatullah, J. as he then was, and Bachawat J. contra) the Court struck down Section 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959, as the same was held to be discriminatory and violative of Article 14 of the Constitution.

5. Before we deal with the submission, we may read rule 18:

"(1) Subject as hereinafter provided, the Deputy Commissioner may eject any person from land over which no person has acquired the rights of a proprietor, land-holder, or settlement holder.

(2) When such person has entered into possession of land that has previously been reserved for roads or road-side lands or for the grazing of village cattle or for other public purposes, or has entered into possession of land from which he has been excluded by general or special orders and when, further, there is no bona fide claim of right involved, he may be ejected or ordered to vacate the land forthwith, and the Deputy Commissioner may sell, confiscate or destroy any crop raised, or any building or other construction erected, without authority on the land.

3 (a) In all other cases ejectment shall be preceded by publication of a notice in the manner prescribed below requiring the occupant generally to vacate the land specified in the notice within 15 days of the date of publication of the notice on the land concerned or in a prominent place in the vicinity thereof, and to remove any buildings, houses, fences, or crops etc., which may have been raised on such land, provided that the Deputy Commissioner may give time to any particular occupant to harvest the crops, if any, growing on such land. Any buildings, houses, fences, crops, etc., which have not been removed in accordance with such notice shall be confiscated to the Government.

3 (b) The notice referred to in clause (a) sub-r. (3) above shall be published by affixing a copy thereof in the Notice Board of the office of the Deputy Commissioner or the Sub-divisional Officer, as the case may be, and also in the Notice Board of the office of the Sub-Deputy Collector within whose jurisdiction the land is situated. A notice shall also be published by affixing a copy thereof on the land concerned or in a prominent place in the vicinity thereof.

(4) Any person or persons required by notice to vacate under the last preceding sub-rule the land which the person or persons occupy, shall comply with the requisition within the time prescribed in the notice, running from the date of its service.

(5) Any person or persons intentionally disobeying an order or requisition to vacate under sub-rule (2) or (3) shall be liable to a penalty which may extend to two hundred rupees, and, in case such disobedience is continued to a further penalty which may extend to fifty rupees for each day during which such breach continues.

5 (a) Any person who having been once evicted under sub-rule (2) or sub-rule (3) from any land encroaches on any land over which no person has acquired the right of a proprietor, land-holder, or settlement-holder, shall on conviction before a Magistrate, be liable to imprisonment which may extend to six months or fine which may extend to one thousand rupees or both.

(6) x x x x
This rule deals with eviction of encroachers on Government land in a summary manner. The Government's right to evict trespassers by recourse to civil court is not barred under the rule, nor under any other provisions in the Regulation. That being the position, there are two alternative remedies open and available to the Government to deal with trespassers, the first one under rule 18, and secondly, when Government so chooses to do, by filing a suit in the Civil Court. There is no guidance in the rule nor under the provisions of the Regulation as to under what circumstances the first remedy will be invoked and the second remedy will not be. That being the position, two remedies are open to the Government and the Government may pick and choose either without any fetter under the law. The provision of eviction under rule 18 is therefore clearly discriminatory as falling under the same class of encroachers upon Government land, some may be evicted summarily while others may be evicted by following the ordinary course of law in the civil court where the defendants will have ample opportunity to defend their claims whatever they may be.

6. In the N. I. Caterers' Case. AIR 1967 SC 1581 (supra), the Supreme Court was required to consider an identical provision of evicting unauthorised occupants from public premises, and the Supreme Court held as follows:

"Assuming that persons in occupation of Government properties and premises form a class by themselves as against tenants and occupiers of private owned properties and that such classification is justified on the ground that they require a differential treatment in public interest, those who fall under that classification are entitled to equal treatment among themselves. If the ordinary law of the land and the special law provide two different and alternative procedures, one more prejudicial than the

other, discrimination must result if it is left to the will of the authority to exercise the more prejudicial against some and not against the rest. A person who is proceeded against under the more drastic procedure is bound to complain as to why the drastic procedure is exercised against him and not against the others even though those others are similarly circumstanced. The procedure under Section 5 is obviously more drastic and prejudicial than the one under the Civil Procedure Code where the litigant can get the benefit of a trial by an ordinary court dealing with the ordinary law of the land with the right of appeal, revision, etc., as against the person who is proceeded against under Section 5 of the Act as his case would be disposed of by an executive officer of the Government, whose decision rests on his mere satisfaction, subject no doubt to an appeal but before another executive officer, viz., the Commissioner. There can be no doubt that Section 5 confers an additional remedy over and above the remedy by way of suit and that by providing two alternative remedies to the Government and in leaving it to the unguided discretion of the Collector to resort to one or the other and to pick and choose some of those in occupation of public properties and premises for the application of the more drastic procedure under Section 5, that section has lent itself open to the charge of discrimination and as being violative of Article 14. In this view Section 5, must be declared to be void." (Paragraph 12).

It appears that in the Supreme Court, an argument was advanced to the effect that the Government in practice is not likely to institute a suit in a case where it can seek quick relief under the Act. This argument prevailed with the minority but was not accepted by the majority. Bachawat, J. speaking for the minority observed:

"The argument based upon the option of the Government to file a suit is unreal, because in practice the Government is not likely to institute a suit in a case where it can seek relief under the Act."

The Supreme Court held that since there is no express bar under the law for the Government to institute suit for eviction in the civil court, the provision was discriminatory. The ratio decidendi of the above decision governs the present case. While no express bar under the law could be pointed out by the learned Advocate General prohibiting the Government from filing a suit for eviction of encroachers, we drew his attention to sections 165 and 167 of the Regulation under Chapter X thereof. By Section 165 (1) in the case of unsettled land any person who without valid authority has encroached upon or occupied it shall be

liable to ejectment forthwith and by Section 167 no civil court shall exercise jurisdiction in any of the matters covered by this Chapter. It is admitted by the learned Advocate General that this chapter deals with backward classes of people and the areas notified by the State Government under Sections 160 (2) and 161 of the Regulation respectively. The bar under Section 167, therefore, it is rightly conceded, is not a general bar.

From the above provision, introducing a bar to the civil court exercising jurisdiction in an eviction matter under this chapter, Government is expressly debarred from invoking the remedy of instituting a civil suit for eviction in such a case covered by the Chapter. The Legislature, therefore, takes note of the availability of the two remedies to the Government in effecting eviction of encroachers. That being the legal position, we have an additional reason to hold that rule 18 is discriminatory and void as the Legislature has not put any bar in the way of the Government in the case of general eviction of encroachers under rule 18 to take recourse to ordinary civil court for eviction. The evil element of picking and choosing remains with the Government in absence of a clear bar.

7. The learned Advocate General strenuously contended that Government has no twin remedies in this case. The Deputy Commissioner has the sole power to evict under rule 18 and Government cannot interfere with the power of the Deputy Commissioner. Besides, the Government has only one remedy to seek eviction by suit. The Deputy Commissioner has no such remedy. It is thus contended that each authority, the Deputy Commissioner or the Government, has only one remedy at a time and therefore no question of picking and choosing arises to attract Article 14 of the Constitution. It is difficult to appreciate the argument since the Deputy Commissioner is an agent of the Government and in no case the Deputy Commissioner could file a suit in his own name. The suit has to be instituted in the name of the State. Besides, rule 1 (1) of the Settlement Rules goes counter to the argument as that rule, inserted on 18th May 1967, reads:

"All powers of the Deputy Commissioner under these rules shall be exercised subject to any general or special orders issued from time to time by the State Government."

Rule 1 occurs in the same section relating to "General Provisions" under Chapter I of Settlement Rules, where rule 18 also appears. Even in the N. I. Caterers' case, AIR 1967

SC 1581 supra, dealing with an identical provision, the Supreme Court was taking note of the two alternative remedies to Government, although the discretion was given to the Collector to take action under S. 5 of the Punjab Act. Even the minority judgment did accept the position that the Government had the option of proceeding against the unauthorised occupier either by a suit or under the Act (Paragraph 27). The argument of the learned Advocate General is, therefore, without substance.

8. No other argument was advanced by the learned Advocate General.

9. An identical question was raised before a Special Bench of this court in Civil Ref Nos. 11 (M) to 27 (M) of 1968 disposed of on 21-9-1970 (Assam and Nagaland), Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 (Central Act XXXII of 1958) was challenged before the Special Bench as being violative of Article 14 of the Constitution. The provisions of Sections 4 and 5 of the Punjab Act are substantially similar to those of Secs. 4 and 5 of Central Act except for the fact that 'Collector' in the Punjab Act was substituted by the 'Estate Officer' and an appeal in the Act lies to a judicial officer whereas under the Punjab Act it lay to the Commissioner of Division, an executive officer. The Special Bench following the decision of the Supreme Court in N. I. Caterers' case, AIR 1967 SC 1581 supra, held that Section 5 of the Central Act is discriminatory and violative of Article 14 of the Constitution.

10. We should however observe that after the decision of the Supreme Court in N. I. Caterers' case, AIR 1967 SC 1581 a new Section 10E was inserted in the Central Act whereby the civil court's jurisdiction to entertain suit or proceeding in respect of eviction of any person, who is in unauthorised occupation of public premises, was expressly barred.

11. In the result, the application is allowed with costs. Advocate's Fee, Rs. 100/-. The impugned orders are quashed. We hold that Rule 18 of the Settlement Rules is discriminatory and void being violative of Article 14 of the Constitution. A mandamus shall issue to the Deputy Commissioner not to enforce the provisions of Rule 18 of the Settlement Rules for evicting the petitioner.

M. C. PATHAK, J.— 12. I agree.

Petition allowed.

AIR 1972 ASSAM & NAGALAND 14
(V 59 C 5)

P. K. GOSWAMI, C. J. AND M. C. PATHAK, J.

Jalaluddin Ahmed, Petitioner v. State of Assam and others, Respondents.

Civil Rule No. 386 of 1968, D/- 12-5-1971.

Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957). S. 7 (1) — Acquisition under — Act aims at only agricultural land — Fishery and stone quarry lands are not "land" under S. 3 (f). Therefore they cannot be acquired. (X-Ref: S. 3 (f)). (Para 3)

M. S. Rahman, for Petitioner; K. Sarma, for Respondents.

GOSWAMI, C. J.: This application under Article 226 of the Constitution of India is directed against a notification publishing a draft statement under Section 7 (1) of the Assam Fixation of Ceiling on Land Holdings Act, 1956, hereinafter referred to as 'the Act'.

2. The draft statement is dated 28-9-65 and was issued by the Sub-divisional Officer, Hailakandi. The land is held by petitioner who is the proprietor of Kachila Tea Estate in Cachar District. The land of this grant measures 1629 Bighas 14 Kathas 13 Chataks, which the petitioner "holds for special cultivation of tea and/or purposes ancillary thereto" (Para 2 of the petition). The petitioner preferred an objection to the draft statement under Section 7 of the Act on 7-2-66 to the Sub-divisional Officer who rejected his objection by order dated 12-6-67. The petitioner thereafter preferred an appeal to the State Government under Section 7 (3) of the Act but without success, and hence this application challenging the draft statement and the successive adverse orders passed in the proceedings under the Act. The petitioner has given a break-up of the entire area under this grant at para 4 of his petition. We may quote the same:

"These lands are classified under the following heads:—

(i) Under Tea cultivation	243 B. 6 K. 8 Ch.
(ii) Fallow land	41 B. 17K. 12 Ch.
(iii) Jungles	103 B. 14K. 10 Ch.
(iv) Fishery	289 B. 3K. 3 Ch.
(v) Stone quarry	610 B. 12K. 2 Ch.
(vi) Khet land viz., Bouri & Bungalow	341 B. Ok. 11 Ch.

Total
area. 1629 B. 14K. 13 Ch.

3. Mr. Rahman, the learned Counsel for the petitioner, submits that the petitioner holds the entire area for special cultivation or for purposes ancillary thereto. He submits that under Section 2 (c) of the Act this type of land

is exempted and, therefore, it could not be the subject-matter of acquisition under the Act. The authorities below did not accept the contention and, it appears, the petitioner also did not give any evidence before the authorities with regard to his objections on that score. We are, therefore, not inclined to interfere with a conclusion arrived at by the authorities below that these lands which are going to be acquired were, on the evidence as produced then before the authorities, not for purposes ancillary to special cultivation. Faced with this position, the learned counsel submits that the lands of the type as the petitioner has shown in his break-up at paragraph 4 quoted above, cannot be a subject-matter of acquisition under the Act. We may, therefore, examine the definition of 'land' given in Section 3 (f) of the Act. That clause reads as follows:

"3 (f).— 'land' means land which is or may be utilised for agricultural purposes or purposes subservient thereto, and includes the sites of buildings appurtenant to such land".

The petitioner has clearly shown in his affidavit that at least 899 Bighas 15 Kathas 5 Chataks of land (Fishery 289B. 3K. 3 Ch. + stone quarry 610 B. 12K. 2Ch.) was covered by fishery and stone quarry. There is no denial to the statements made in paragraph 4 of the petition. We will, therefore, assume that an area of 899B. 15K. 5Ch. is covered by fishery and stone quarry, as alleged by the petitioner. That being the position, where there is a fishery or a stone quarry would not come within the definition of land under Section 3(f). This area of land clearly cannot be acquired under the provisions of this Act. The view we have taken receives support from the objects and purposes and the entire scheme of the Act. One of the objects is to acquire excess land either from landlord or from the tenant in excess of the ceiling fixed by the Act with a view to distribute the same equitably amongst people who deserve and are entitled to settlement under the provisions of the Act.

It is, therefore, understandable that only agricultural land is aimed at. Stone quarries and fisheries cannot, therefore, be intended to be handed over to the landless people for the purpose of cultivation. It is because of that reason that land has been defined as had been done under Section 3 (f) of the Act. If, therefore, out of 1629 B. 14K. 13 Ch., an area of 899B. 15K. 5 Ch. cannot be touched under the provisions of the Act, there remains only an area of 729 B 19K. 8Ch. The petitioner states that an area of 243 B. 6K. 8Ch. is under tea, that is to say, under special cultivation. We have also perused the original draft statement and the area

given in the petition is corroborated by what is mentioned in the draft statement.

The Government concedes, and it is not for us to decide, that double that area will be allowed by the Government to a grantee for special cultivation. The petitioner on that footing is entitled to hold 243B. 6K. 8Ch. + 486B. 13K. 0Ch., totalling an area of 729 B 19K. 8Ch., which even according to the Government's concession the petitioner is entitled to hold. There is, therefore, no jurisdiction of the State Government under the provisions of this Act to set in process the provisions of this Act with regard to the land covered by fishery and stone quarry as shown by the petitioner. The draft notification, therefore, stands quashed.

4. The application is accordingly allowed. We will, however, make no order as to costs.

M. C. PATHAK, J.: 5. I agree.

Petition allowed.

AIR 1972 ASSAM & NAGALAND 15
(V 59 C 6)

P. K. GOSWAMI, C. J. AND
D. M. SEN, J.

Bhutkani Nath and others, Appellants v. Mt. Kamaleswari Nath and another, Respondents.

Second Appeal No. 147 of 1967, D/- 9-3-1971, from order of Sub. J. Gauhati, D/- 13-5-1967.

(A) Registration Act (1908), Sec. 60

(2) — Presumption under — When execution of a document is challenged its registration is not sufficient proof of its due execution — In such a case proof of execution complying with Section 67 Evidence Act is still necessary — (X-Ref:— Evidence Act (1872), Sec. 67). (1906) 33 Ind App. 60 (PC), Distinguished. (Para 6)

(B) Registration Act (1908), Sec. 35 — "Execution of the document" — It is not mere signing of the document but a solemn act of the executant owning up the recitals therein fully knowing the contents. (Para 6)

(C) Limitation Act (1908), Art. 144 — Adverse possession — Husband's possession of wife's property will be on her behalf — Hence in the absence of strict proof of his open and hostile possession from certain definite date bar under the provision or under Article 142 will not apply to her suit for possession of that property against her husband and the alienees therefrom — (X-Ref:— Art. 142). (Para 8)

Cases Referred: Chronological Paras (1906) 33 Ind App. 60 = ILR 33 Cal 537 (PC), Gangamoyi Debi v. Troiluckhya Nath Chowdhry 6

GO/IO/D464/71/JRM/G

P. Choudhuri and S. K. Goswami, for Appellants; N. M. Dam and A. R. Kalita, for Respondents.

GOSWAMI, C. J.— This second appeal is directed against the decree of the learned Subordinate Judge, Gauhati, reversing that of the Munsiff, who had dismissed the plaintiff's suit.

2. The plaintiff's case is that the land measuring 8 Bighas 3 Kathas 1 lessa covered by three different dags in three separate periodic pattas mentioned in the schedule to the plaint originally belonged to one Mania, husband of the plaintiff. After Mania's death, the name of his son Lakhiram Nath was mutated in place of his father by inheritance on 18th May, 1934. After Mania's death, the plaintiff took Akoluram Nath as her second husband and he went and lived with the plaintiff as a 'Chapania' (domesticated husband). Akolu was managing the property and it is alleged that without the knowledge of the plaintiff, he procured a registered sale deed on 10th April, 1934 from Lakhiram Nath conveying the land in suit in favour of Akolu and his uterine brother Pararam Nath (since dead), who was the father of the defendants 2, 3 & 4. The plaintiff was not aware of the mutation, nor about the sale. Akolu quarrelled with her and drove her away from the house on 16th January, 1959. Thereafter, on enquiry, she came to know about the alleged sale deed and instituted the present suit on 7th April, 1959. The plaintiff alleges that the sale deed is invalid and is also void for want of consideration. It is also alleged that the deed was procured by taking undue advantage of the minority of Lakhiram and is tainted with fraud. The plaintiff asserts that she was a victim of deception practised by Akolu. She has therefore prayed for declaration of right and title to the suit land and also for khas possession and other reliefs.

3. A joint written statement was filed by the defendants 1, 2, 3, 5 and 6. The defendant No. 4 neither appeared nor submitted any written statement and the suit proceeded ex parte against him. The defendants denied the plaintiff's claim in their written statement dated 17th April, 1960 and averred that the plaintiff's husband died 29 years back (that is to say, about 1931) and after his death, Lakhiram, who had already married during the life-time of his father, conveyed the suit land by a registered sale deed on 10th April, 1934 to defendant No. 1 and late Pararam for valuable consideration the former left for a place called Kalbari at Tamulpur with his wife and his mother, the plaintiff. Lakhiram died at Kalbari leaving no issue and his widow took a domesticated husband. The plaintiff, according to the defendants, is

making a false claim in collusion with some of the defendants' enemies. The defendants have since been enjoying the possession of the land peacefully and got their names mutated in the revenue records. Akolu in his written statement denies that he lived with the plaintiff as domesticated husband. He also denies to have driven out the plaintiff from her house. It is asserted that Akolu had no connection with the plaintiff. The plaintiff never resided in her former husband's home. Neither Lakhiram Nath nor the plaintiff had any possession over the disputed land after its sale by Lakhiram Nath. The plaintiff's suit was therefore barred by limitation. The defendant also averred that the suit is bad for non-joinder of parties and particularly the non-joinder of the wife of late Pararam Nath.

4. The trial court framed the following issues:

(1) "Whether the sale deed dated 10-4-1934 executed by Lakhi Nath in favour of Akolu and another is void for want of consideration and proper execution.....?"

(2) Whether the plaintiff is entitled to a decree for declaration of title and for khas possession of the land in suit against the defendants?

(3) Whether the suit is bad for non-joinder of parties as alleged in the written statement?

(4) Whether the suit is barred by limitation?

(5) To what relief?

5. The trial court answered issue No. 1 in favour of the defendants and issue No. 2 also against the plaintiff. It did not answer issue Nos. 3 and 4, as these were not pressed and it accordingly dismissed the suit. The matter had come up in appeal before the Subordinate Judge once earlier and he disagreeing with the court decided both issues 1 and 2 in favour of the plaintiff. He also held that the suit was not bad for non-joinder of parties nor that it was barred by limitation. He therefore decreed the plaintiff's suit. The defendants preferred a second appeal to the High Court (S. A. No. 18 of 1965) against the decree of the Subordinate Judge and the Court set aside the judgment and decree of the Subordinate Judge and remanded the appeal "for disposal according to law, after considering all the matters which arise for decision in this case." Thereafter, the impugned judgment and decree were passed after remand by the learned Subordinate Judge decreeing the suit.

6. With regard to the first issue, the first appellate court held that the sale deed Ext. A was not duly executed by the vendor Lakhiram since neither there is the signature nor the thumb impression of Lakhiram indicating that he executed

the document. The court found that the scribe of the document, D. W. 1 Udit Chandra Das, signed the name of Lakhiram on behalf of the latter, but there was no evidence of authority given by Lakhiram to Udit to sign his name in the sale deed. It therefore held that Udit signed the name of Lakhiram in the deed without any power or authority received from Lakhiram. The court held that the sale deed was void for want of proper execution and passing of consideration. Mr. P. Choudhuri, the learned counsel for the appellants, submits that the learned Subordinate Judge erred in law in holding that the sale deed was not properly executed by Lakhiramnath. He submits that since the document was registered, there is a presumption under the law that the same has been duly registered as well as duly executed. He relies upon section 60 of the Indian Registration Act. It is, however, well-settled that when execution of a document is being challenged the certificate of registration alone will not be sufficient proof of the due execution of the document. Registration does not dispense with the necessity of proof of execution when the same is denied. It is true that a sale deed is not required by law to be attested. Even then, proof of execution of a sale deed, when it is denied, will have to be furnished as in the case of any other document under Sec. 67 of the Evidence Act.

Mr. Choudhuri has drawn our attention to the endorsement of the Sub Registrar that the document was presented by Lakhiram and that Lakhiram had admitted execution of the same. When we examined the endorsements, we find that the document is stated to be presented by Lakhiram, who was not personally known to the Sub Registrar, but was identified by one Jaliram who has not been examined by the defendants. On the other hand, Udit (D. W. 1) in his examination in chief stated that he identified Lakhiram before the Sub Registrar, although when pressed in cross-examination he also stated that Jaliram identified the executant before the Sub Registrar. The learned counsel also relied upon the thumb impression of Lakhiram given before the Sub Registrar. This thumb impression again has been attested by no other person than Udit (Bakalam Udit Chandra Das). It is Udit who has attested even the thumb impression of Jaliram as well as Lakhiram even before the Sub Registrar. It is intriguing why, if Lakhiram could put his thumb impression in front of the Sub Registrar, he was not able to put the same on the deed itself in token of execution and owning up the contents. On the other hand, we find on both pages of the sale

deed the name of Lakhiram being put by Udit Chandra Das with a Bakalam.

There is a further disturbing feature on the body of the deed. Although the deed is said to have been written on 10th April, 1934, a date which has been clearly inserted by the writer therein, the Sub Registrar had registered it on 9th April, 1934. Mr. Choudhuri also read the evidence of Udit to us and he was the only witness examined to prove the execution of Ext. A. His evidence is very laconic. He merely stated that he wrote out the sale deed "executed by Lakhiramnath in favour of Akolu and Parar". He signed Lakhiram's name on his behalf. In cross-examination he stated that Lakhiram did not put his thumb impression on the document at the time of his execution. The document was executed in 1934. When Udit was examined in 1961 he gave his age as 45 years. He indeed stated that he was a petitioner for the last 25 years. If that is so, he was only a boy of 18 years of age when the sale deed was written.

Besides, we must bear it in mind that the sale deed was procured by the husband of the plaintiff from her son. We are, therefore, clearly of opinion that the learned Judge rightly appreciated the evidence of Udit and rejected his testimony. Execution of a document is not mere signing of it. It is a solemn act of the executant who must own up the recitals in the instrument and there must be clear evidence that he put his signature in a document after knowing fully its contents. Udit (D. W. 1) in this case even did not state that he had written the sale deed under instructions from Lakhiram, nor did he state that the document was read over to Lakhiram. There is not a little of evidence to show that Udit was authorised by Lakhiram to sign or execute the document on his behalf. That being the position, there is no execution of the sale deed in law. The circumstances, which we have noted above, together with the evidence of Udit clearly displace any *prima facie* presumption, which may, in absence of denial in an appropriate case, arise under the law. The endorsements of the Sub Registrar and certificate of registration under Section 60 may furnish some evidence. But, that evidence can always be rebutted and is not conclusive evidence, when execution of a document is under challenge. Mr. Choudhuri cited a decision of the Privy Council in (1906) 33 Ind. App. 60 (P. C.) (*Gangamoyi Debi v. Troiluckhya Nath Chowdhry*) and relied upon the following passage:

"The registration is a solemn act, to be performed in the presence of a competent official appointed to act as registrar, whose duty it is to attend the part-

ies during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order."

In the Privy Council case the question of execution of a will by one Brojo Nath Chowdhry was in issue. Brojo Nath signed the will which was attested by several persons including his attending physician, who was examined as a witness in the case. It is also proved in that case that Brojo Nath was taken in a palanquin to the office of the Sub Registrar where he admitted execution of the document. This oral evidence was believed by the court and coupled with the presumption under Section 60 of the Registration Act held that the will was duly executed and properly attested. This decision, therefore, will not help the instant case where the document was not signed by the executant nor was the only witness namely, the writer of the document authorised to sign the name of the executant on the latter's behalf. Ext. A in this case is a document entirely written by Udit and even signed by him. Except the alleged thumb impression of Lakhiram on the reverse of the first page of the document before the Sub Registrar identified by one Jaliram who was not even examined in the case, there is nothing to attribute any act to Lakhiramnath. Neither Lakhiram nor Jaliram was known to the Sub Registrar, as is clear from the endorsements. In a case of this nature, the evidentiary value regarding execution of the document from the fact of such a registration is reduced to almost nil. The Privy Council decision will not at all come to the aid of the defendants in this gravely suspicious case. We are, therefore, clearly of opinion, in agreement with the learned Subordinate Judge, that the sale deed Ext. A has not been duly executed by Lakhiramnath. The first issue therefore, has been rightly decided by the court below.

7. Mr. Choudhuri next contends that at any rate the plaintiff had no title to the land in suit at any point of time. He submits that the plaintiff did not inherit the property of her husband Mania on the latter's death in 1930. She was only entitled to maintenance out of her husband's estate. Since her husband had died in 1930, she could not also inherit the property under Section 3 of the Hindu Women's Rights to Property Act, 1937. Besides, on her own admission that she has taken a second husband, she lost even her right to maintenance or inheritance under Section 2 of the Hindu Widows' Re-marriage Act, 1856. He further submits that Bagari (D. W. 2) is the widow of Lakhiram. Since Lakhiram had in-

herited the property of Mania in 1930, on the former's death, Bagari will inherit her husband's property after Lakhiram's death. The defendants, however, in the written statement admitted that Lakhiram had no issue and his wife had taken a domesticated husband. At any rate, the defendants did not even enter any specific plea in their written statement that Bagari was entitled to inherit the land in suit and that the suit was bad for her non-joinder.

We are, therefore, not required to decide in this suit the issue, if any, that may be raised between Bagari and the plaintiff. We will, therefore, assume in this suit in view of the pleadings that Kamaleswari, who is not only the widow of Mania but also the mother of Lakhiram, is the only heir to inherit Lakhiram's estate after the latter's death. In this view of the matter, it is not necessary to consider the prior history of her right or title if any. If therefore Lakhiram had not conveyed the property by a duly executed sale deed, as we have already held above, the defendants cannot have any claim to the property under the sale deed and Kamaleswari alone will be entitled to a decree for declaration of title and khas possession.

8. Being faced with this position, Mr. Choudhuri contends very strenuously that the suit is barred by limitation. He submits that at no point of time the plaintiff was ever in possession of the property. The first appellate court held that the defendant No. 1 Akolu went and lived with the plaintiff as husband and wife. The plaintiff in her plaint stated that she was driven away sometime in January, 1959. In the course of her evidence, she stated that she lived with the defendant No. 1 Akolu for about ten years when she was driven out. She secured a decree for maintenance against Akolu. She further stated that thereafter she was taken back by Akolu. There is no denial of the maintenance decree by Akolu, nor the fact of her being taken back by Akolu after once she had been driven out. It is, therefore, clear that possession of the defendant Akolu will be possession on behalf of the plaintiff, the relationship being that of husband and wife. Besides, we do not find in the written statement any clear statement of adverse possession in order that the wife's title to the property can be extinguished by the husband's adverse possession. Very strict proof of open and hostile possession by the husband from a certain definite point of time will be necessary. No case of adverse possession of that nature was at all pleaded in the written statement and none was established in the evidence produced in the case. We do not also give much importance to Ext. 'C' relied upon by the learned counsel showing the

entries of mutations at a time when Akolu as the husband of the plaintiff was, in fact, managing the property, enjoying then her complete confidence. The learned Subordinate Judge was, therefore, clearly justified in holding that the suit was not barred under Article 144 or Article 142 of the Limitation Act. The second and the fourth issues have, therefore, been correctly decided by the learned Subordinate Judge.

9. With regard to Issue No. 3, Mr. Choudhuri has rightly not pressed it even in view of paragraph 7 of the written statement. No case is made out that any necessary party has been left out in this suit.

10. In the result, the appeal fails and is dismissed. We will, however, make no order as to costs.

D. K. SEN, J. :— 11. I agree.
Appeal dismissed.

AIR 1972 ASSAM & NAGALAND 19
(V 59 C 7)

P. K. GOSWAMI, C. J. AND M. C. PATHAK, J.

Banikanta Sarma, Petitioner v. The State of Assam and others, Respondents.

Civil Rule No. 365 of 1970, D/- 27-7-1971.

Panchayats — Assam Panchayat Act (24 of 1959) Section 27(3) Second Proviso — Power of the State Government to suspend a president pending his removal under Section 27(3) — It is not necessary that before the order of suspension is passed, there should exist an order of disqualification of the president.

(Para 6)

At that stage, all that is necessary on which the Government has to arrive at its satisfaction for the purpose of suspending pending removal is that there are grounds on which action could be taken for disqualification. This power reserved to the Government is undoubtedly an extraordinary power and the only limitation is that Governments' satisfaction is to be based on the grounds mentioned in the second proviso. If however Government does decide to suspend a President pending removal and the grounds in subsection (2) exist, the exercise of power by the Government under the second proviso is not open to question.

(Para 6)

K. Lahiri and D. N. Choudhury, for Petitioner; K. Sarma, for Respondents.

GOSWAMI, C. J.:— This application under Article 226 of the Constitution is directed against an order of the Government of 18th April 1970 suspending the petitioner who was the President of

Baranaddi Gaon Panchayat at the material time, pending his removal from the office.

2. The petitioner was elected President on 15th of July 1968. When he took over charge one Prafulla Chandra Sarma was the Secretary of the Gaon Panchayat who was appointed temporarily by the Gaon Panchayat on 6th March 1966 and permanently on 23rd August 1967, in place of Ghanashyam Sarma who had taken leave with effect from 22nd November 1965 for more than a year on account of his suffering from tuberculosis. It appears from the records that Ghanashyam also was appointed by the Gaon Panchayat on a temporary basis on 8th March 1960 (Annexure 'I' to the application). It is said that Ghanashyam was cured and he desired to rejoin his post, but was not allowed by the Panchayat to do so. As a matter of fact, an order was passed by the Executive Magistrate, Nalbari on 11th April 1967 asking the President to allow Ghanashyam to join his post. The Sub-divisional Officer, Nalbari also in his letter to the President dated 15th May 1968 directed the President to "discharge the newly appointed Secretary Shri Prafulla Sarma and allow the former Secretary to join in his original post" (Vide Annexures 'E' and 'F' to the counter-affidavit). The President, who was at that time one Rameswar Sarma, on receipt of this Sub-divisional Officer's letter submitted his resignation by his letter dated 3rd June 1968 (Annexure 'F'). As a matter of fact, Rameswar Sarma had already written on 23rd of May 1968 requesting the Sub-divisional Officer to accept his resignation and to relieve him of the responsibilities (Annexure 'G'). It appears that the resignation was accepted, which led ultimately to the election of the petitioner as President on 15th July 1968, as already noticed. It is in this background that the petitioner received the letter dated 27th August, 1968 (Annexure 'H'), by which he was asked by the Sub-divisional Officer "to allow Shri Ghanashyam Sarma to join his duty within 8 days from the date of receipt of this letter. Otherwise you are hereby asked to show cause within 7 days why action will not be taken according to the provision of the Assam Panchayat Act." The petitioner wrote to Ghanashyam Sarma on 27th July 1968 (Annexure 'I') with copy to the Subdivisional Officer informing him that "the Gaon Panchayat has no authority to appoint the G. P. Secretary under Section 13 of Assam Panchayat Act, 1959 as amended in 1964. In obedience to the A. P. Act, you could not be reappointed". The matter was also discussed in the meeting of the Gaon Panchayat held on 29th October, 1968 and the second resolution on the subject may be quoted in extenso: (Annexure 'J').

"Today's meeting opined that the Govt. letter in connection with discharge and appointment of G. P. Secretary was discussed in the proceeding (sic) meeting and the President was authorised verbally to communicate with Govt. in this respect. Now it is learnt that grants to Gaon Panchayat have been stopped for the Secretary affairs. The former Gaon Panchayat legally appointed Shri Prafulla Sarma as Secretary and he is serving continuously and smoothly since 2 years 6 months back and the Gaon Panchayat has granted him increments and the same has been incorporated in annual budget. Today's meeting regret at the direction of the Govt. to discharge the Secretary who is serving for the last 2 years 6 months.

This meeting request the State Government to confirm the appointment of Shri Prafulla Sarma as Secretary of the Gaon Panchayat. Today's meeting authorise the President to make all correspondence in this respect.

"Amongst the members present Shri Khagen Deka and Shri Prasanna Kumar Deka opposed the resolution. By the decision of the majority it was passed." The Subdivisional Officer reacted to this resolution by his letter dated 8th November 1968. (Annexure K) to the President, the relevant portion of which may be quoted:

"With reference to the Resolution No. 2 you are hereby informed that the G. P. has no power to appoint the G. P. Secretary as per provision of the Amended Act. Hence the 2nd resolution of the G. P. meeting held on 29-10-68 has been hereby declared illegal according to the Section 138 (1) of the A. P. Act, as the resolution has been taken in contravention of the Act...."

Then again, on 21st December 1968, the Gaon Panchayat passed another resolution (Annexure L), which may also be quoted in extenso:

"To-day's meeting, after discussing all aspects of income and progress of the G. P. finds that the total annual income of the G. P. does not exceed Rs. 1400.00 from the share of land revenue, local rate and sale proceed of pounds. On the other hand, as per direction of the Govt. from the 1st July of 1967, the Panchayat are to pay Rs. 100.00 per month as pay of the Secretary. Under the circumstances, the Panchayat works have been greatly hampered. Therefore, the meeting of the G. P. today unanimously resolved keeping in mind the financial condition of the G. P., that the Panchayat be run without the Secretary. The President will himself conduct the business of the G. P. under such conditions. The President is empowered to conduct the function of the G. P. by paying allowance according to need. The President is hereby asked to send copy of this resolution to the S. D.

O. Nalbari for necessary action and approved (sic).

The Subdivisional Officer replied to this resolution by his letter dated 4th February 1969 to the President (Annexure M) as follows:

"This action of the G. P. cannot be considered as the proper reply of this office letter dated 8.11.68. As this is merely a resolution of the G. P. the resolution of the Panchayat may be approved provided you act according to our letter mentioned above."

This letter therefore refers back to Annexure 'K' whereby it was pointed out by the Subdivisional officer that the Gaon Panchayat had no power to appoint the Secretary.

3. The above is the background in which the petitioner was asked by the Government on 22nd March 1969 (Annexure VII) to show cause why "you should not be removed from the office of the President under Sub-section (3) of Section 27 of the Assam Panchayat Act, 1959 (Assam Act XXIV of 1959) for wilful negligence in the discharge of your duties on the following charges:

1. You appointed one Shri Prafulla Sarma as Secretary of the Barnadi Gaon Panchayat in violation of Section 13 of the Assam Panchayat Act, 1959 while the existing Secretary of the said Gaon Panchayat was on leave.

2. You did not obey the orders of the Sub Divisional Officer Nalbari issued in this connection under his letter No. (1) DKNPI-1/67/91-94 dated 11-4-67

(2) DKNP. 1-12/68/2534 dated 15.5.68

(3) DKNP. 1-12/68/2748 dated 28.5.68 and

(4) DKNP. 1-12/68/4637 dated 27.8.68.

Thus you have made yourself liable to the charges of wilful neglect in the discharge of your duties within the meaning of Section 27 (2) (ii) of the Assam Panchayat Act, 1959."

The Subdivisional Planning Officer, Nalbari was asked to receive the petitioner's explanation and to hold an enquiry. The petitioner in his explanation to the charge dated 19th April 1969 (Annexure VIII) pointed out that he never wilfully neglected in discharging his duties as President of the Barnadi Gaon Panchayat and that Prafulla Sharma was not appointed as Secretary during his presidentship and was appointed three years earlier during the presidentship of Rameswar Sarma. It was then explained that the charge of violation of Section 13 was not tenable against him. The petitioner also pointed out there that the first three letters referred to in charge no. 2 were prior to his assumption of office as President. With regard to the fourth letter which was received by him, he placed the same before the meeting of the Gaon Panchayat and the Gaon Panchayat

passed several resolutions on the subject, to which attention was drawn. The petitioner therefore represented that he was not liable for any of the charges.

4. The enquiry officer communicated his findings to the Government on 23rd May 1969 (Annexure N) with the following conclusion:

"In conclusion it is a fact that the present President has also refused to allow the lawful Secretary Shri Ghanashyam Sarma to resume his duty after his leave and allowed Shri Prafulla Sarma to act as Secretary though there does not occur a vacancy. Hence the President Shri Banikanta Sarma has violated Section 13 of the A. P. Act and he is guilty of misconduct and wilful negligence in the discharge of his duties.

I therefore suggest that Shri Banikanta Sarma President Barnaddi G. P. may be disqualified under Section 27 (2) (i) (ii) (iii) of the A. P. Act, 1959 as amended up to 24th December 1964."

The Government also on 25th September, 1969 (Annexure O) instructed the petitioner "to relieve Sri Prafulla Sarma from duties immediately and allow Shri Ghanashyam Sarma the original incumbent to re-join his duties as Gaon Panchayat Secretary with immediate effect." Ultimately since the President backed by the resolutions of the Gaon Panchayat did not comply with the direction of the State Government, the impugned order dated 18th April 1970 was passed.

5. From the above recitals of the events, the whole episode discloses a showdown between the Subdivisional Officer on the one hand and the Gaon Panchayat on the other. We are unable to find from the records whether Ghanashyam was at any stage permanently appointed by the appropriate authority. He is only shown as a temporary employee whereas Prafulla Sarma was appointed permanently by the Gaon Panchayat. At the material time of his permanent appointment, the State Government was the competent authority to appoint the Secretary. It is, however, pointed out that since the appointment was by a resolution of the Panchayat which was forwarded to the authorities and the appointment was not disapproved and even budgetary provision was made for the appointment, although initially the appointment was made by the resolution of the Gaon Panchayat it can be considered as being ratified by the appropriate authority. We are not required to consider these aspects in this application with regard to the mutual rights of the two appointees.

6. The only questions which are canvassed before us in this proceeding are with regard to the charge which has

been framed and the suspension order pending removal. We will take the suspension order first for consideration. The petitioner was suspended pending his removal under the second proviso to sub-section (3) of Section 27. It is submitted by the learned counsel appearing on behalf of the respondents that the charge is also under Section 27 (2) (ii) for wilful neglect in the discharge of his duties. We may read the provision under which the order of suspension has been made:

"27. (3) A President who immediately ceases to hold office according to the provisions of sub-section (1)(a) and (c) or is disqualified by the State Government according to the provisions of Sub-section (2) shall be removed in the manner prescribed:

Provided that no such person as aforesaid shall be removed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him.

Provided further that notwithstanding anything contained in this sub-section, the State Government may, at any time, suspend a President pending his removal under this Sub-section if his continuance in office is considered inadvisable by the State Government on any of the grounds for which he may be disqualified under sub-section (2) of this section or on the ground of public interest."

It is contended by Mr. Lahiri on behalf of the petitioner that the order of suspension is beyond the scope of the proviso. He submits that unless the Government had disqualified him earlier, it had no power to suspend under the proviso. He further submits that the words "pending his removal" clearly show that the question of suspension could be taken up only in a removal proceeding after the petitioner had been disqualified by the Government under Section 27 (2). It is admitted by the respondents that the petitioner had not been disqualified by the Government under Section 27(2). It is, however, submitted that the charge is a composite charge covering both the question of disqualification as well as removal of the petitioner for the offence he has committed, namely, wilful neglect in the discharge of his duties. A perusal of the proviso clearly brings to light the power of the State Government to suspend a President pending his removal under Sub-section (3) if his continuance in office is considered by the Government to be inadvisable on any of the grounds on which he may be disqualified under Sub-section (2) of Section 27 or on the ground of public interest. It is, therefore, clear that once the Government is of opinion that the continuance of the President in office is inadvisable on

the grounds for which he may be disqualified and, in this case, for the offence of wilful neglect in the discharge of his duties (Section 27 (2) (ii)), it is not necessary that before the order of suspension is passed, there should exist an earlier order of disqualification of the President. At that stage, all that is necessary on which the Government has to arrive at its satisfaction for the purpose of suspending pending removal is that there are grounds on which action could be taken for disqualification. This power reserved to the Government is undoubtedly an extraordinary power and the only limitation is that Governments' satisfaction is to be based on the grounds mentioned in the second proviso. If, however, Government does decide to suspend a President pending removal and the grounds in subsection (2) exist, the exercise of power by the Government under the second proviso is not open to question. The submission of Mr. Lahiri therefore cannot be accepted.

7. This however will not solve the entire problem. It is next to be considered whether there was any jurisdiction of the Government to frame a charge on 22nd March 1969 against the President on the two counts set out above. The first charge cannot at all be levelled against the petitioner who had no occasion to appoint Sri Prafulla Sarma. If at all, the charge can be laid against the Panchayat, who by successive resolutions appointed him. With regard to the second charge, three letters clearly were not addressed to the petitioner and the only letter which he could at all be said to have disobeyed is the one dated 27th August 1968. Even this letter he was duty bound to place before the Panchayat and under Section 14 (11) he has to carry out the resolutions of that body. While therefore he placed the letter dated 27th August 1968 before the Panchayat and communicated the resolution of the Panchayat, as he did, stating the circumstances under which the order could not be complied with, he was only carrying out the duties enjoined upon him by the Act to mention one such under Section 14 (11). The second charge therefore, against the petitioner is on the face of it absolutely untenable under the law. No charge can be levelled against the petitioner by the Government when he was only carrying out the statutory duties imposed upon him under the Act. The impugned charge is therefore invalid and is hereby quashed. Since the suspension order was in pursuance of this charge, the order of suspension shall also cease to be in force and that order vacates itself.

8. In the result, the application is allowed. The impugned orders are quashed. The Rule is made absolute. The

petitioner will be entitled to costs. Counsel's Fee: Rs. 100/-.

M. C. PATHAK, J.:— 9. I agree.
Application allowed.

AIR 1972 ASSAM & NAGALAND 22 (V 59 C 8)

P. K. GOSWAMI C. J. AND
D. M. SEN, J.

T. O. Francis, Petitioner v. State of Assam and others, Respondents.

Civil Rule No. 217 of 1966, D/- 9-7-1971.

Motor Vehicles Act (1939), (as amended by Act 100 of 1956), Section 36 — State Government can alter the laden capacity of a vehicle in appropriate cases.

The State Government, with a constant eye to the margin of safety, is not left merely with the manufacturer's estimate of the weight carrying capacity of the vehicle and can raise or lower the figure in appropriate cases. While the manufacturer's certificate may furnish some basis, the power is reserved for the State Government with the approval of the Central Government to specify the safe laden weights once again in the light of technical knowledge, experience and other guide line mentioned in the Act and also to revise the same when necessary. (Para 4)

Cases Referred: Chronological Paras

(1965) AIR 1965 Raj 175 (V 52) =

1965 Raj LW 395, Ghevarchand v. State of Rajasthan

5

(1952) AIR 1952 SC 369 (V 39) =

1953 SCR 1, Aswini Kumar v. Arabinda Bose

4

P. Choudhuri, H. M. Goswami and J. K. Barua, for Petitioner; Dr. J. C. Medhi, Advocate General, Assam, and K. Sarma, for Respondents.

GOSWAMI, C. J.:— The petitioner in this Civil Rule is the owner of a 1948-Model Ford V-8 Motor Vehicle bearing Registration No. ASD-1353 and he has been holding a public carrier permit for this truck since 1954. Originally, the Manager, Lukwah Tea Estate was the owner of this vehicle and his registration certificate issued on 5th April 1949 shows unladen weight as 5600 lbs. and registered laden weight as 14,500 lbs. The payload is also shown as the difference between the two figures, namely 8,900 lbs. The petitioner purchased this vehicle from the original owner and the registration certificate with the identical particulars noted above was transferred to his name on 28th August 1953. The petitioner states that the principles to be followed for the purpose of calculating the amount of tax for the vehicle are to

be found in the provisions of Assam Motor Vehicles Taxation Act, 1936 and the Rules made thereunder 'on the basis of authorised pay loads in respect of goods vehicles'. (Paragraph 5 of the petition). The Government of Assam published a notification dated 17th February, 1959, with the approval of the Central Government, classifying all transport vehicles other than motor cabs into two broad groups, namely (1) vehicles of 1952 and earlier models of all makes, and (2) vehicles of 1953 and later models of all makes, and specifying the maximum safe laden weights and axle weights at 112½ per cent and 125 per cent respectively of the gross vehicle weights and the maximum axle weights certified by the manufacturers of the vehicles for the aforesaid groups respectively. The notification is marked as Annexure 'AA' to the petition, and this is the impugned notification in the present proceeding.

2. The notification was made under Section 36 of the Motor Vehicles Act, as amended by Act 100 of 1956, which came into force on 15th January 1959. That section may be quoted:

"(1) Having regard to the number, nature and size of the tyres attached to the wheels of a transport vehicle, other than a motor cab, and its make and model and other relevant considerations, a State Government may, with the approval of the Central Government, by notification in the official Gazette, specify in relation to each make and model of a transport vehicle the maximum safe laden weight of such vehicle and the maximum safe axle weight of each axle of such vehicle.

(2) A registering authority, when registering a transport vehicle other than a motor cab, shall enter in the record of registration and shall also enter in the certificate of registration of the vehicle the following particulars, namely:

(a) the unladen weight of the vehicle;

(b) the number, nature and size of the tyres attached to each wheel;

(c) the registered laden weight of the vehicle and the registered axle weights pertaining to the several axles thereof; and

(d) if the vehicle is used or adapted to be used for the carriage of passengers solely or in addition to goods, the number of passengers for whom accommodation is provided;

and the owner of the vehicle shall have the same particulars exhibited in the prescribed manner on the vehicle.

(3) There shall not be entered in the certificate of registration of any such vehicle any laden weight of the vehicle or a registered axle weight of any of its axles different from that specified in the

notification under sub-section (1) in relation to the make and model of the vehicle and to the number, nature and size of the tyres attached to its wheels:

Provided that where it appears to a State Government that heavier weights than those specified in the notification under sub-section (1) may be permitted in a particular locality for vehicles of a particular type, the State Government may, by order in the Official Gazette, direct that the provisions of this sub-section shall apply with such modifications as may be specified in the order.

(4) When by reason of any alteration in such vehicle, including an alteration in the number, nature or size of its tyres the registered laden weight of the vehicle or the registered axle weight of any of its axles no longer accords with the provisions of sub-section (3), the provisions of Section 32 shall apply and the registering authority shall enter in the certificate of registration of the vehicle revised registered weights which accord with the said sub-section.

(5) In order that the registered weight entered in the certificate of registration of a vehicle may be revised in accordance with the provisions of sub-section (3), the registering authority may require the owners of transport vehicle in accordance with such procedure as may be prescribed to produce the certificates of registration within such time as may be specified by the registering authority."

Sections 36 and 37 of the original Motor Vehicles Act, 1939 were replaced by this amended section and Section 37 together with VII Schedule were omitted by this amendment. The learned counsel for the petitioner does not dispute that the amended section is applicable in the present case. He, however, strenuously contends that the notification is foreign to Section 36 of the amended Act and has been made in colourable exercise of power under section 36. The learned counsel does not dispute the validity of Section 36. The impugned notification as noted earlier is made in exercise of the powers conferred by sub-section (1) of Section 36 with the approval of the Central Government. It is not denied that the approval of the Central Government was taken by the State Government in making this notification.

3. The only submission which is made by Mr. Choudhuri is that the objects and reasons of the Motor Vehicles Amendment Bill, 1955 show that,

"it is thus possible for a manufacturer to bid up as a "selling point", the certified weights to the limit of capacity of tyres, as somewhat liberally allowed in the Seventh Schedule.....It is therefore, now proposed that State Governments should be empowered to specify the

maximum safe laden weight and axle weight in relation to any make or model of transport vehicle and that the registering authorities shall enter in the registration certificates the laden weight, etc. as specified by the State Government The amendments proposed are expected to serve as a check on the growing tendency to certify exaggerated weights, ignoring safety margins, and also to safeguard against the possibility of fixation of maximum permissible weights at an unwarrantable figure by merely fixing tyres of large sizes."

Relying upon these objects and reasons, Mr. Choudhuri strenuously contends that what is really sought to be now done by the impugned notification is to revise the pay-loads by stepping up the maximum safe laden weight and maximum safe axle weight only to enable the State Government to realise higher tax for the vehicles. This, according to the learned counsel, is against the very object and purpose of Section 36. The notification therefore is a fraud on that power.

4. It is true that the objects and reasons showed what Mr. Choudhuri has contended, but the objects and reasons are no safe-guide to construe the provisions of the statute when these are clear. The objects and reasons of a Bill reflect the views of the member introducing the same at the time of initiation of the Bill. In the history and procedure of law-making it is not unknown that an original Bill introduced sometimes assumes a different form after it goes through various stages of discussion and after several amendments may even be accepted by the mover of the Bill. What is crucial is the shape and form in which the Legislature finally accepts the Bill and passes it into law. The objects and reasons, therefore, cannot come to aid in construing the provisions of section 36, about which there is no ambiguity. The following observations of the Supreme Court in AIR 1952 SC 369, (Aswini Kumar v. Arabinda Bosa) at p. 378 are apposite in this context:

"As regards the propriety of the reference to the Statement of Objects and Reasons, it must be remembered that it seeks only to explain what reasons induced the mover to introduce the Bill in the house and what objects he sought to achieve. But those objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. The Bill may have undergone radical changes during its passage through the House or Houses, and there is no guarantee that the reasons which led to its introduction and the objects thereby sought to be achieved have remained the same throughout till the Bill emerges

from the House as an Act of the Legislature, for they do not form part of the Bill and are not voted upon by the members. We therefore, consider that the Statement of objects and reasons appended to the Bill should be ruled out as an aid to the construction of a statute." (Paragraph 32)

It appears from a perusal of the provisions of Section 36 that the focus is on the margin of safety of the vehicle carrying load. While the manufacturer's certificate may furnish some basis, the power is reserved for the State Government with the approval of the Central Government to specify the safe laden weights once again in the light of technical knowledge, experience and other guideline mentioned in the Act and also to revise the same when necessary. The State Government, with a constant eye to the margin of safety, is not left merely with the manufacturer's estimate of the weight carrying capacity of the vehicle and can raise or lower the figure in appropriate cases. There is, therefore, no foundation for the objection that the State Government cannot in a given case raise the laden capacity of a vehicle as has been done in the present case. It is significant to note that in the amended section, the word 'safe' has been introduced in Section 36 (1), qualifying 'laden and axle weight' of a vehicle.

We are, therefore, clearly of opinion that the impugned notification is not open to any legal objection and there is no colourable exercise of power by the State Government in making the same.

We are not concerned in the present case with the Assam Motor Vehicles Taxation Act, 1936 providing for imposition of tax on motor vehicles.

5. Mr. Choudhuri drew our attention to a decision of the Rajasthan High Court in AIR 1965 Raj 175, *Ghevarchand v. State of Rajasthan*. In that decision, the petitioners sought to restrain the State Government from levying or realising any increase of additional tax under the Rajasthan Motor Vehicles Taxation Act, 1951 in excess of what is properly leviable according to the load carrying capacity as mentioned in the registration certificate and public carrier permits. The decision is therefore of not much assistance to the learned counsel in this case. We may observe that there is no assertion by the petitioner that the vehicle in question is unable to bear the burden of safe laden weight specified in the impugned notification.

6. In the result, the application is dismissed. We will, however, make no order as to costs.

D. M. SEN J.:— 7. I agree.
Application dismissed.

AIR 1972 ASSAM & NAGALAND 25
(V 59 C 9)

P. K. GOSWAMI, C. J. AND M. C. PATHAK, J.

Sunahar Ali and others. Appellants v. On the death of Sarat Chandra Suklobaidya, his heirs Sythendra Suklobaidya and others. Respondents.

Second Appeal No. 5 of 1966, D/- 7-5-1971, from order of S. C. Datta Sub J. No. 2. Cachar at Silchar, D/- 16-7-1965.

Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1956) S. 23(b)—Suit by landlord possessing less than 10 bighas of land for eviction of tenant possessing more than ten bighas of land — Non-compliance with S. 27 and Rule 25 of the Rules by landlord before institution of suit — Suit is liable to be dismissed, (X-Ref:— Section 27). (X-Ref:— Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Rules, 1957, Rule 25).

The landlord will have to comply with the provisions of Section 27 if he wants to resume any land for his personal cultivation under Section 23. It cannot be said that the provisions under Chapter VI of the Act can be called in aid by tenants only against landlord who has more than 150 bighas of land and whose excess land has been acquired under the provisions of the Act. (Paras 6; 7)

A. M. Mazumdar, for Appellants; N. M. Dam, for Respondents.

GOSWAMI, C. J.:— This second appeal is by the defendants having lost in both the courts below in a suit instituted by the plaintiff on 1st June, 1961 for their eviction from the agricultural lands measuring about 4 B. 16 K. 13 Ch. The plaintiff also got a decree for recovery of rent which is not at all disputed by the defendants.

2. The plaintiff's case is that the defendants held the suit land as his tenants by executing a kabuliat on 11th February, 1953 for a period of three years and thereafter they were holding over. A rent suit was earlier instituted by the plaintiff against the defendants for recovery of rent and that was decreed. The plaintiff wants khas possession of the suit land which is adjacent to his homestead land and he claims that it is necessary for his own use. The defendants admitted the tenancy, but pleaded that they were tenants since long before 1953 for about 30 years in the case of R. S. Patta No. 14 and for about 12 or 13 years in case of R. S. Patta No. 20. Hence they acquired occupancy right over the suit land and are not liable for eviction.

3. The court below held that the notice of eviction was valid and that is

not challenged before us. It found that the defendants were tenants since only 11th February 1953 on the strength of the kabuliat. Hence it also held that the defendants did not acquire occupancy right over the suit land. It further held that the plaintiff required the land for his own use. The court also found that the plaintiff had less than 100 bighas of land and the defendants had more than 10 bighas under their own cultivation. On the two last findings of fact the court held that Section 23 of the Assam Fixation of Ceiling on Land Holdings Act, 1956 (Assam Act I of 1957) hereinafter called the 'Ceiling Act', is no bar to the eviction of the defendants from the suit land.

4. The principal point which is canvassed before us by Mr. Mazumdar the learned counsel for the appellants, is that the learned court below erred in passing a decree of eviction in view of the provisions of Section 23(b) of the Ceiling Act. We may therefore turn to the material provisions of the Act :
Section 4 (1) :

"Notwithstanding anything to the contrary in any law, custom or agreement no person shall be entitled to hold as owner or tenant, lands, which exceed the limit of 150 bighas in the aggregate:

x x x x x x

Section 5:

"Any person who, on the date of commencement of this Act holds as owner or tenant lands, which in the aggregate, exceed the limit fixed under Section 4 above, shall within the prescribed period, submit to the Collector a return giving the particulars of all his lands in the prescribed form and stating therein his selection of plot or plots of lands (not exceeding in the aggregate the limit fixed under Section 4 above) which he desires to retain under the provision of this Act." Under Section 6, the Collector can obtain information regarding lands through other agency. Under Section 7, the Collector has to prepare a draft statement and the procedure thereto and thereafter is detailed in the section. Under Section 8, the State Government acquires the excess lands by publishing in the official Gazette, and, under Section 9, on publication of the notification all rights, title and interests of the persons in such excess lands stand transferred to the Government free from encumbrances. Chapter III provides for disposal of excess land, and sections 16 to 18 deal with the manner of disposal of excess land. Chapter IV deals with excess land under annual lease and Chapter V with ceiling on future acquisition of land exceeding the ceiling fixed under the Act. Section 23, which occurs in Chapter VI with the title "Ceiling for resumption of land from tenants for per-

sonal cultivation by the landlord", reads as follows:

"Notwithstanding anything to the contrary in any law, usage or agreement, no landlord shall be entitled to terminate the tenancy of any person on the ground for his requiring the land for his personal cultivation except under the following circumstances, namely :—

(a) if the aggregate area of lands in actual occupation of a tenant does not exceed 10 bighas, then he shall not be ejected therefrom, until he has been provided with land of equivalent value in the locality :

(b) if the aggregate area of lands in actual occupation of a tenant exceeds 10 bighas, then the tenant shall not be ejected from a minimum area of 10 bighas as selected by him (tenant), until he has been provided with land of equivalent value in the locality but the landlord shall be entitled to resume for personal cultivation any area in excess of these 10 bighas. In no case, however, the aggregate area of lands so resumed from all his tenants taken together along with any other land already held under personal cultivation by the landlord on the date of resumption shall exceed an overall limit of 100 bighas;

(c) the right of resumption shall be exercisable by only those landlords whose income by cultivation of land is the principal source of income for their maintenance:

Provided that no tenancy of a tenant, who has acquired the right of occupancy under any law for the time being in force shall be terminated except under the provisions of that law:

x x x x'
Section 24 :

"No tenant shall, after the expiry of a period of 5 years from commencement of this Act, be ejected on the ground that the landlord requires the land for his personal cultivation under the provisions of Section 23 above. x x x x."

Section 27:

"(1) A landlord who wants to resume any land for personal cultivation under Section 23 shall give notice to his tenant to that effect and thereupon the tenant shall select the area under his occupation which he is entitled to retain under the provisions of this Act, and shall inform the landlord in writing within 30 days of the service of the notice.

(2) The landlord may then, out of the area not so selected by the tenant, choose the area which he is entitled to resume and may terminate the tenancy thereof after giving the tenant not less than 60 day's notice in writing.

(3) If no information as required under Sub-section (1) above is received by the landlord within 45 days of the service of the notice, the landlord shall

be entitled to select in his discretion the land for resumption under Section 23, and to terminate the tenancy thereof after giving the tenant not less than 60 days' notice in writing.

(4) Notwithstanding anything to the contrary in any law or contract, no tenant of the land which has not been selected and demarcated for resumption for personal cultivation by the landlord under the Sub-sections above and no tenant of the land which has been selected for resumption by the landlord but proceeding for ejection wherefrom has not been instituted within the period mentioned in Section 24 of this Act shall be ejected except on the grounds mentioned below and after giving at least 30 days' notice in writing—

(a) that he has done any act which is destructive or permanently injurious to the land and failed to repair the damage within 90 days of the service of the notice given by the landlord; or

(b) that he has failed to pay the rent lawfully due to the landlord within 90 days of its becoming due; or

(c) that he has kept the land fallow for two consecutive years without any reasonable ground."

5. The Ceiling Act came into force on 15th February, 1958 and the suit being instituted in 1961 the bar of Section 24 is not attracted. On the finding of the court below, the defendants had more than 10 bighas of cultivable land in their possession and the plaintiff had less than 100 bighas of such land in his possession. The Ceiling Act has been passed to make provision for imposition of limits on the amount of land that may be held by a person, and, after acquisition of the land in excess of the ceiling fixed by the Act, to make equitable distribution of the same under the provisions of the Act. The Act allows the landlord to possess land within the limit of the ceiling fixed. It also protects the tenant from eviction from an area of 10 bighas or less of cultivable land in his possession. Unless such a protection is given to tenants, the entire object behind the provisions of the Ceiling Act will be frustrated. Chapter VI, which opens with Section 23, therefore contains salutary provisions in furtherance of the avowed object underlying this Act for putting a ceiling even for resumption of land from tenants for personal cultivation by the landlord.

6. It is contended on behalf of the respondents that the provisions under Chapter VI of the Act can be called in aid by tenants only against landlord who has more than 150 bighas of land and whose excess land has been acquired under the provisions of this Act. This submission seemed to have been accepted by one of us (Pathak, J.) in an unreported

ed decision of this Court in Second Appeal No. 3 of 1965 disposed of on 15th September 1967 but, later on, his Lordship felt some doubt about the matter and referred this appeal to a Division Bench and that is how it has come before us. We have now given our anxious consideration to the entire matter and come to the conclusion that the landlord will have to comply with the provisions of Sec. 27 if he wants to resume any land for his personal cultivation under Section 23. It is difficult to introduce any limitation suggested by the learned counsel for the respondents in the definition clause of landlord in view of the unalloyed definition of 'landlord' in the Act, and also in view of the integrated scheme and objects underlying the entire provisions of the Act. Under Section 27 (1), the tenant shall select the area of 10 bighas or less under his occupation and has to inform the landlord in writing within 30 days of the service of notice of termination of tenancy. Chapter VI lays down certain limitations upon the landlord and also some pre-conditions before he is entitled to eject a tenant from excess land. Under Section 27 (4), however, the tenant can still be ejected after giving at least 30 days' notice in writing if he commits any one of the lapses mentioned in (a) to (c) of that sub-section.

We may also observe that Rule 25 of the Assam Fixation of Ceiling on Land Holdings Rules, 1957 Lays down a procedure for resumption of land from tenant by landlord for personal cultivation under Section 23 of the Act. He has to make an application to the Civil Court having territorial jurisdiction over the land and it will dispose of the application in the manner of a suit for possession of immovable property under the Code of Civil Procedure. The order of ejection shall be carried out in accordance with the provisions of order XXI of the Code of Civil Procedure.

The landlord, therefore, after the passing of the Ceiling Act, has to comply with the provisions of the Act and the Rules, if he wants to evict tenant from agricultural land. Under Section 23(3), the right of resumption by landlord for personal cultivation shall be exercisable by only those landlords whose income by cultivation of land is the principal source of income for their maintenance. Under the proviso to that sub-section, the rights of occupancy acquired under other laws are protected in accordance with the provisions of those laws. The provisions of the Ceiling Act therefore are not in derogation of the rights which have already been conferred upon tenants under other laws, but only supplemental to such provisions. These laws are under a class of welfare legislation and have to be viewed without however straining the language

of the provisions, in defence of the rights of the tenants conferred by them.

7. Since, in the instant case, the plaintiff has not complied with the provisions under Chapter VI of the Act and Rule 25 of the Rules mentioned above and since it has not been shown that the provisions of Section 27 of the Act have been complied with by the plaintiff before institution of the suit, the suit is liable to be dismissed for non-compliance of the provisions of the Act and Rule 25.

8. In the result, the judgment and decree of the court below are set aside and the plaintiff's suit stands dismissed. The appeal is allowed. We will, however, make no order as to costs.

M. C. PATHAK J.:— 9. I agree.
Appeal allowed.

AIR 1972 ASSAM & NAGALAND 27 (V 59 C 10)

M. C. PATHAK J.

Mahendra Chandra Malakar, Defendant, Appellant v. Chandra Kanta Mahanta and others, Plaintiffs, Respondents.

Second Appeal No. 50 of 1969 D/30-4-1971, from order of G. C. Phukan Asst. Dist. J. No. 1 Gauhati D/4-7-1968.

Limitation Act (1908), Art. 47 — Suit for possession of immoveable property — A suit for recovery of possession of the property comprised in a proceeding under Section 145 Cr. P. C., filed by a person bound by the order under Section 145, is governed by the Article. AIR 1966 SC 605, Followed. (Para 9)

Where in proceedings under Section 145, Cr. P. C. between the plaintiff and the defendant possession of the suit land was declared in favour of the defendant, a suit by the plaintiff for declaration of his occupancy rights and for possession of the disputed land filed beyond three years from the date of final order in the proceeding under Section 145 Cr. P. C. would be barred by limitation under Art. 47. (Para 9)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 605 (V 53) =
1966-1 SCR 758, Ambika Prasad

Thakur v. Ram Ekbal Rai

9

K. Majumdar, for Appellant; S. K. Goswami, for Respondents.

JUDGMENT:— This appeal is from the judgment and decree passed by the Assistant District Judge No. 1 at Gauhati.

2. The plaintiff brought the suit for declaration of his occupancy right and for khas possession of the disputed land by evicting defendant No. 1, the principal defendant. The plaintiff's case briefly is that the lands of the suit patta belonged to Madhab Temple of Hajo and

the lands were in occupation of one late Jagyaram as occupancy tenant. Jagyaram died leaving three sons who inherited the lands in equal shares. Thereafter Nidhiram, one of the sons of Jagyaram, sold his share to the plaintiff for Rs. 200/-. A dispute regarding possession arose and there was a proceeding under Section 145, Criminal Procedure Code in respect of the suit land and the said proceeding terminated against the plaintiff. Hence the plaintiff brought the suit for declaration of his occupancy right and recovery of Khas possession in respect of $\frac{1}{2}$ share of the land of the suit dag.

3. The principal defendant resisted the suit. He admitted that the land under the suit dag belonged to Madhab Temple of Hajo and his father was an occupancy tenant in respect thereof. His case is that the land under the suit dag was not divided amongst the three sons of Jagyaram as alleged by the plaintiff but the principal defendant got the entire area of 3B, 2K, 7 Lechas of the suit dag in his exclusive share and possession according to family arrangement on partition and therefore his brother Nidhiram had no right to sell the suit land at all. He further alleged that the sale deed in question was fraudulent and that the suit was bad for non-joinder of necessary parties.

4. Several issues were framed by the learned Munsiff on the pleadings of the parties and issue No. 4 was to the following effect:—

"Whether the plaintiff's suit is barred under Article 47 of Schedule I of the Indian Limitation Act of 1908?"

5. On consideration of the evidence on record learned Munsiff found that the suit was barred under Article 47 (Contd. on Col. 2)

"Description of suit.

By any person bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1898 (V of 1898), or the Mamlatdars' Courts Act, 1906 (Bom. II of 1906), or by any one claiming under such person, to recover the property comprised in such order.

9. A suit for recovery of the property comprised in a proceeding under Section 145, Criminal Procedure Code by a party who is bound by the order under Section 145, Criminal Procedure Code, will have to be brought within three years from the date of the final order passed in the proceeding under Sec. 145, Criminal Procedure Code. If the suit is filed beyond three years, it will be hit by this article and barred by limitation. This view is in accordance with the decision in Ambika Prasad Thakur v. Ram Ekbal Rai, AIR 1966 SC 605. In the circumstances I hold that the instant suit

of Schedule I of the Limitation Act. Consequently he dismissed the plaintiff's suit. On appeal the learned Assistant District Judge found that the suit was not barred under Article 47. He however found that the suit was bad for non-joinder of necessary parties and since the suit might not be dismissed on that ground he remanded the suit for retrial.

6. Mr. K. Majumdar, the learned counsel appearing for the appellant submits that the learned Assistant District Judge was wrong in his finding that the suit was not barred by Article 47, Schedule I of the Limitation Act. Mr. S. K. Goswami, the learned counsel for the respondents on the other hand submits that the learned Assistant District Judge correctly decided that the suit was not barred by limitation.

7. The admitted position is that there was a proceeding under Section 145, Criminal Procedure Code between the plaintiff and the principal defendant in respect of the suit land. The proceeding under Section 145, Criminal Procedure Code was initiated at the instance of the plaintiff and the final order in the proceeding under Section 145 was passed on 6-1-58 declaring possession in favour of the principal defendant Mahendra Chandra Malakar. The present suit was filed on 14th July 1961. It is therefore very clear that the suit was filed beyond three years from 6-1-58, the date of final order in the proceeding under Section 145, Criminal Procedure Code. The present suit has been filed for khas possession of the same land which was the subject matter of the proceeding under Section 145, Criminal Procedure Code on declaration of occupancy right.

8. Article 47, Schedule I of the Limitation Act reads as follows:—

Period of limitation	Time from which period begins to run.
Three years.	The date of the final order in the case.

is barred under Article 47, Schedule I to the Limitation Act. The finding of the learned Assistant District Judge regarding issue No. 4 is therefore set aside. That being the position the plaintiff's suit must fail.

10. In the result the judgment and decree of the learned Assistant District Judge are set aside and the plaintiff's suit stands dismissed. The appeal is allowed but in view of the facts and circumstances of the case I make no order as to costs.

Appeal allowed.

AIR 1972 ASSAM & NAGALAND 29
(V 59 C 11)

P. K. GOSWAMI, C. J. AND D. M. SEN, J.

Sawkat Ali, Plaintiff, Appellant v. The Superintendent of Police, Sibsagar, Defendant, Respondent.

Second Appeal No. 150 of 1967, D/- 12-2-1971, from order of S. C. Datta, Sub. J., U. A. D. Jorhat; D/- 17-3-1967.

Civil P. C. (1908), Section 80 read with Order 7 Rule 11(d) — Plea as to waiver of notice under Section 80 in plaint — Court has no power to reject plaint under Order 7 Rule 11(d) straightway — Court has to try issue of waiver if denied by defendant in written statement.

Though Section 80 is mandatory the right given thereunder being for the benefit of the defendant Government or the public officer concerned can be waived expressly or impliedly by conduct. Since service of notice under S. 80, is a condition precedent for the institution of a suit against the Government or a public officer, the cause of action for the institution of the suit will include even the service of such a notice and the plaint shall state that fact. If there is no mention of the fact of service of a notice and, in fact, no notice has been served and the plaint does not contain a plea of waiver of the notice on the part of the Government or the public officer concerned the plaint in that case may be straightway rejected under O. VII, R. 11(d). But when the plaintiff with the full knowledge of his obligation under Section 80 avers that service of notice has been waived by the defendant, he should have an opportunity to establish this fact if the defendant denies the waiver by filing a written statement. (Prs. 6, 7)

Cases Referred: Chronological Paras
(1947) AIR 1947 PC 197 (V 34) =

74 Ind. App. 223, Vellayan v.

Govt. of Madras Province

(1927) AIR 1927 PC 176 (V 14) =

54 Ind. App. 338, Bhagchand v.

Secy. of State

B. Islam, for Appellant; T. N. Singh, for Respondent.

GOSWAMI, C. J.:— This second appeal is directed against the judgment and decree of the learned Subordinate Judge, Jorhat, affirming those earlier of the learned Munsiff dismissing the plaintiff's suit.

2. The plaintiff's case in brief is that he is an Indian citizen. He states that he was born at Akbarpatty, Dibrugarh and lost his parents in his infancy. He was brought up by Yakub Hussain of Dibrugarh and at the age of ten, he migrated to Jorhat town. At first, he

served under one Muktinath Bharali for seven years and then he opened his own shop of old motor tyres in 1958 and he was carrying on that business. On 28-1-1965 he was arrested by a police officer of the Jorhat Police Station and after detaining him at the Thana for a night was deported to East Pakistan on the following day on the allegation that he was a foreigner. He returned from Pakistan to Jorhat on 13-5-1965 and he was rearrested the following day and produced before the Additional District Magistrate who however enlarged him on bail till 28-5-1965. The plaintiff apprehends that he will again be deported on or after 28-5-1965 and in that predicament was compelled to institute this suit on 28-5-1965 for declaration that he is an Indian citizen and for permanent injunction, without serving a notice under Section 80 of the Code of Civil Procedure on the defendant, who in this case is the Superintendent of Police and Registration Officer. He states in paragraph 9 of his plaint as follows:

"That no notice under S. 80 C. P. C. has been issued to the defendant as he by his conduct has waived his right to receive such a notice. The issue of such a notice before the filing of the suit is not possible on the part of the plaintiff with his running the grave risk of being deported again before the notice matures and the suit is filed."

3. No written statement was filed by the defendant, who, however, took a preliminary objection that in absence of a notice under Section 80, C. P. C., the suit should be dismissed on this preliminary ground. After hearing the parties, the learned Munsiff rejected the plaint under Order VII, Rule 11(d), C. P. C. for non-compliance with the provisions of Section 80 C. P. C. In appeal the learned Subordinate Judge affirmed the decision. Hence this second appeal.

4. Mr. Baharul Islam the learned counsel for the plaintiff appellant, submits that both the Courts erred in law in this case in dismissing the suit on the ground of absence of notice under Section 80, C. P. C. According to the learned counsel, the defendant has waived the right to a notice under Section 80, C. P. C. In this case, Section 80 provides that no suit shall be instituted against the Government or a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered to the public officer or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left. Under the provisions of Order VII,

Rule 11(d). C. P. C. relied upon by the trial court, the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. We have, therefore, to consider whether, in this case on the averments in the plaint the suit is liable to be dismissed in the absence of a notice under S. 80, C. P. C.

5. The Privy Council in AIR 1927 P. C. 176 = (54 Ind. App. 338) (Bhagchand v. Secy of State) has held:

"Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in which inter alia an injunction is prayed is still "a suit" within the words of the Section and to read any qualification into it is an encroachment on the function of legislation. This decision was noticed by their Lordships of the Privy Council in a later case in AIR 1947 P. C. 197 (Vellayan v. Govt. of Madras Province). There were two issues in the suit out of which the appeal came up for decision before the Privy Council:

"9 — (a) Whether the defendants have waived their right to a proper notice of suit?

9 — (b) Whether defendants are estopped from contending that no proper notice of suit was given to them "

Their Lordships observed in paragraph 12 as follows:

"Upon the first issue the decision of this Board in 54 Ind. App. 338 = (AIR 1927 P. C. 176) appears to be decisive. It was there said that Section 80 is express, explicit and mandatory and admits of no implications or exceptions. The question there was whether a suit, in which an injunction was claimed, was a "suit" within the section. This Board decided for the reason above briefly stated that it was. In the present case the question is whether, a notice having been given on behalf of one plaintiff stating his cause of action, his name, description and place of residence and the relief which he claims a suit can then be instituted by him and another. It is clear to their Lordships that it cannot. The section according to its plain meaning requires that there should be in the language of the High Court of Madras "identity of the person who issues the notice with the person who brings the suit. x x x To hold otherwise would be to admit an implication or exception for which there is no justification."

Dealing with the first question, their Lordships held as follows:

"In 54 Ind. App. 338 = (AIR 1927 PC 176) to which reference has already been made, no question of waiver arose. The observations of Lord Sumner in delivering the opinion of the Board were directed solely to the construction of the section and cannot in their Lordships'

opinion be regarded as deciding that it is not competent for the authority, for whose benefit the right to notice is provided, to waive that right. There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the Court and that they may be waived by the authority for whose benefit they are provided.

x x x x x

On the other hand, there appears to their Lordships to be no reason why the notice required to be given under Section 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required. If in the particular case he does not require that protection and says so, he can lawfully waive his right." (Para 14)

6. It is therefore clear that when waiver is pleaded in the plaint, it is not permissible to reject the plaint relying upon Order VII Rule 11(d). C. P. C. It is true that section 80 is imperative and mandatory, but since it is for the benefit of the Government or the public officer concerned, the latter can, if they choose waive their right which is given to them by this provision. There is no legal bar against waiver of the right under Section 80. Since service of notice under Section 80, C. P. C. is a condition precedent for the institution of a suit against the Government or a public officer, the cause of action for the institution of the suit will include even the service of such a notice and the plaint shall state that fact. Since, however, if there is no mention of the fact of service of a notice and, in fact, no notice has been served and the plaint does not contain a plea of waiver of the notice on the part of the Government or the public officer concerned, the plaint in that case may be straightway rejected under Order VII, Rule 11(d). But, when the plaintiff, with the full knowledge of his obligation under Section 80, avers that service of notice has been waived by the defendant, he should have an opportunity to establish this fact if the defendant denies the waiver by filing a written statement.

7. 'Waiver' is defined in Halsbury's Laws of England, Volume 14 (Third Edition) at page 637 as follows:

"Waiver is the abandonment of a right, and is either express or implied from conduct.

x x x x x

Although there is no express waiver, the person entitled to the right may so conduct himself that it becomes inequitable to enforce it, and this is sometimes called an implied waiver....." It is, therefore, clear that waiver can be both express as well as implied. At any rate, this is a matter which has to be

gone into by the court before which the plea is raised. In this case, the plaintiff has raised the plea of waiver of the notice under Section 80, C. P. C. by the defendant. It is for the defendant to admit or deny this averment when he files his written statement. Then an issue would be raised and the court, after taking evidence of both parties, if produced, and hearing both parties, will determine the issue. All that we say in this case is that mere absence of the service of notice will be sufficient to attract the provisions of Order VII, Rule 11 (d), C. P. C. if no waiver is pleaded by the plaintiff. If waiver is pleaded, the Court will have to give an opportunity to the plaintiff to establish it and if he fails to establish, the plea will be rejected only after the issue is decided against the plaintiff. In this case the courts below rejected the plea on the sole ground that there was no notice served on the defendant under Section 80, C. P. C. In view of the plea of waiver raised by the plaintiff, this order is clearly erroneous without a finding as to whether the plea has been established or not. The court will be free to come to its own independent conclusion in the matter after hearing the parties. Since, however, the suit is a long pending one, we direct the trial court to dispose of all the issues that may arise on the pleadings in the suit after the defendant files his written statement. We must, however, make it absolutely clear that we must not be understood to have expressed any opinion on the merits of the plea of waiver raised by the plaintiff.

8. In the result, we set aside the judgments and decrees of the courts below and remand the suit to the learned Munsiff for disposal in accordance with law and in the light of the observations made hereinabove. The appeal is allowed and the suit remanded accordingly. We, however, make no order as to costs.

D. M. SEN J.:— 9. I agree.
Case remanded.

AIR 1972 ASSAM & NAGALAND 31
(V 59 C 12)

P. K. GOSWAMI, C. J. AND
D. M. SEN, J.

Management of Messrs. Associated Industries (Assam) Ltd., Petitioner v. Bipin Behari Singh and another, Respondents.

Civil Rule No. 688 of 1969, D/- 8-9-1971.

(A) Limitation Act (1963), S. 14 (2) — A proceeding before certifying officer under S. 5, Industrial Employment (Standing Orders) Act (1946), is not a "civil proceeding". nor is the Labour

Court exercising the power of appellate authority under S. 6 of that Act a Court" for the purpose of S. 14, Limitation Act — (X-Ref:— Industrial Employment (Standing Orders) Act (1946), Sections 5, 6 and 11). (Para 4)

The fact that under Section 11 of the Industrial Employment (Standing Orders) Act every certifying officer and the appellate authority have all powers of a Civil Court for certain specified purpose will not convert them to a 'Court'; nor the fact that the matter was later agitated on the writ side of the High Court will make the proceeding before Labour Court "a civil proceeding in a Court." (Para 4)

(B) Industrial Employment (Standing Orders) Act (1946), S. 10 — Standing Orders are immutable for the first six months from the date on which they come into operation — However, employer or workman may apply to the certifying officer to have the Standing Orders modified after the said period. (Observations). (Para 6)

K. Lahiri and M. Sarma, for Petitioner; A. R. Barthakur, for Respondents.

GOSWAMI, C. J.:— This application under Art. 226 of the Constitution of India is directed against an order of the appellate authority under the Industrial Employment (Standing Orders) Act, 1946, hereinafter called 'the Act'.

2. The petitioner-company, which is an industrial establishment under the Act, submitted its draft Standing Orders to the certifying officer and the same, after certification, was sent to the parties on 2nd December, 1964. Respondent No. 1, representing the Union of the workers, preferred an appeal to the Labour Court, Gauhati, on 22nd December 1964 and the case was duly registered being No. 14 of 1964. After hearing the parties, the appeal was disposed of by the Labour Court on 29th January, 1966 in favour of the Union. The petitioner moved the High Court on 23rd March 1966 under Art. 226 of the Constitution against the order of the Labour Court and the petition was allowed on 21st November 1967 holding that the Labour Court had no jurisdiction to hear the appeal. The High Court observed:

"It is unfortunate that the respondents had misconceived their remedy by filing their appeal in a wrong forum under some mistaken impression."

Thereafter, on 6th December 1967, the respondent No. 1 preferred an appeal to the respondent No. 2, being the appellate authority under the Act, praying at the same time for condonation of the delay. The petitioner raised before the appellate authority a preliminary objection on the ground of limitation. The appeal under Section 6 of the Act is to be filed

within thirty days from the date on which the copies of the Standing Orders are sent to the parties. Since, in this case, the certified Standing Orders were sent to the Union on 2nd December 1964, the appeal before the authority was clearly beyond time. It is common ground that if the period wherein the opposite party was successfully prosecuting his appeal before the Labour Court and later on resisting the writ petition before the High Court were excluded under Section 14 of the Limitation Act, the appeal before the appellate authority would be in time. The appellate authority, by excluding this period as a bona fide prosecution before a wrong court, admitted the appeal. Hence this writ application.

3. The point, therefore, that falls for consideration in this application is whether Section 14 of the Limitation Act can be invoked by the appellate authority.

4. Before we look at the provisions of the Act, we may quote Section 14 (2) of the Limitation Act, which is material for the present purpose:

"In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

Before we construe Section 14 (2), we have to see the nature of the proceeding, out of which the appeal arose. The appeal is against an order in a proceeding before a certifying officer under Section 5 of the Act. That proceeding is not a civil proceeding inasmuch as an order in such a proceeding does not relate at that stage to any civil rights of the parties as such, or to any infraction of such rights. The Act requires employers to precisely define the conditions of employment and to make the same known to workmen. The conditions are to be certified by a certifying officer under Section 5 (3) after hearing the parties and making appropriate orders, if any, under Section 5 (2) of the Act. The conditions for certification of Standing Orders are that provision has been made therein for every matter set out in the Schedule to the Act as applicable to the industrial establishment, the standing orders are otherwise in conformity with the provisions of the Act and that the provisions of the standing orders are fair or reasonable.

It is true that under Section 11 every certifying officer and appellate authority

have all the powers of a civil court for certain specified purposes mentioned therein and shall be deemed to be a civil court for the purposes of Sections 480 and 482 of the Code of Criminal Procedure. This circumstance, by itself with nothing more, will not convert a certifying officer to a 'Court', nor the proceeding before it to a 'civil proceeding'. If, as we have held, the proceeding before the certifying officer is not a civil proceeding, it will not change its character when taken in appeal before the appellate authority, which, in this particular case, was taken to the Labour Court, and admittedly a wrong forum. Section 14 can be invoked only if the earlier proceeding had been a 'civil proceeding' and had been 'prosecuted in a court'. Section 14 (1) refers in terms to the 'period of limitation for any suit' and 'whether in a court of first instance or of appeal or revision.' These expressions clearly refer to a civil suit prosecuted in a civil court. When we come to Section 14 (2), the reference is to 'any application'. But the expression 'civil proceeding', 'whether in a court of first instance or of appeal or revision', and 'prosecuted in court' are repeated. When these expressions are used in the same section, it is difficult to give a different meaning to the word 'Court' and include a tribunal or a labour court with the trappings of a court within the term. In our opinion, the Labour Court, whether wrongly or rightly, exercising the power of the appellate authority under Section 6 of the Act, is not a 'court' for the purpose of Section 14 of the Limitation Act. If prosecution before the Labour Court was not in a 'civil proceeding', nor in a 'court', the fact that the matter was later agitated on the writ side of the High Court against the order of the Labour Court does not make the earlier proceedings before the Labour Court a civil proceeding in a court.

5. In the result, the appeal was clearly time-barred before the appellate authority and it had no power to admit the same by invoking Section 14 of the Limitation Act. The petition is allowed. The impugned order is quashed. We make no order as to costs.

6. We may, however, observe that under Section 10 of the Act, the standing orders are immutable for the first six months from the date on which these came into operation. But, there is no bar in the way of the employer or workmen in applying to the certifying officer to have the standing orders modified after the said period.

D. M. SEN, J.:— 7. I agree.

Application allowed.

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BOMBAY SECTION

WITH COMPARATIVE TABLES FOR

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BOMBAY HIGH COURT

1972

CHIEF JUSTICES :

The Hon'ble Mr. Justice S. P. Kotval, B.A., LL.B. (Retired from 27-9-1972).
" " K. K. Desai (Ag. C. J. from 31-7-1972 to 12-8-1972)
(As C. J. 27-9-1972 to 27-10-1972).
" " R. M. Kantawala (As C. J. from 27-10-1972).

PUISNE JUDGES:

The Hon'ble Mr. Justice N. A. Mody, B.A., LL.B. (Retired from 2-3-1972).
" " K. K. Desai, B.A., LL.B. (up to 26-9-1972).
" " M. G. Chitaley, B.A., LL.B. (Retired from 7-1-1972).
" " Y. V. Chandrachud, B.A., LL.B. (Elevated to the Bench
of Supreme Court on 25-8-1972).
" " R. M. Kantawala, B.A., LL.B. (up to 26-10-1972).
" " V. G. Wagle, B.A., LL.B. (Retired on 6-3-1972).
" " V. D. Tulzapurkar, B.A., LL.B.
" " B. N. Deshmukh, M.A., LL.B.
" " D. B. Padhye, B.Sc., LL.B.
" " J. R. Vimadalal, B.A. (Hons.), LL.B.
" " V. S. Deshpande, B.A., LL.B.
" " N. P. Nathwani, B.A. (Hons.), LL.B.
" " J. L. Nain, Barrister at law.
" " D. P. Madan, B.A. (Hons.), LL.B.
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NOMINAL TABLE

Abdul Hussain Shaikh Gulamali Jambawalla v. M/s. Bombay Mental Syndicate, a firm	(Aug) 252	Lalshankar Mulji Joshi v. Kantilal Mohanlal Parikh	(Dec) 373
Agarwal, K. R. Dr. v. Balkrishna Jawar	(Nov) 343	Laxmi Co-operative Bank Ltd. Sholapur v. Mohan Govind Diwanji	(Dec) 354
Aiyasha Begum v. Kapurochand Rahmal	(May) 145	Lingarkar M. K. v. S. B. Kesarkar	(Apr) 100
Ajitsingh v. State of Maharashtra	(Jun) 177	Little Gibbs Co-op. Housing Society Ltd. Bombay v. State of Maharashtra	(Apr) 108
Akhil Deshastha Rugvedi Brahmin Madhyawarti Mandal v. Joint Charity Commissioner Maharashtra State Bombay	(Oct) 313	Mahomed Akil Khan v. Premraj Jawanmal Surana	(July) 217
Amin Abdul Kadar Murtasa v. Jivraj Otmal	(Mar) 88	Mangharam Chuharmal v. B. C. Patel	(Feb) 46
Arthur and Co. v. Shamji Kalidas and Co.	(Nov) 345	Municipal Corporation of Greater Bombay v. Hashaim Ismail Mamsa	(Nov) 350
Baban Krishnarao Misal v. Narayan Yeshwant Godase	(Dec) 375	Muralilal Mahabirprasad v. B. R. Vad	(Jan) 15
Balku Laxman Khatik v. Biru Ramachandra Kotmire	(Dec) 379	Nagnath Tatyha Halge v. Kishan Tatyha Kale	(Aug) 228
Bhatt P. B. v. V. R. Thakkar	(Dec) 385	Narendrakumar Bhogilal Shah v. State	(June) 184
Bibi Batool v. Principal Judge, City Civil Court, Bombay	(Aug) 254	Patil B. B. v. Smt. Gangabai	(Jan) 16
Bindichand Hiralal Bhandari v. Babu, Sadashiv Borhade	(Aug) 232	Parvatibai v. Sitabai Ganpat Chavan	(Dec) 381
Caitan D'Souza v. Miss Jerbai S. C. Dinshaw	(Apr) 117	Pitamber Govinda v. Abdul Gafur	(Feb) 43
Chandulal and Co. v. Nihalchand Pannaji	(Oct) 299	Punjaram Mithu Kirad v. Khandelwal Ferror Alloys Ltd.	(Nov) 339
Charity Commissioner, Maharashtra State, Bombay, v. Hirjibhoy Mancherji Kayarana	(Aug) 229	Purnebai Bapu Jawale v. State of Maharashtra	(July) 194
Daftardar R. G. v. Vijaya Raghunath Daftardar	(May) 132	R. T. Engineering and Electronics Co. In the matter of	(May) 157
Dattu Subrao v. Dattatraya Pandurang	(Mar) 72	Raja Bahadur Motilal (Bombay) Mills Ltd. v. Life Insurance Corporation of India	(Jan) 1
Deshmukh G. K. v. Devisingh Venkatasingh	(Dec) 369	Rajamane A. S. v. T. K. Kamble	(May) 155
Devlakshmi Harisukh Vahalia v. Vishwakant P. Bhatt	(Apr) 103	Randive V. R. v. D. B. Ghatge	(Apr) 122
Dharamdas Motibhai Wani v. Shidya Jatra Bhil	(Mar) 65	Ratnaprabhabai v. Sheshrao Shankarrao Bhore	(Jun) 182
Diwanchand Gupta v. N. M. Shah	(Oct) 316	Sabir Ahmed Lal Mohamed v. State of Maharashtra	(Oct) 296
Durgadas Devidas Rathod v. Vithal Sidram Udate	(Mar) 92	Sadashiv Shankar v. Bala Nisbat Babaji	(Jun) 164
Fokmare K. D. v. S. P. Mahalle	(Mar) 81	Sahadu Bala v. Namdeo Bapuji	(Jan) 25
German Democratic Republic v. Dynamic Industrial Undertaking Ltd.	(Jan) 27	Shankarlal :Laxminarayan. Rathil v. Gangabisen Maniklal Sikchi	(Nov) 326
Gool Rustomji Miss v. Jal Rustomji	(Apr) 113	Shirang Ganapati Pandit v. State of Maharashtra	(Aug) 242
Govinda Zibla Doye v. Udhao Dharmaji Nikhade	(Jun) 169	Shivamurti v. Dudhe	(May) 152
Gulabchand Hiralal v. Hakimchand Chothmal	(Jun) 192	Shrikant Pundlikrao Ganorkar v. Assistant Collector, Achalpur	(Apr) 128
Housabai v. Jijabai Baba Powar	(Apr) 98	Sohanraj Ganeshmal Shah v. Gulabrao B. Kate	(Dec) 377
Jambu Anna v. Bapu	(May) 141	Sohansingh Bharatsingh v. Narhar Narayan Godbole	(Mar) 67
Jankibai Prahladrai Brijlal Seksaria v. Kashinath Raghunath Kelkar	(July) 199	Somvanshi M. G. v. S. N. Biradar	(May) 129
Jaysing Ratilal Kotak v. Municipal Commissioner for Greater Bombay	(July) 197	State of Mysore v. Ramchandra Gunda	(Mar) 93
Jivanlal Damodardas Wani v. Narayan Ukha Sali	(May) 148	Suka Ishram v. Jamnabai Ranchodas	(Sep) 273
Kapadia L. C. v. Lalji B. Desai	(Sep) 276	Suratwala and Co. v. Mahmud Bidi Works Sholapur	(Aug) 238
Keshavarao Sorabji Irani v. State of Maharashtra	(Dec) 357	Timade P. R. v. Jagdamba Devi Deosthan, Nagpur	(Apr) 123
Kisan Sahakari Punarvasan Society Ltd. v. N. M. Gowalkar and Co.	(May) 150	Trust for Education, Achalpur v. Chandrabhan Akaji Dhor	(Aug) 235
		Union of India v. Tata Engineering and Locomotive Co. Ltd.	(Oct) 301
		Vishnu Shantaram Desai v. Smt. Indira Anant Patkar	(July) 207 (FB)

SUBJECT INDEX

- Arbitration Act (10 of 1940), S. 2 (a)** — East India Cotton Association Bye-laws, Bye law 38-A — Cotton contract subject to Bye-laws of East India Cotton Association Bombay — Bye-law 38-A providing for arbitration in case of disputes applicable — Contract is an arbitration agreement in terms of S. 2 (a) (Nov) 345
- Bombay Agricultural Debtors Relief Act (28 of 1947)**
See under Debt Laws.
- Bombay Civil Manual (1980), Vol. 1, Para 271, Page 95, R. (12)** — See Hindu Minority and Guardianship Act (1956), S. 8 (2) (May) 152A
— Vol. 2, Page 431, Appendix C, Form G — See Hindu Minority and Guardianship Act (1956), S. 8 (2) (May) 152A
- Bombay Court-fees Act (36 of 1989)**
See under Court-fees and Suits Valuations.
- Bombay High Court (Original Side) Rules (1987)**
See under High Court Rules and Orders.
- Bombay Money Lenders Act (31 of 1947)**
See under Debt Laws.
- Bombay Motor Vehicles Rules (1959), R. 28 (34)** — See Motor Vehicles Act (1939), S. 17 (1) (Oct) 296C
- Bombay Municipal Corporation Act (3 of 1888)**
See under Municipalities.
- Bombay Public Trusts Act (29 of 1950), Ss. 2 (13), 19** — Corporation, registered under Companies Act, owning property in trust for religious and charitable purposes for the benefit of a class of persons, is a public trust liable to registration under the Act (Oct) 313
— S. 19 — See Ibid, S. 2 (13) (Oct) 313
— S. 22.A — Provisions of Ss. 19 to 22 apply to inquiry under S. 22.A — Question whether property belongs to trust — Charity authorities cannot refuse to determine it and refer trustee to a civil suit (July) 199C
— S. 31 (1) — Bar under is not to institution of suit but to its being heard and decided (July) 199D
— S. 50 — See also Ibid, S. 50A: (Aug) 229
— S. 50 — Essential condition for maintainability of suit under S. 50 — Suit property must be property belonging to or registered in name of trust (July) 199B
— S. 50.A — Power of Charity Commissioner to frame a scheme includes power to appoint trustees (Aug) 229
— Ss. 79 and 80 — Effect of — Jurisdiction of Civil Court — Exclusion of (July) 199A
- Bombay Public Trusts Act (contd.)**
— S. 80 — See Ibid, S. 79 (July) 199A
- Bombay Rents Hotel and Lodging House Rates Control Act (67 of 1947)**
See under Houses and Rents.
- Bombay Tenancy and Agricultural Lands Act (67 of 1948)**
See under Tenancy Laws.
- Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958)**
See under Tenancy Laws.
- Citizenship Rules (1958), R. 30** — Acquisition of foreign citizenship — Exclusive jurisdiction of Central Government (Dec) 357C
- Civil Procedure Code (5 of 1908), Pre. — See Precedents (Aug) 254C, D**
— S. 11 — Principle of res judicata — Earlier decision on Chamber Summons in suit refusing to try issues as preliminary does not operate as res judicata in subsequent proceedings on Notice of Motion in the same suit to dismiss suit in limine (Jan) 27A
— S. 11 — Principle of res judicata — Issue disposed of on its own merits, in the Notice of Motion will not be allowed to be re-agitated subsequently even if the hearing of the suit proceeds — Only way the issue can be reagitated is by way of an appeal and not in the same suit (Jan) 27B
— S. 11 — Interlocutory order — What is — Order made on Notice of Motion not necessarily interlocutory (Jan) 27C
— S. 11 — Decision in previous suit when operates as res judicata (Feb) 46B
— S. 11 — A fresh suit for possession on the ground of reasonable and bona fide requirement based on identical facts but pleading change of circumstances is not barred by res judicata (Feb) 46C
— S. 11 — Res judicata — Applicability to execution proceedings (May) 141A
— S. 11, Explanation IV — Execution application — Defence of limitation not raised — Grant of relief — Implied decision — Whether res judicata in subsequent execution proceedings (May) 141B
— S. 11 — Previous suit for rent — Order refusing to stay or adjourn suit till defendant's application for fixation of standard rent is decided by the Rent Controller — Cannot operate as res judicata for stay of subsequent suit for rent on similar ground (Aug) 228A
— S. 11 and O. 14, R. 2 — Issue of res judicata — Should not ordinarily be tried as a preliminary issue (Aug) 228B

Civil P. C. (contd.)

—Ss. 86, 87-A, 151 — Suit on Original Side of Bombay High Court — Claim by defendant to immunity from being sued in municipal courts as foreign Sovereign State — Procedure — Question can be raised on Notice of Motion (Jan) 27E

—Ss. 86, 87-A. — Doctrine of immunity of foreign Sovereign State from being sued in municipal courts under International Law — Principles apply in India but as modified by S. 86 (Jan) 27F

—S. 87A — See Ibid, S. 86 (Jan) 27E, F

—S. 100 — See also Companies Act (1956), S. 172 (1) (Sep) 276C

—Ss. 100, 101 — Finding of fact — Finding of fact of the first appellate court as to absence of legal necessity being binding on High Court in second appeal it is not open to challenge (Apr) 98A

—S. 107 — Power to frame issues and refer case for trial (May) 145

—S. 115 — See Ibid, O. 1, R. 10 (May) 148

—S. 145 — A surety, who had executed a surety bond for satisfaction of a decree that might be passed by the Court, is not ipso facto discharged upon passing of a consent decree, if such a consent decree is not the result of any fraud or collusion between the plaintiff and the defendant (Mar) 88

—S. 151 — See Ibid, S. 86 (Jan) 27E

—O. 1, R. 3 — See Ibid, O. 2, R. 4 (July) 199E

—O. 1, R. 10 — Addition of parties — Application for, opposed by plaintiff — Court cannot grant application unless the party sought to be joined is a necessary party (May) 148

—O. 2, Rr. 2 and 4 — Interpretation of — First suit for damages stipulated in lease against lessee holding over after expiry of lease — Second suit for possession on basis of title as owner and damages for period subsequent to first suit — Causes of action for two suits being entirely different O. 2; R. 2 does not apply — Suit is maintainable under O. 2, R. 4 (Nov) 326 (FB)

—O. 2, R. 3 — See Ibid, O. 2, R. 4 (July) 199E

—O. 2, R. 4 — See also Ibid, O. 2, R. 2 (Nov) 326 (FB)

—O. 2, R. 4 — Suit for possession and mesne profits — Claim for recovery of money received by defendant by wrongful sale of some property — Leave of court — Necessity — It cannot also be justified

Civil P. C. (contd.)

under O. 1, R. 3 or O. 2, R. 3 — Leave granted at stage of revision (July) 199E

—O. 6, R. 4 — See Companies Act (1956), S. 172 (Sep) 276D

—O. 14, R. 2 — See Ibid, S. 11 (Aug) 228B

—O. 21, R. 1 — Option to judgment-debtor to make payment in different ways — Judgment-debtor cannot choose option that makes payment impossible: (Oct) 299

—O. 21, R. 84 — See High Court Rules and Orders — Bombay High Court (Original Side) Rules (1957), R. 500A : (Jan) 1A

—O. 38, Rr. 5, 6 — Scope and applicability — Order for furnishing security for producing property in Court when made (Dec) 377

—O. 38, R. 6 — See Ibid, O. 38 R. 5 (Dec) 377

Companies Act (1 of 1956), S. 172 (1) — Notice of meeting — Invalidity or insufficiency of notice — Question as to is a mixed question of law and fact and its grounds have to be specifically pleaded — It cannot be raised at any stage of the proceeding (Sep) 276C

—Ss. 172; 173 (1) & (2) — Section 173 is mandatory and not directory — Non-compliance with it vitiates the action taken at the meeting — Allegation of insufficiency or misleading nature of notice of special business — Has to be substantiated by relevant particulars (Sep) 276D

—Ss. 173, 258, 396 (1) (b) — Suit for permanent injunction restraining defendants from acting as directors — Allegations of non-compliance with mandatory provisions of Section 173 and Section 258 and unauthorised alteration in Board of Directors — Maintainability of suit (Sep) 276I

—S. 173 (1) & (2) — See Ibid, S. 172 (Sep) 276D

—S. 258 — See Ibid, S. 264 (1): (Sep) 276G

—S. 258 — See also Ibid, S. 173: (Sep) 276I

—Ss. 258, 260 — Right of company to increase the number of its directors — Board of Directors cannot by appointment of Additional Directors increase the strength of the Board so as to affect the power of the company vested in it under Section 258 (Sep) 276A

—S. 258 — Power to increase number of directors — Exercise of — No formalities are prescribed therefor — It is not necessary to pass separate resolution increasing the number (Sep) 276B

—S. 260 — See Ibid, S. 258 (Sep) 276A

—S. 264 (1) (as amended) — Interpretation of use of Objects and Reasons —

Companies Act (contd.)

Provision so far as it relates to filing of consent is directory (Sep) 276E

—S. 264 (1) — Expression "or otherwise" — Connotation of (Sep) 276G

—S. 264 (1) — Scope — Consent to act as director — Consent contemplated is referable to the candidature of a person for the office of a director — No consent is necessary to act as a director or an additional director (Sep) 276H

—S. 264 (2) — Interpretation of — Provision is mandatory — Filing of consent under the provision is a condition precedent for acting as a director — Unless the consent is filed within the prescribed time, person appointed as director for the first time cannot act as a director. (Obiter.) (Sep) 276F

—S. 396 (1) (b) — See Ibid, S. 173 (Sep) 276I

Constitution of India, Pre. — See Precedents (Oct) 296A

—Art. 5 (a) and (c) — Essentials of citizenship under the Article — Domicile (Dec) 357B

—Art. 14

See also (1) Houses & Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), S. 13(1) (i): (Feb) 46A

(2) Municipalities — Bombay Municipal Corporation Act (1888), S. 527 (Nov) 350B

—Arts. 14 and 15 — Admission to Medical College — Rule 2 of Rules framed by Government of Maharashtra for admission to B. J. Medical College, Poona and Miraj Medical College, Miraj is valid (Aug) 242A

—Art. 14 — Legislation vesting discretion in authority — Guiding principles to test its constitutionality under Art. 14 (Aug) 254B

—Art. 15 — See also Ibid, Art. 14 (Aug) 242A

—Arts. 15 (4) and 46 — Admission into educational institutions — Reservation of seats for backward class in the proportion of that class to the population of the State as per last census is valid (Aug) 242B

—Arts. 15 (4) and 46 — Admissions into educational institutions — Rule carrying forward vacant seats in a particular group to the other groups in the backward classes is reasonable (Aug) 242C

—Arts. 15 (4) and 46 — Admission into educational institutions — Provision of less or minimum qualification marks in the case of applicant of backward classes is permissible (Aug) 242D

—Art. 19 — See Municipalities — Bom.

Constitution of India (contd.)

bay Municipal Corporation Act (1888), S. 354 (Oct) 316C

—Art. 19 (1) (f) — See Municipalities — Bombay Municipal Corporation Act (1888), S. 527 (Nov) 350B

—Art. 20 (2) — See Motor Vehicles Act (1939), S. 17 (1) (Oct) 296B

—Art. 46 — See Ibid, Art. 15 (4) (Aug) 242B, C, D

—Art. 133 — 'Judgment' dismissing writ petition on preliminary point of jurisdiction being interlocutory is not a judgment (Jan) 15

—Art. 226 — See also Municipalities — Bombay Municipal Corporation Act (1888), S. 354 (Oct) 316C

—Art. 226 — Writ petition for quashing order of Commissioner rejecting application for revision — Non-availability of alternative remedy — Petition maintainable (Nov) 339A

—Art. 226 — Patent error of Law — Court holding that certain premises were not let for non-residential purposes on 19-1-1948 and at the same time holding that requirement of owner (Bank) for its occupation is reasonable and bona fide — Patent error of law (Dec) 354B

—Art. 227 — See also Houses and Rents — Bombay Rents Hotel and Lodging House Rates Control Act (1947), Section 13 (1) (b) (Sep) 273B

—Art. 227 — Order of Revenue Tribunal depriving landlord of his accrued right to possession of land from tenant on a misconception of its own earlier order — Order quashed under Article 227: (Mar) 81C

—Art. 300 — Liability of Government — When the Government builds a reservoir for facilitating the supply of water but fails to provide an overflow channel to meet any contingency the Government is liable for damage to the adjoining lands by overflow of such reservoir due to unprecedented floods — The damage in such a case does not result from the act of God (Mar) 93A

—Art. 300 — Vicarious liability of Government for the negligent acts of its servants committed in pursuance of the sovereign power of the State (Mar) 93B

Contract Act (9 of 1872), S. 17 — See Hindu Marriage Act (1955), S. 12 (1) (c) (May) 132A

—S. 124 — See Limitation Act (1963), Art. 113 (Aug) 252

—S. 126 — See Limitation Act (1963), Art. 113 (Aug) 252

—S. 133 — See Civil P. C. (1908), S. 145 (Mar) 88

Contract Act (contd.)

—S. 135—See Civil P. C. (1908), S. 145
(Mar) 88

CO-OPERATIVE SOCIETIES

—**Maharashtra Co-operative Societies Act 1960 (24 of 1961)**, S. 78 — Supersession of Committee without affording opportunity to show cause—Effect (Apr) 108A
—S. 78 — Existence of rival group by itself, cannot furnish any basis for supersession of managing committee (Apr) 108B
—S. 91 — Scope of (May) 129

Court-fees Act (7 of 1870)

See under Court fees and Suits valuations

COURT-FEES AND SUITS VALUATIONS

—**Bombay Court-fees Act (38 of 1959)**, S. 2 (c) —See Court-fees and Suits Valuations—Court-fees Act (1870), Sch. 1 Art. 1 (May) 150
—S. 6 (iv) (a)—Suit for accounts—What is (Nov) 350A
—**Court-fees Act (7 of 1870)**, S. 7 (iv) (f) — See Court-fees and Suits Valuations — **Bombay Court-fees Act (1959)**, S. 6 (iv)(a) (Nov) 350A
—Sch. 1, Art. 1 — Counter claim for equitable set-off—Court-fee must be paid (May) 150

—**Criminal Procedure Code (5 of 1898)**, Ss. 435 and 438 — Issue of domicile and nationality certificate—Procedure for cancellation in case it is wrongly or illegally issued—Government cannot issue executive instructions for its cancellation (Dec) 357

—S. 438—See Ibid, S. 435 (Dec) 357

DEBT LAWS

—**Bombay Agricultural Debtors' Relief Act (28 of 1947)**, S. 40 — S. 40 makes alienation invalid and not merely voidable (Feb) 43A
—S. 40 — Alienation in contravention of S. 40 is invalid — But a lease not being alienation even if made without previous sanction of Court is not invalid (Feb) 43B

—**Bombay Money Lenders Act (31 of 1947)**, Ss. 2 (6), 25, 2 (9) (g) — Transaction between traders styled as Bidi selling agreement— Construction — Dominant intention of the transaction has to be considered (Aug) 238A
—S. 2 (9) — Loan — A transaction evidenced by a pronote on which interest

Debt Laws — Bombay Money Lenders Act (contd.)

would be payable under S. 80 of the Negotiable Instruments Act would be a loan within the sub-section (Mar) 65
—S. 2 (9) — Loan to a trader—Not a loan within the sub-section — Purpose immaterial (Mar) 92
—S. 2 (9) (g) — See Ibid, S. 2 (6) (Aug) 238A
—S. 10 (2)—See Ibid, S. 2 (9) (Mar) 65
—S. 21 — See Ibid, S. 2 (9) (Mar) 92
—S. 25 — See Ibid, S. 2 (6) (Aug) 238A
—**Usurious Loans Act (10 of 1918)**, S. 2 (2) —Loan — Definition of loan under this Act is of wider connotation — It gives the Court power to declare a transaction as loan if in its opinion the transaction is in substance a loan (Aug) 238B

—**East India Cotton Association Bye-laws**, Bye-law 38A—See Arbitration Act (1940), S. 2 (a) (Nov) 345

—**Evidence Act (10 of 1872)**, Ss. 91 and 92— Expression "terms" of contract — Not applicable to statement in nature of condition precedent to formation of contract (Dec) 365A

—S. 92—See also Ibid, S. 91:(Dec) 365A
—S. 92, Proviso (6)—Extrinsic evidence is admissible for purpose of showing circumstances in which document came to be prepared and executed with a view to arrive at true effect of transaction (Dec) 365B

—**Guardians and Wards Act (8 of 1890)**, S. 29 —See Hindu Minority and Guardianship Act (1956), S. 8 (2) (May) 152A

HIGH COURT RULES AND ORDERS

—**Bombay High Court (Original Side) Rules (1957)**, R. 310—See Ibid, R. 500A (Jan) 1E

—R. 500-A—Deposit of twenty five per cent of purchase money at the time of sale unless "otherwise ordered" — There can be an implied order (Jan) 1A

—R. 500-A—Deposit of purchase money —Mortgagee decree-holder allowed to bid and set-off—Amount of "estimated costs" incurred by mortgagee for realising his mortgage security to be set-off—Practice —Not illegal (Jan) 1B

—R. 500-A—Discretion to extend time for deposit of balance of the purchase money, is also available to Court hearing an appeal against order of the Chamber Judge (Jan) 1D

—R. 500-A — The time for payment of balance of the purchase money can be extended even after the expiry of the pre-

High Court Rules and Orders — Bombay

High Court (Original Side) Rules (contd.)
 scribed period of thirty days in view of the wide power conferred by R. 310

(Jan) 1E

—R. 500-A (ii) — Extension of time for deposit of balance of purchase money — In a proceeding by mortgagor, the mortgagee can request the court to extend the time

(Jan) 1C

Hindu Adoptions and Maintenance Act (78 of 1956), S. 10 (iv)—Adoption — Custom or rule of Hindu Law in the former State of Bombay permitting adoption of males over the age of fifteen years is protected by S. 10 (iv)

(Apr) 98B

—S. 12, proviso (c)—Effects of adoption —Alienations made by a Hindu widow prior to 1956 can be challenged by the son adopted even subsequent to alienations when the alienations were not made for legal necessity

(Apr) 98C

Hindu Law — Illegitimate son of shudra —Right to succeed to father's property

(June) 164

Hindu Marriage Act (25 of 1955), S. 9 — Restitution of conjugal rights — Petition for — Burden of proof

(June) 182

—S. 12 (1) (c) — Section 17 of Contract Act does not apply to a case of fraud under S. 12 (1) (c)

(May) 132A

—S. 12 (2) (a) (ii)—Bar to entertain petition for annulment of marriage — When attracted

(May) 132B

Hindu Minority and Guardianship Act (32 of 1955), S. 8 (2) — Application for permission of Court for transfer of immovable property of minor by intending purchaser is not maintainable—It is only the natural guardian who can maintain such application

(May) 152A

Hindu Succession Act (30 of 1956), S. 14 (1) —Limited ownership and restricted estate —An absolute estate may be restricted in a variety of ways in point of duration, enjoyment, disposal or the like, and all such cases are covered by the Explanation—Limited ownership is also restricted ownership and every case of limited ownership will fall within the meaning of "restricted estate" in sub-section (2)

(Jan) 16B

—S. 14 (1)—"In any other manner whatsoever" — Expression is wide enough to include property acquired under an award or a decree

(Jan) 16C

—S. 14 (1) and (2) —Property of female Hindu—Limited estate of Hindu widow in her husband's share of family property

Hindu Succession Act (contd.)

recognised in decree by allotting property to her — Widow in possession of such property on date of commencement of 1956 Act would get full ownership under S. 14 (1)—Section 14 (2) does not apply

(Jan) 16A

HOUSES AND RENTS

—**Bombay Rents, Hotel and Lodging House Rates Control Act (87 of 1947) S. 5 (11)** (c)—Member of family who can inherit right of tenancy can only be one person

(Apr) 113

—S. 6 — Words 'premises let' in S. 6 must be construed as including premises agreed to be let

(June) 184B

—Ss. 12, 13 and 14 — Acts or omissions of a tenant cannot deprive his sub-tenant of the statutory protection where the impugned act or omission is not that of the sub-tenant and he is not shown to have been privy to the same

(Aug) 232

—S. 12 (2) — Notice demanding arrears of rent and to quit the premises—Validity —Mere fact that by mistake or oversight the landlord had demanded the rent for the month for which it was not due, would not make the notice invalid

(Dec) 373

—S. 12 (3) (a) — Refusal by landlord to accept rent sent by M. O.—Tenant cannot be said to be in arrears of rent nor can he be said to be not ready and willing to pay rent — Eviction under S. 12 (3) (a) is erroneous

(Sep) 273A

—S. 13—See Ibid, S. 12

(Aug) 232

—S. 13 (1)—"Reasonable and bona fide requirement"—Meaning of

(Feb) 46C

—S. 13 (1) (b) — Eviction for construction of permanent structure by tenant without permission of landlord — Interference by High Court under Art. 227

(Sep) 273B

—S. 13 (1) (c), second sub-clause — Tenant is liable not only for his own acts but also for the acts of those who reside with him

(Apr) 117A

—S. 13 (1) (c), second sub-clause — Mere proof of conviction of an offence alleged to have been committed on the premises alone will not satisfy the requirement of the provision

(Apr) 117B

—S. 13 (1) (g) — Requirement of premises for personal occupation of landlord

(Mar) 67

—Ss. 13 (1) (g) and 25 — "Bona fide" requirement — Certain premises used for residential purposes on date on which Act came into force — Landlord requiring it for non-residential purposes — Requirement not "bona fide" (Dec) 354A

Houses and Rents — Bom. Rents, Hotel and Lodging House Rates Control Act (contd.)

- S. 13 (1) (i) — Classification under, is reasonable— Not hit by Art. 14 of Constitution (Feb) 46A
- S. 13 (1) (i) — Tenancy of open plot — Subsequent construction thereon by tenant cannot make S. 13 (1) (i) inapplicable (Feb) 46D
- S. 14—See also Ibid, S. 12 (Aug) 232
- S. 14 — Effect of on rights and liabilities of sub-tenant (Feb) 46E
- S. 14 — Interpretation of (Feb) 46F
- S. 18 (1) (3) — Sub-section (3) is couched in the form of proviso to sub-s. (1) (June) 184A
- S. 18 (3) — See also Ibid, S. 6 (June) 184B
- S. 18 (3) — Word 'shall include' in sub-s. (3) can be construed as meaning 'shall be incorporated' (June) 184C
- S. 18 (3) — Conditions of sub-s. (3) are incorporated by operation of law in all construction loan agreements whether oral or in writing (June) 184E
- S. 18 (3) — Provision in sub-s. (3) that agreement should be in writing and registered is equally one of the conditions specified in the sub-section (June) 184F
- S. 18 (3) (4) — Conditions listed in sub-s. (3) must be complied with—Breach thereof is offence under sub-s. (4) unless reasonable excuse for non-compliance is proved (June) 184G
- S. 18 (3) (4) — Failure to provide for charge on building and on interest in land, in construction loan agreement — No offence under sub-s. (4) (June) 184H
- S. 25 — See Ibid, S. 13 (1) (g) (Dec) 354A

Hyderabad Abolition of Inams and Cash Grants Act (8 of 1955)

See under Tenancy Laws.

International Law — Private — See Civil P. C. (5 of 1908), S. 86 (Jan) 27E, F

Interpretation of Statutes — Civil Manual issued by High Court — Contains rules for guidance of subordinate Courts and officers — It cannot be used as an aid to the construction of a statutory provision (May) 152B

—Construction of penal statutes

(June) 184D

—Hardship — Effect (May) 152C

—Marginal note to section — See Bombay Tenancy and Agricultural Land Act (1948), S. 32F (July) 207 (FB)

—Marginal Notes — Reference to for construing provisions of statute: (Feb) 43D

Interpretation of Statutes (contd.)

—Reference to Objects and Reasons — Permissibility — See Compaines Act (1956), S. 264 (1) (Sep) 276G

—Word defined — Whether to be understood in its dictionary meaning — See Monopolies and Restrictive Trade Practices Act (1969), S. 23 (1) (a) (Oct) 301B

Land Acquisition Act (1 of 1894), S. 3 (b) — See Ibid, S. 30 (July) 217

—Ss. 4, 6 and 55 — Maharashtra Rules under S. 55, Rule 1 — Non-service of individual notice contemplated by R. 1 renders notification under S. 6 invalid

June 177A

—S. 4 and 6 — Notification under S. 6 vis-a-vis petitioner's land declared invalid for non-service of individual notice under S. 4 — Effect (Jun) 177B

—S. 6 — See Ibid, S. 4 (June) 177A, B

—S. 9 (1) — See Ibid, S. 30 (July) 217

—S. 23 — See Ibid S. 30 (July) 217

—Ss. 30, 3 (b), 9 (1), 23 — Contract for sale of land frustrated due to acquisition of the land by State — Nature of buyer's right in the land — Extent of buyer's claim in the compensation payable under the Act (July) 217

—S. 55 — See Ibid, S. 4 (June) 177A

Letters Patent (Bom), Cl. 15 — 'Judgment' — Order refusing defendant's claim to immunity as foreign Sovereign State and want of jurisdiction against it is a judgment (Jan) 27D

Limitation Act (9 of 1908), Art. 144 — Adverse possession — Possession under invalid lease — Nature of — Payment of rent by lessee—Effect (Feb) 43C

Limitation Act (36 of 1963), S. 22 — See Ibid, Art. 113 (Aug) 252

—S. 23 — See Ibid, Art. 113 (Aug) 252

—Art. 113 — Contract of indemnity — Cause of action — When accrues

(Aug) 252

Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961)

See under Tenancy Laws.

Maharashtra Co-operative Societies Act (24 of 1961)

See under Co-operative Societies.

Maharashtra Land Revenue Code (41 of 1963), S. 48 — Mining lease—Fixation of compensation to owner of land from which minerals are to be extracted — Delegation of powers is not a pre-condition (Nov) 339B

—S. 249 (2)—See Constitution of India, Art. 226 (Nov) 339A

—S. 252 (b)—See Constitution of India, Art. 226 (Nov) 339A

Maharashtra Municipalities Act (40 of 1965)

See under Municipalities.

Maharashtra Ownership Flats (Regulation of Promotion, Construction, Sale, Management and Transfer) Act (45 of 1963), S. 2 (a) — 'Flat' — Meaning of — Conditions requisite to constitute a flat — Building divided into independent and separate units by common party wall — Each unit constitutes a flat irrespective of its ownership (Nov) 343

Monopolies and Restrictive Trade Practices Act (64 of 1969), S. 2 (v) — Engagement in provision of service — Held the old Central Bank was not engaged in provision of service (Oct) 301A

— S. 23 (1) (a) — "Any other undertaking" — Meaning of (Oct) 301B

Motor Vehicles Act (4 of 1939), S. 17 (1) — Does not offend Art. 20 (2) of the Constitution (Oct) 296B

— S. 17 (1) — Conviction for contravention of a rule under Act — Person can be disqualified under S. 17 (1) for holding driver's licence (Oct) 296C

— S. 21 — See Ibid, S. 17 (1) (Oct) 296C

— S. 112 — See Ibid, S. 17 (1) (Oct) 296C

MUNICIPALITIES

— **Bombay Municipal Corporation Act (3 of 1888), Ss. 56 (3) and 354** — Power of Commissioner to issue notice to pull down dangerous structure — Delegation of power by Deputy Commissioner to Assistant Engineer — Validity (Oct) 316D

— S. 105-B and Chap. V-A — As amended by Maharashtra Act 14 of 1961 — Constitutionality — Section 105-B and provisions of Chap. V-A do not violate Art. 14 of the Constitution and are valid (Aug) 254A

— Chap. V-A (Ss. 106 to 110H) — See Ibid, S. 105-B (Aug) 254A

— S. 167 — See Ibid, S. 217 (1) (July) 197

— S. 217 (1) and (2) — Appeal against valuation — Appeal is maintainable not only against fixation of rateable value under the Act but also against the rejection of representation under S. 167 (July) 197

— S. 354 — See also Ibid, S. 56 (3) (Oct) 316D

— S. 354 — Notice to pull down dangerous structures — Subjective satisfaction of authority — Justiciability (Oct) 316A

— S. 354 — Notice to pull down danger-

Municipalities — Bombay Municipal Corporation Act (contd.)

ous structures — Whether becomes inefficient (Oct) 316B

— S. 354 — Power to issue notice to pull down dangerous structures to owner or occupier — Exercise of, whether violated principles of natural justice (Oct) 316C

— S. 354 — Discretion to issue notice to pull down dangerous structures — Exercise of — Whether mala fide (Oct) 316E

— S. 507 — Jurisdiction of Chief Judge under — Not taken away by Ss. 13 (1) (hhh) or S. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act (1947) (Oct) 316F

— S. 507 (2) — Power to require the occupiers "to afford all reasonable facilities to the owner" — Extent of (Oct) 316G

— S. 527 — Section if violates Arts. 14 and 19 (1) (f) of Constitution (Nov) 350B

— S. 527 — Suit against Corporation — Limitation (Nov) 350C

— **Maharashtra Municipalities Act (40 of 1965), S. 16 (1) (h)** — Disqualification under — When commences (May) 155

— S. 150 — See Ibid, S. 16 (1) (h) (May) 155

— S. 151 — See Ibid, S. 16 (1) (h) (May) 155

— S. 169 — See Ibid, S. 16 (1) (h) (May) 155

— S. 170 — See Ibid, S. 16 (1) (h) (May) 155

Natural Justice — Principles of — See Co-operative Societies — Maharashtra Co-operative Societies Act (1961), S. 78 (Apr) 108A

Negotiable Instruments Act (26 of 1881), S. 80 — See Debt Laws — Bombay Money-Lenders Act (1947), S. 2 (9) (Mar) 65

Precedents — Binding effect of a decision — Does not depend upon whether a particular argument was considered or not provided that the point with reference to which an argument was subsequently raised was actually decided (Aug) 254C

— Decision based upon two or more independent reasons each of which sufficient to justify final conclusion and decision based on cumulative effect of decision on several points — Distinction between as to binding effect. (Aug) 254D

— Two single Judge rulings taking same view — Their authority cannot be equated to that of a Division Bench and

Precedents (contd.)

cannot preclude a reference to another division bench when a subsequent single judge differs from it (Oct) 296A

Provincial Insolvency Act (5 of 1920), S. 43 (1)—Annulment of adjudication—Creditor cannot apply to the Court against deceased insolvent (Jun) 192

Rule 4 (d) of Rules framed by Govt. of Maharashtra for Admission to B. J. Medical College, Poona—See Constitution of India Art. 15 (4) (Aug) 242B, C

Rule 4 (d) of Rules framed by Govt. of Maharashtra for Admission to Miraj Medical College, Miraj—See Constitution of India, Art. 15 (4) (Aug) 242B, C

Stamp Act (2 of 1899), S. 35—Document not properly stamped—Admitted in evidence—Its admissibility cannot thereafter be questioned at any stage, of the same proceedings or even in appeal (Aug) 238C

TENANCY LAWS

Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 2 (8)—See Ibid, S. 86 (c) (Apr) 122A

—S. 14—See Ibid, S. 25 (2) (Mar) 72A

—S. 25 (2) (As came into force on 1-8-1956)—Sub-section (2) applies only in cases where at the date of the institution of the application for ejectment by landlord, tenant can be held to be in arrears of payment of rent for any three years (Mar) 72A

—S. 25 (2) (as came into force on 1-8-1956)—Expression “any three years”—Meaning—Three years need not be connected with each other (Mar) 72B

—S. 25 (2) (As came into force on 1-8-1956)—Failure to pay rent for any three years involves failure to pay even any part of rent for any year (Mar) 72C

—S. 32—See Ibid, S. 32 F (Jul) 207 (FB)

—S. 32-F—Scope and interpretation of—Section 32-F does not create any independent right to purchase land in a tenant apart from S. 32—Section 32 is subject to S. 32-F which prescribes a special procedure for exercise of such right (Jul) 207 (FB)

—Ss. 32G to 32R—See Ibid, S. 32F (Jul) 207 (FB)

—S. 33A—See Ibid, S. 33B (Dec) 381B

—S. 33A (i)—See S. 33B (4) (Dec) 375A

—S. 33B—Right of certificated landlord to terminate tenancy or apply for posses-

Tenancy Laws—Bombay Tenancy and Agricultural Lands Act (contd.)

sion of lands surviving on his death to all his heirs succeeding as tenants-in-common, cannot be exercised by any one of them alone (Dec) 381B

—S. 33-B (4)—Point of time for considering whether sub-section (4) applies is the date on which the Certificate is granted—“Certificate holder”—Meaning (Dec) 375A

—S. 33-B (5) (B)—Restoration of possession—Power and duty of revenue authorities (Dec) 379B

—S. 33-B (5) (c)—Word “otherwise” in section is wide enough to include “under a will” (Dec) 381A

—S. 84-A, Second Proviso—Transfer resulting in eviction—The expression “Any person other than the tenant in actual possession” does not include a group of persons which includes a tenant in possession (Jan) 25

—S. 85-A (1) and (2)—Reference under the section—When necessary (Apr) 122B

—S. 86 (c)—Scope (Apr) 122A

—S. 88-C—See also Ibid, S. 33-B (Dec) 381B

—S. 88-C—“Holding”—The holding referred to in the section is the holding in respect of lands and not the other holdings of a landlord (Dec) 379A

—**Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Ss. 2 (26) and 2 (32)**—See Ibid, S. 30 (1) (Mar) 81B

—S. 19—See Ibid, S. 30 (1) (Mar) 81A

—S. 20—See Ibid, S. 98 (b) (Apr) 128

—S. 21—See Ibid, S. 98 (b) (Apr) 128

—S. 30 (1)—Tenant can be ordered to pay arrears of rent or lease money falling due prior to Act but not paid by him in exercise of jurisdiction for granting relief to tenant under Section 30 (1) (Mar) 81A

—S. 30 (1)—Words “rent in arrears” include also the arrears of rent for a period prior to coming into force of Act (Mar) 81B

—S. 36 (1)—Application for restoration of possession—Maintainability (June) 169D

—S. 36 (3)—See Ibid, S. 30 (1) (Mar) 81A

—S. 43 (14A)—See also Ibid, S. 50 (June) 169A

—S. 43 (14A)—Landlord cannot create tenancy after the statutory surrender (June) 169B

Tenancy Laws—Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (contd.)

- S. 49A (5) — See Ibid, S. 98 (b) (Apr) 128
- S. 50 — See also Ibid, S. 43 (14A) (June) 169B
- S. 50—Tenant failing to exercise his right of purchase under S. 50—Effect (June) 169A
- S. 50 — Limitation for exercise of right of purchase (June) 169C
- S. 98 (b) — The proper authority to decide the question whether in fact there is any surrender as contemplated by Section 49-A (5) and how the land so surrendered is to be dealt with is the Agricultural Lands Tribunal and not the Tahsildar (Apr) 128
- S. 100—See Ibid, S. 98 (b) (Apr) 128
- S. 100 (2) — See Ibid, S. 107 (1) and (a-1) (Apr) 123
- S. 107 (1) (a-1) (as inserted by Maharashtra Act 17 of 1966) — Appeal—Decision on contractual tenancies under Section 100 (2) is appealable under S. 107 (1) (a-1) (Apr) 123
- S. 129 (b) — Exemption from compulsory ownership of land — A trust for education of settler's own family is not a public trust and hence not entitled to the exemption under the Section (Aug) 235
- Hyderabad Abolition of Inams and Cash Grants Act (8 of 1955), S. 2-A — The power under Section 2-A to hear appeal cannot be delegated by the State Government (Dec) 369
- Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), S. 19 — Resumption of land under, whether permissible (July) 194

Tort—Damages—Act of God—See Constitution of India, Art. 300 (Mar) 93A

—Damages—Vicarious liability — See Constitution of India, Art. 300 (Mar) 93B

Trade and Merchandise Marks Act (43 of 1958), Ss. 11, 12, 18, 20—It is not obligatory on Registrar before accepting application for registration to advertise and call for evidence of likelihood of deception or confusion in every case—Distinction between Sections 11 (a) and 12 (i) pointed out (May) 157

—S. 12—See Ibid, S. 11 (May) 157

—S. 18—See Ibid, S. 11 (May) 157

—S. 20—See Ibid, S. 11 (May) 157

Transfer of Property Act (4 of 1882), S. 3, Expl. II—Notice of 'Title'—Whether includes notice of part performance (Apr) 106

- S. 55 (6) (b) — See Land Acquisition Act (1894), S. 30 (July) 217
- S. 106—See also Houses and Rents — Bombay Rents, Hotels and Lodging House Rates Control Act (57 of 1947), S. 12 (2) (Dec) 373
- S. 106—Notice to quit — Not invalid if it is addressed to a lawyer and the copy has been forwarded to the tenant (Mar) 67A
- S. 106 — Notice to quit — Where the notice contemplates termination of tenancy "by the end of the month of tenancy commencing next after receipt of the notice," the notice cannot be said to be invalid (Mar) 67B
- S. 111—See Tenancy Laws—Bombay Tenancy and Agricultural Lands Act (1948), S. 25 (2) (Mar) 72A
- S. 114—See Tenancy Laws—Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (1958), S. 30 (1) (Mar) 81B

Trusts Act (2 of 1882), S. 9—The English doctrine of acceleration of subsequent interests—Applicability in India to trusts created by will and to settlements inter vivos (Apr) 103

Usurious Loans Act (10 of 1918)

See Debt Laws.

Words and Phrases—"Alienation" — See Debt Laws — Bombay Agricultural Debtors' Relief Act (1947), S. 40 (Feb) 43B

BOMBAY CASES OVERRULED, REVERSED AND DISSENTED FROM ETC. IN A. I. R. 1972

Diss.==Dissented from in; **Not-foll**==Not followed in; **Over.**==Overruled in; **Revers.**==Reversed in.

- (1904) ILR 28 Bom 630, Nanchand Khemchand v. Venawakom Anna—Diss. AIR 1972 Ker 64 (Mar).
- AIR 1921 Bom 434=23 Bom L R 250, Vyankat v. Onkar—Held overruled by AIR 1939 Bom 66 (FB) as interpreted in AIR 1972 Raj 241D (Oct).
- AIR 1922 Bom 83=24 Bom L R 305, Kashibai v. Vallibhai—Diss. AIR 1972 J & K 74(A) (Aug).
- AIR 1928 Bom 553=30 Bom L R 1396, Maneklal Manilal, In re.—Diss. AIR 1972 All 519B (SB) (Dec).
- AIR 1938 Bom 469=40 Bom L R 935, Ganpatrao Ramji Patil v. Jehangir Navroji—Diss. AIR 1972 Delhi 122B (Jun).
- AIR 1939 Bom 23=40 Bom L R 989, Parvatibai v. Vinayak.—Over. AIR 1972 Bom 88 (Mar).
- AIR 1949 Nag 410=1950 Nag L J 78, Bhulkoo Ghaslya v. Hiriyabai—Held overruled by AIR 1955 Nag 306 as interpreted in AIR 1972 Raj 83C (April).
- AIR 1952 Bom 189=54 Bom L R 230 (SB), Indian Stamp Act, In re — Diss. AIR 1972 All 519B (SB) (Dec).
- AIR 1952 Bom 463=54 Bom L R 636, Ramchandra Shirinivas v. Ramkrishna Krishnarao—Over. AIR 1972 S C 1401 (Jun).
- AIR 1953 Bom 273 = 55 Bom L R 40, Tattya Mohayaji Dhomse v. Rabha Dadaji Dhomse — Not foll. AIR 1972 All 357A (Aug).
- AIR 1953 Bom 437=55 Bom L R 641 (FB), Bhikhabai Nanabhai v. Chhimanlal Maganlal — Diss. AIR 1972 Orissa 136C (July).
- AIR 1954 Nag 181=17 Nag L J 63, Shamrao v. Motiram—Diss. AIR 1972 Mys 254 (Sep).
- AIR 1955 Bom 182=56 Bom L R 994, Babulal Chhaganlal v. Chopda Electric Supply Co. Ltd., — Held Impliedly Overruled by AIR 1964 SC 1598 as interpreted in AIR 1972 Guj 50 (Apr).
- AIR 1956 Bom 250, Rambhau Ganjaram v. Rajaram Laxman. —, Not Foll. AIR 1972 All 357A (Aug).
- AIR 1960 Bom 315=62 Bom L R 47, Prithvirajsinhji Mansinghji v. Shivprabhakumari—Diss. AIR 1972 Guj 174B (Aug).
- AIR 1963 Bom 42=64 Bom L R 554, Kamalakar and Co. v. Gulamshahi Imambhai—Diss. AIR 1972 Guj 37B (Mar).
- AIR 1963 Bom 54=64 Bom L R 676, Union of India v. B. D. Rathi — Over. AIR 1972 S C 1721B (Aug).
- (1963) 65 Bom L R 15=1963 Mah L J 309, Mishri-mal Chhogalal v. N. B. Patel—Diss. AIR 1972 Guj 9B (Jan).
- (1964) C. A. No. 6 of 1959, D/- 12-8-1964 (Bom). — Revers. AIR 1972 S C 899A, B, C (Apr).
- (1965) Spl. Civil Appln. No. 1261 of 1963 D/- 5-1-1965 (Bom).—Revers. AIR 1972 S C 306 (Feb).
- (1966) S C A No. 926 of 1965 D/- 14-9-1966 (Bom). —Revers. AIR 1972 S C 2582 (Dec).
- (1967) Appl. No. 889 of 1967 D/- 19-10-1967 (Bom).—Revers. AIR 1972 S C 2356, (Nov). 4
- (1967) App. Mic. (I C) No. 2 of 1966 D/- 23-8-1967 (Bom)—Revers. AIR 1972 S C 1210 (Jun)
- (1967) Civil Revn. No. 32 of 1965 23-2-1967 (Bom)—Revers. AIR 1972 S C 45 (Jan).
- (1967) Cri. A. No. 1568 of 1967 D/- 21-12-1967 (Bom).—Revers. AIR 1972 S C 521 (Mar).
- (1967) N. T. 1 of 1965 D/- 11-1-1967 (Bom), — Revers. AIR 1972 S C 2148 A, B (Oct).
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- (1968) 70 Bom L R 487=1970 Mah L J 156, Oriental Fire and General Insurance Co. Ltd. v. American President Lines Ltd.—Diss. AIR 1972 Guj 255 (Nov).
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- (1969) 71 Bom L R 402, Bapu Dnyanu v. Sadashiv Ramchandra — Over. AIR 1972 Bom 207 (July).
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- (1970) Ref. (F. T.) Nos. 284 of 1968 and 19 of 1969 D/- 9-6-1970 (Bom).—Revers. AIR 1972 S C 1967 (Sep).
- (1970) Sp. Civil Appl. No. 1019 of 1970 D/- 6-11-1970 (Bom).—Revers. AIR 1972 S C 1680 A, B (Aug).
- (1970) 72 Bom L R 351=1970 Mah L J 852, Sulochana Ganpat v. Madan Dattatraya.—Diss. AIR 1972 Bom 184A (Jun).
- (1970) 72 Bom L R 585, State v. Century Spg. & Mfg. Co. — Revers. AIR 1972 S C 545 (Mar).
- (1971) Spl. Civ. App. No. 619 of 1971 D/- 7-7-1971 (Bom). — Revers. AIR 1972 S C 1893 (Sep).
- AIR 1971 Bom 106=73 Bom L R 755 (FB), Madho Tattya v. Maharashtra Revenue Tribunal—Not-F AIR 1972 Guj 251 (Nov).
- (1971) 73 Bom L R 200, P. C. M. (Pvt.) (Ltd.) v. Asst. Collector of Central Excise.—Over. AIR 1972 S C 689 (Mar).

COMPARATIVE TABLES

Supplement to Comparative Tables of Previous Years

Owing to late receipt of Other Journals the following *supplement* to Comparative Tables of A. I. R. = Other Journals is issued

A. I. R. Bombay = Other Journals

AIR 1969 Bombay		AIR 1971 Bombay		AIR 1971 Bombay		AIR 1971 Bombay	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
281	74 Bom L R 248 1972 Mah L J 509	94	ILR (1972) Bom 427 74 Bom L R 789	200	74 Bom L R 775 ILR (1971) Bom 1505	814	ILR (1972) Bom 205 74 Bom L R 565
—		97	74 Bom L R 793 ILR (1972) Bom 865	220	ILR (1972) Bom 95 74 Bom L R 779	817	ILR (1972) Bom 1087
—		108	ILR (1971) Bom 1187	244	(1972) 1 Lab L J 180	841	ILR (1972), Bom 1
—		115	ILR (1971) Bom 1551	278	ILR (1972) Bom 885	848	ILR (1971) Bom 1418
—		121	ILR (1972) Bom 724 74 Bom L R 804	288	40 F J R 817	865	74 Bom L R 851 (1972) 8 Co-op L J 140
—		148	ILR (1972) Bom 701	298	ILR (1972) Bom 271		ILR (1972) Bom 1231
—		158	ILR (1971) Bom 1898	295	ILR (1972) Bom 263	875	1971 Mah L J 894 74 Bom L R 190
—		172	ILR (1972) Bom 718	298	ILR (1972) Bom 214		ILR (1972) Bom 488
—		174	ILR (1972) Bom 1821	302	ILR (1972) Bom 124	898	1972 Ren C R 59 1972 Ren C J 106
—		183	74 Bom L R 414	304	74 Bom L R 807 74 Bom L R 421		ILR (1972) Bom 448
—		188	ILR (1971) Bom 1284		ILR (1972) Bom 831	410	74 Bom L R 879 ILR (1972) Bom 650
—		196	ILR (1972) Bom 19	305	1972 Mah L J 710 74 Bom L R 67	418	ILR (1972) Bom 88

A. I. R. 1972 Bombay = Other Journals

AIR		AIR		AIR		AIR	
Other Journals		Other Journals		Other Journals		Other Journals	
1	78 Bom L R 528 1971 Mah L J 992 ILR (1972) Bom 552	65	78 Bom L R 458 1971 Mah L J 808 ILR (1971) Bom 1054	93	78 Bom L R 728 ILR (1972) Bom 142	113	ILR (1972) Bom 1210
15	78 Bom L R 249 1971 Mah L J 480	67	78 Bom L R 282 ILR (1971) Bom 975	98	78 Bom L R 687 1971 Mah L J 980 ILR (1972) Bom 60	117	78 Bom L R 418 1971 Mah L J 974 ILR (1971) Bom 1487
16	78 Bom L R 407 1971 Mah L J 657		1972 Ren C R 145 1972 Ren C J 178	100	78 Bom L R 454 1971 Mah L J 745 ILR (1972) Bom 876		1972 Ren C R 15 1972 Ren C J 166
25	78 Bom L R 318 1971 Mah L J 1014	72	78 Bom L R 285 1972 Mah L J 75 ILR (1972) Bom 1129	108	78 Bom L R 594 1972 Mah L J 87	129	78 Bom L R 752 1972 Mah L J 85 ILR (1972) Bom 882
27	78 Bom L R 188 1971 Mah L J 482 ILR (1972) Bom 781	81	1971 Mah L J 587	108	78 Bom L R 778 1971 Mah L J 969 (1972) 8 Co-op L J 229	128	1971 Mah L J 1045 ILR (1972) Bom 1074
43	78 Bom L R 468 1971 Mah L J 988 ILR (1971) Bom 1488	88	78 Bom L R 715 1971 Mah L J 958			128	ILR (1972) Bom 884
46	78 Bom L R 140 1971 Mah L J 389 ILR (1972) Bom 80	92	78 Bom L R 751 1971 Mah L J 980 ILR (1972) Bom 208	118	78 Bom L R 600 1971 Ren C J 772 1971 Mah L J 1088 1972 Ren C R 182	129	78 Bom L R 780 1971 Mah L J 961 ILR (1971) Bom 1592

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
132	73 Bom L R 840 1972 Mah L J 110 ILR (1972) Bom 511	184	73 Bom L R 828 1972 Cri L J 921 ILR (1972) Bom 1372	242	ILR (1971) Bom 1006	350	74 Bom L R 883 1972 Mah L J 911
141	ILR (1971) Bom 772 73 Bom L R 606 1972 Mah L J 43	192	73 Bom L R 882 1972 Mah L J 156 ILR (1972) Bom 585	252	74 Bom L R 48 1972 Mah L J 175 ILR (1972) Bom 622	354	74 Bom L R 186 1972 Ren C J 467 1972 Mah L J 423 1972 Ren C R 619 ILR (1972) Bom 1032
145	73 Bom L R 754 1971 Mah L J 987 ILR (1972) Bom 619	194	1972 Mah L J 132 73 Bom L R 809 ILR (1972) Bom 508	254	74 Bom L R 22	357	74 Bom L R 271 1972 Mah L J 649 1972 Cri L J 88 ILR (1972) Bom 1262
148	73 Bom L R 814 1972 Mah L J 84	197	1972 Mah L J 179 73 Bom L R 885 1972 Mah L J 92	275	74 Bom L R 220 1972 Mah L J 477 1972 Ren C R 572	358	74 Bom L R 509 1972 Mah L J 756
150	73 Bom L R 817 1972 Mah L J 86	199	73 Bom L R 729 1972 Mah L J 134	298	74 Bom L R 161 1972 Mah L J 450 1972 Cri L J 1437	359	74 Bom L R 316 1972 Mah L J 861 ILR (1972) Bom 978
152	73 Bom L R 709 1971 Mah L J 984	207	73 Bom L R 792 ILR (1972) Bom 592	299	74 Bom L R 142 1972 Mah L J 829 ILR (1972) Bom 811	373	74 Bom L R 241 1972 Mah L J 459 1972 Ren C R 614 1972 Ren C J 709 ILR (1972) Bom 1808
155	73 Bom L R 811 1971 Mah L J 749 ILR (1972) Bom 108	217	74 Bom L R 225 1972 Mah L J 468 ILR (1972) Bom 1040	301	42 Com Cas 72 74 Bom L R 1 ILR (1972) Bom 228	375	74 Bom L R 310 1972 Mah L J 560 ILR (1972) Bom 1284
157	73 Bom L R 586	228	74 Bom L R 141 1972 Mah L J 834	313	74 Bom L R 387 1972 Mah L J 571	377	74 Bom L R 107 1972 Mah L J 378 ILR (1972) Bom 792
164	73 Bom L R 786 1972 Mah L J 564 ILR (1972) Bom 128	229	73 Bom L R 880 1972 Mah L J 158 ILR (1972) Bom 902	316	74 Bom L R 259 1972 Mah L J 524 ILR (1972) Bom 1417	379	74 Bom L R 812 1972 Mah L J 601 74 Bom L R 147 1972 Mah L J 857
169	1972 Mah L J 588 ILR (1972) Bom 1000	232	73 Bom L R 867 1972 Mah L J 251 1972 Ren C J 880 1972 Ren C R 646 1972 Mah L J 154	326FB	1972 Mah L J 758		
177	1972 Mah L J 108 74 Bom L R 345 ILR (1972) Bom 1147	235	74 Bom L R 181	339	1972 Mah L J 687		
182	1972 Mah L J 159 74 Bom L R 484	238	1972 Mah L J 340 ILR (1972) Bom 817	348	74 Bom L R 188 1972 Mah L J 474		
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THE All India Reporter

1972

Bombay High Court

AIR 1972 BOMBAY 1 (V 59 C 1)

MODY AND KAMAT, JJ.

Raja Bahadur Motilal (Bombay) Mills Ltd., Applicant v. Life Insurance Corporation of India and others, Respondents.

Appeal No. 155 of 1970, Sult No. 454 of 1949, D/- 5 and 9-3-1971.

(A) High Court Rules and Orders — Bombay High Court (Original Side) Rules (1957), R. 500-A — Deposit of twenty five per cent of purchase money at the time of sale unless "otherwise ordered" — There can be an implied order — (X-Ref:— Civil P. C. (1908), O. 21, R. 84).

(Para 15)

If the mortgagee-decree-holder is declared the purchaser and he has been granted liberty to bid and set-off, then even though there be no specific order permitting the set-off against the amount of the deposit of 25 per cent. required to be made under sub-rule (i) of R. 500-A of the Original Side Rules, he is entitled to set-off the amount decreed in his favour by the mortgage decree, to the extent of that decretal amount first against the said deposit of 25 per cent. and thereafter against the balance of his purchase price. AIR 1928 Bom 123, Rel. on.

(Para 26)

The conflicting decided cases on the question whether the provision for deposit of 25 per cent. under O. 21, R. 84 is mandatory referred to. The view taken by the Madras and Rajasthan Courts that the permission granted to a decree-holder in general terms to bid and set-off can be construed, depending on the circumstances of the case, by comparing the amount of the purchase price with the decretal amount due to the decree-holder purchaser, to include a right to set-off even against the deposit

of 25 percent and that for the latter purpose there need not necessarily be a specific order permitting set off against the amount of the deposit of 25 per cent. relied upon. AIR 1954 SC 349, Explained; AIR 1959 Madh Pra 115, Distinguished; AIR 1966 Andh Pra 201, Dissented from; AIR 1956 Raj 18 & AIR 1931 Mad 103 & AIR 1935 Mad 893, Rel. on.

(Para 26)

(B) High Court Rules and Orders — Bombay High Court (Original Side) Rules (1957), R. 500-A — Deposit of purchase money — Mortgagee decree-holder allowed to bid and set-off — The practice to allow the amount of "estimated costs" incurred by the mortgagee for realising his mortgage security to be set-off — Not illegal.

(Paras 38, 39)

The actual order for costs subsequent to the Decree Absolute for Sale is normally made by the Court at the time when the Court makes the order confirming the sale by ordering all proper costs incurred after the date of the Decree absolute for sale till and inclusive of the confirmation of sale to be tacked on to the mortgage claim and to be paid out of the net sale proceeds. But when the mortgagee decree-holder is given liberty to bid and set-off the question of set-off costs against the amount of the balance of 75 per cent. would arise prior to the time when the Court would consider the question of confirming the sale. In absence of any provision in the Original Side Rules providing for recovery of subsequent costs incurred in realising the mortgage security the practice followed by the Commissioner's office is to take a statement of account from the plaintiff-decree-holder, showing the different amounts for principal and interest as well as the estimated costs due under the decree and allow such amount of estimated costs to be set-off. This pro-

cedure is followed for the reason that the taxing of costs takes a considerable time after the sale is knocked down. It is quite possible that such estimated costs as are sought to be deducted by the decree-holder may be more or less. In order to safeguard the interest of all concerned, an undertaking is taken from the decree-holder on affidavit stating that if the taxed costs turn out to be less than the estimated costs included in the statement of account filed by him, the difference shall be deposited by him after the costs are taxed. Such a practice is not in any way repugnant to or inconsistent with any provision of law.

(Paras 34, 38)

The effect of the practice is to determine the amount which is payable under sub-rule (ii) of R. 500-A as and by way of the balance of purchase price and it is only that amount so determined which is payable within thirty days and to the non-payment whereof within that time the provision of re-sale under sub-r. (iv) is attracted. In other words, the quantum or the amount to which sub-rule (ii) applies would by reason of the practice be the balance of the purchase price as otherwise ascertained reduced by the estimated amount of costs. The practice is, therefore, not repugnant to any provision contained in sub-rule (ii) or sub-rule (iv) of R. 500-A. (Para 39)

(C) High Court Rules and Orders — Bombay High Court (Original Side) Rules (1957), R. 500-A (ii) — Extension of time for deposit of balance of purchase money — Even in a proceeding taken out by the mortgagor, the mortgagee can if it is necessary, as and by way of defending against the relief asked for in that proceeding by the mortgagor request the court to extend the time. (Para 41)

(D) High Court Rules and Orders — Bombay High Court (Original Side) Rules (1957), R. 500-A — The discretion to extend time for deposit of balance of the purchase money, which R. 500-A vests in the Chambers Judge, is also available to the Court hearing an appeal against the order of the Chamber Judge. (Para 41)

(E) High Court Rules and Orders — Bombay High Court (Original Side) Rules (1957), R. 500-A — The time for payment of balance of the purchase money can be extended even after the expiry of the prescribed period of thirty days in view of the wide power conferred by R. 310 — (X-Ref:— Rule 310). (Para 41)

Cases Referred: Chronological Paras
(1966) AIR 1966 Andh Pra 201

(V 53) = (1964) 2 Andh WR 430,

Sivaraya v. Lingareddi

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(1959) AIR 1959 Madh Pra 115

(V 46) = 1959 Jab LJ 238,

Kishanlal v. Kothari Jothmal

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(1956) AIR 1956 Raj 18 (V 43) =
1956 Raj LW 124, Kanhaiyalal
v. Sansmal

23

(1954) AIR 1954 SC 349 (V 41) =
57 Bom LR 10, Manilal Mohan-
lal v. Sardar Sayed Ahmed

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(1935) AIR 1935 Mad 893 (V 22) =
42 Mad LW 564, Murugappa v.
Ramasami

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(1931) AIR 1931 Mad 103 (V 18) =
1930 Mad WN 568, Bhyraraju
Ramaraju v. Lakshmiah

24, 25

(1928) AIR 1928 Bom 123 (V 15) =
ILR, 52 Bom 459, Vrajlal Jivandas
v. Venkataswami Lingaya

16

(1922) AIR 1922 PC 336 (V 9) =
25 Bom LR 630, Radhakrishna
v. Bisheshar Sahay

18

D. R. Dhanuka with D. R. Zaiwala,
for Applicant; G. A. Thakkar with S. T.
Tijoriwala (for No. 1) and M. S. Sanghavi
(for No. 3), for Respondents; V. G. Pittie,
Respondent No. 2 in person.

MODY, J.: (5-3-1971) This is an appeal against the Order dated 2-11-1970 made by Mr. Justice Nain as Chamber Judge dismissing the appellant's Chamber Summons dated 12th October 1970, the reliefs prayed whereby we will set out a little later.

2. The appellant which was the owner of an immoveable property in Bombay, mortgaged that property in favour of the first respondent by an Indenture of Mortgage dated 20th April 1946. The second respondent, who has at all material times been a director of the appellant Mills guaranteed the said mortgage debt. Thereafter, the appellant created a second mortgage on that property in favour of the third respondent. The first respondent thereafter filed a suit, being suit No. 454 of 1950 in this court for realising the debt and the security under the said Mortgage making the appellant and respondents Nos. 2 and 3 as defendants to that suit. On the 9th of August 1949 a Preliminary Mortgage Decree was passed and thereafter on the 28th of June 1950 a Decree absolute for sale was passed. Under the decree absolute for sale liberty was given to the first respondent to bid and set off the purchase money against the debt declared due to it under the Mortgage Decree. Thereafter there followed eighteen infructuous auction sales. The nineteenth auction sale was held on the 11th of September 1970 where the first respondent's bid of Rs. 20,00,000/- was accepted by the Commissioner subject to the sanction of the court. Although the conditions under which the auction sale was held required a deposit being made of 25 per cent. of the purchase price, no deposit was made. The purchase price well exceeded the amount due to the first

respondent under the Decree absolute for sale and the first respondent paid the amount of the excess to the Commissioner after retaining out of the said amount a sum of Rs. 75,000/- being its estimated costs of the suit and of the sale. The appellant thereafter took out the said Chamber summons praying that it may be declared that there was no sale in favour of the first respondent which in other words means that the sale was a nullity and that the said sale be set aside. Mr. Justice Nain dismissed that Chamber summons by his said Order dated 2nd November 1970. The appellant has hence appealed against that Order.

3. Before dealing with the rival contentions of the parties, it is necessary to first set out all the necessary facts in greater detail.

4. The Preliminary Mortgage Decree declares that on the date of that Decree there was payable by the appellant to the first respondent an aggregate sum of Rs. 11,44,617.75, grants to the appellant six months' time for redemption, makes a further declaration in respect of further interest till the date fixed for redemption, declares that there shall also be payable "the costs of the suit when taxed as between attorney and client and noted in the margin" thereof and simple interest on such costs at the rate of four per cent per annum from the date of the Decree till payment and then further declares the amount then due and payable to the third respondent under the Second Mortgage. That Decree also contains a decree against the second respondent for the amount mentioned in the Decree as payable under his guarantee to the first respondent.

5. No amount whatever having been paid in respect of the Preliminary Decree, the said Decree Absolute for sale was passed. Under that decree the first respondent was given liberty "to bid at the said sale and that in the event of the plaintiffs becoming the purchasers of the said immoveable property they be at liberty to set-off the amount of the purchase money against the amount due to them under the said consent Preliminary Mortgage Decree and "the costs hereinafter mentioned". The costs mentioned after the above clause were a sum of Rs. 220/- being the costs of the Notice of Motion for obtaining the said Decree absolute for sale. The said several auction sales were held subject to certain terms and conditions of sale. The eighteenth auction sale was held in September 1966 and condition No. 5 in respect of that sale provided as follows:

"The plaintiffs and the third defendants have been given liberty to bid. The purchaser other than the plaintiffs shall

at the time of sale pay a deposit of twenty five per cent. of the amount of his purchase-money to the commissioner, otherwise the property shall be again immediately put up and re-sold on account and at the risk of the defaulting purchaser who shall be liable to make good any deficiency thereby caused but shall not be entitled to any excess in price obtained on such resale."

In respect of the next i.e., nineteenth, auction sale the said terms and conditions of sale were adopted but with certain changes made therein. So far as the said condition No. 5 is concerned, the only change was that the words "other than the plaintiffs" were omitted.

6. The said nineteenth auction sale was held on the 11th of September 1970 by the Commissioner of this Court. As is usual the Commissioner has made his Minutes as to what transpired at the said auction sale. The Minutes show that no outsider bidder at all was present at the said auction sale. On behalf of the first respondent a bid was given of Rupees 18,00,000/- but was later raised to Rupees 20,00,000/-. In the absence of any competing bid the fact that the bid of Rs. 18,00,000/-, was raised to Rupees 20,00,000/- shows from common experience that the Commissioner must have refused to accept the bid of Rs. 18,00,000/- as being below the reserve bid fixed for the auction. It may be stated here that in sales by auction by the Commissioner the reserve bid is fixed by the Commissioner, but when it is necessary to be reduced it is reduced by the Chamber Judge and all the reserve bids, whether fixed by the Commissioner or by the Chamber Judge, are never divulged. The Commissioner has recorded in his minutes that he accepted the bid subject to the sanction of the court and thereafter "No deposit is taken from the L. I. C. as the L. I. C. has been permitted by the Court to bid and set-off their claims against the sale price. The plaintiffs are directed to pay the balance of the purchase price after deducting the amount of set-off together with the amount of stamp duty payable on the conveyance to be executed or on the sale Certificate to be issued within 30 days." As recorded in the Minutes, the first respondent has not deposited the sum of Rs. 5,00,000/- being the 25 per cent. of its purchase price of Rs. 20,00,000/-.

7. Thereafter on 30th September 1970 the Attorneys for the first respondent addressed a letter to the Commissioner. The letter states that the amount due to the first respondent, as at the date of the sale for principal and interest was Rs. 16,13,163.21 and that in addition, a further amount would also be due to it for costs. It then states that the suit

was of 1949 and considerable costs had been incurred, including the costs of eighteen auction sales, and that taxation of all such costs would take a long time and that therefore the first respondent roughly estimated the costs at Rupees 75,000/-. The letter then requests that the first respondent may be allowed to add the said estimated costs to the aforesaid sum of Rs. 16,13,163.21 making the total sum of Rs. 16,88,163.21. The letter then states that the costs would be got taxed or settled in due course and that if they exceeded the said sum of Rupees 75,000/- the first respondent would recover the excess amount from the commissioner from the amount to be deposited with him but in case the taxed costs were less than the estimated costs, the first respondent would make a further deposit of an additional sum and would give to the Commissioner an undertaking that in case the taxed costs were less than the said sum of Rs. 75,000/- it would pay to the Commissioner the balance. It contains a further statement about the amount of stamp duty which is not relevant to this appeal. The letter contains certain calculations and a statement that the amount payable by the first respondent to the Commissioner would be Rs. 5,00,556.79.

8. The first respondent thereafter filed before the Commissioner an affidavit dated 5th October 1970 of Bodhraj Bhandra, by the fourth paragraph whereof the first respondent gave an undertaking to pay to the Commissioner whatever balance may be found due and payable by it in respect of the said costs in case the said costs were found to be less than Rs. 75,000/- on taxation by the Taxing Master of this Court. Thereafter the first respondent through its Solicitor paid to the Commissioner the said sum of Rs. 5,00,556.79.

9. In support of the appellant's contention that the sale is no sale in law or that the sale should be set aside, Mr. Dhanuka, its learned counsel contended that under the relevant provisions of law, it is a mandatory requirement firstly, that the 25 per cent. of the purchase price must be deposited at the time of the sale and secondly that the whole balance of the purchase price must be paid to the Commissioner within thirty days from the date of the sale. He contended that the first respondent, however, did not make the said deposit of 25 per cent or any part thereof, nor did the first respondent pay the amount of Rs. 75 per cent balance in full, but deposited such amount after retaining the said sum of Rs. 75,000/-.

10. In support of his contention Mr. Dhanuka relied upon Rr. 500-A and

497 of the Rules of this Court applicable on its Original side, which rules are hereinafter referred to as "the Original Side Rules".

11. The said Rule 500-A provides as under:—

"500-A (i):— When immovable property is to be sold unless otherwise ordered or agreed to by the parties, not less than twenty five per cent of the purchase money shall be deposited with the Commissioner at the time of the sale.

(ii) The balance of the purchase-money, or so much thereof as may be payable by reason of any set-off to which the purchaser may be entitled, together with the amount of stamp-duty payable on the conveyance to be executed or on the sale certificate to be issued, shall unless otherwise ordered, be paid by the purchaser to the Commissioner within thirty days from the date of the sale. The Judge sitting in Chambers may for special reasons, extend the time for payment on such conditions as to payment of interest or otherwise as to the Judge may seem fit. If the Judge extends the time the provisions of Cl. (iv) shall not come into operation until the expiry of the extended time. (iii) in default of payment of the deposit mentioned in sub-rule (i) the bid of the person who would otherwise have been declared the purchaser shall be rejected and the property shall forthwith be resold. (iv) In default of payment of the amounts mentioned in sub-rule (ii) within the period prescribed therein, the deposit may, if the Judge thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold. (v) Any deficiency of price which may arise on a resale by reason of the purchaser's default and all costs and expenses occasioned by such resale shall be recoverable from the defaulting purchaser under an order to be obtained from the Judge in Chambers. The Judge may direct the defaulting purchaser to pay interest at such rate from the date of default and on such amount as to the Judge may seem just."

12. The said Rule 497, in so far as it is material, provides that when immovable property is to be sold, the conditions shall be adapted to the state of the title to the said property and that the conditions of sale shall be in Form No. 151 or Form No. 152 as the case may be with variations as the circumstances of each case may require.

13. Mr. Dhanuka contended that under sub-rule (i) of the said Rule 500-A

the 25 per cent. deposit must be made on the date of the sale "unless otherwise ordered or agreed to by the parties", but there was no such specific order "otherwise ordering" nor was there anything "otherwise agreed to by the parties." He pointed out that there was such a provision contained in the said old Condition No. 5 applicable to the eighteenth sale, but that in the revised condition No. 5 applicable to the last sale such a provision was omitted from condition No. 5 by deleting the words "other than the plaintiffs." He contended that this is a deliberate departure. Mr. Thakkar, the learned counsel for the first respondent, contended that this omission from the condition No. 5 was due to the fact that between the two dates of the said old and new conditions, the Original Side Rules were revised, certain Rules were deleted and the said New R. 500-A was introduced and that it is because of that reason that it was considered to be unnecessary and redundant to retain the words "other than the plaintiffs" as liberty to bid and set-off given to the first respondent implied that the first respondent could set-off the mortgage debt against the amounts of both the deposit of 25 per cent and the payment of the balance of 75 per cent.

14. Now under Rule 500-A (i) deposit is not to be made if it is otherwise ordered or it is so agreed. Whether the omission from the new Condition No. 5 of the said words "other than the plaintiffs" be a deliberate departure as contended by Mr. Dhanuka or it be due to having been made on the ground that it was considered to be unnecessary and redundant as contended by Mr. Thakkar, it is clear that there is no specific agreement between the parties dispensing with the requirement of the 25 per cent. deposit in case the first respondent became the purchaser. As there is no such agreement between the parties, it has next to be ascertained whether it has been "otherwise ordered."

15. Mr. Thakkar contended that the liberty to set-off granted to the first respondent by the Decree Absolute for sale must be construed as having been "otherwise ordered" by the Court as contemplated in sub-rule (i) of R. 500-A either expressly or, in any event impliedly. In our opinion, it is obvious that there is no such express order made by the Court. Mr. Thakkar also relied upon the said Minutes of the Commissioner dated 11th September 1970 and argued that it was such an order. These Minutes are what they purport to be i.e., a record of what transpired at the meeting before the Commissioner when it says that no deposit was taken from the first respondent. The Minutes merely record a statement of fact and do not amount

to an order dispensing with the deposit of 25 per cent. It is a statement of fact and not an order. It is, therefore, unnecessary to decide whether the commissioner has or does not have the power to "otherwise order", i.e., to make an order dispensing with the requirement of sub-rule (i) of Rule 500-A for a deposit of 25 per cent. It must, however, be borne in mind that sub-rule (i) of Rule 500-A does not specifically provide that such "otherwise ordered" must be a specific order. There can, therefore be an implied order. In our opinion, in a sale under a Mortgage Decree when an order is made under the Original Side Rules giving liberty to the mortgagee decreeholder to bid and set-off, the liberty to set-off would imply that to the extent of the amount of the set-off it "otherwise orders" as contemplated by the sub-rule (i) unless, of course, the order contains a contrary or inconsistent provision. These sales are in pursuance of a Mortgage Decree and not a simple money decree. The provision in the said sub-r. (i) for deposit of a substantial part like 25 per cent. of the Purchase price together with the provision for its forfeiture, has been made with the obvious intention of guarding against bids being given by a person who is declared to be a purchaser but who does not intend to complete his purchase or is incapable of completing his purchase or subsequently wants to unjustifiably back out of his purchase. When the purchaser is the holder of the decree and the decree is a mortgage Decree, the Decree in his favour is by itself a security. Moreover even when liberty to set-off has been ordered the court has the power till the sale is confirmed to order the purchaser to bring the purchase money or the necessary part of it into court and the fulfilment of such an order by the Mortgage decreeholder purchaser is secured by his Mortgage Decree itself.

16. Mr. Dhanuka pointed out that the word used in the said sub-rule (i) of Rule 500-A in connection with the deposit is "shall" which means that the requirement of the 25 per cent. deposit is mandatory. Mr. Dhanuka further pointed out that sub-rule (iii) of Rule 500-A provides that in default of payment of the deposit mentioned in sub-rule (i) the bid of the person who would otherwise have been declared the purchaser shall be rejected and the property shall forthwith be resold and that this also shows that the provision about deposit is mandatory. In our opinion, it is not necessary for us to decide whether this provision is or is not mandatory because, even if the provision of sub-r. (i) for making the deposit were to be held to be mandatory as contended by Mr.

Dhanuka, sub-rule (i) itself creates two exceptions, one of which is when it is "otherwise ordered." Such a provision would be an exception to what Mr. Dhanuka contended is a mandatory provision. In our opinion, as sub-rule (i) does not specifically require that an order, in order to hold that it has so "otherwise ordered", must do so expressly, it can be held to be of that nature even if it can be held to so order even by implication. The Decree Absolute for sale in the case before us permits set-off for the full decretal amount. It does not appeal to reason or to commonsense that when the auction purchaser is himself the holder of a Mortgage Decree in his favour and it is the same court which has passed that decree which is selling the property and the decree is a Mortgage Decree with the result that to the extent of the amount of the decree no question of rateable distribution between the attaching creditors of the mortgagor can possibly arise, the set-off should be confined to the payment only of the balance of the purchase price, but should not be extended to the initial deposit of 25 per cent. We are of the opinion that the permitted set-off must extend to the entire purchase price, i.e., to both the initial deposit of 25 per cent and also the subsequent payment of the balance but only to the extent of the amount of the decree and that when the Court made the order permitting such set-off it has impliedly ordered that the mortgagee decree-holder purchaser is not required to make the deposit of 25 per cent. We have reached this conclusion as a matter of interpretation of the order, i.e., the Decree absolute for sale. We are, however, otherwise, satisfied that this conclusion is in accordance with what appears to be the interpretation put on it by the practice of this Court extending over a long period. These sales are effected through the Commissioner of this Court who is a permanent officer of the Court assigned the work of effecting such sales and he is not a Commissioner appointed only for effecting an individual such sale. He would normally ascertain his office practice and follow it. In this case the Commissioner has, as seen earlier, stated that he has not taken the deposit as first respondent has been granted liberty to bid and set-off. In the natural course of his work and in the background of the knowledge which he has acquired the word which he has used is "taken." It suggests that because of the liberty to bid and set-off he did not even ask for the deposit of 25 per cent. of the purchase price being made. One of the cases cited before us but in another connection, was the judgment delivered by Martin, C. J. on behalf of

the Division Bench of this High Court in *Vrajilal Jivandas v. Venkataswami Lingaya*, (1928) ILR 52 Bom 459 = (AIR 1928 Bom 123). It concerns a sale by the Commissioner of this court of an immoveable property under a Mortgage Decree under which the Mortgagee decree-holder was given liberty to bid and set-off and the mortgagee, he being the highest bidder, was declared the purchaser. The portion of the Judgment at page 463 of the Report (ILR Bom) = (at pp. 124-125 of AIR) refers to the certificate issued by the Commissioner in respect of that sale. The commissioner certified that at the sale the plaintiffs in that suit were "the highest bidders for and were, subject to confirmation by this court, declared the purchasers of the said property at the price or sum of Rs. 1,45,000/- and that I have allowed them to set off the said sum of Rupees 1,45,000/- against an equivalent part of the amount due to them under the said preliminary decree." It is obvious from this certificate that the Commissioner allowed the entire amount of the purchase price i.e., both the amount of the deposit of 25 per cent. and the balance amount to be set-off against the amount due under the mortgage decree without taking a deposit of 25 per cent. of the purchase price.

17. Mr. Dhanuka drew our attention to Rules 72, 84 and 85 of Order 21 of the Code of Civil Procedure. Now it must be remembered that under Section 129 of the Code of Civil Procedure this High Court is entitled to make Rules to regulate its own procedure in the exercise of its Original Civil Jurisdiction as it shall think fit and that this High Court has, as a matter of fact, made the said Original Side Rules. The procedure on the Original side of this High Court is governed by the Original Side Rules and not by the provisions of the Code of Civil Procedure to the extent that there are provisions in the Original Side Rules. In view of Section 129, Mr. Dhanuka himself stated that the provisions under Order 21 would not apply to sales of immoveable properties by the Commissioner of this Court. He however, stated that he would refer to the Rules in Order 21 which contain similar provisions only for the purpose of comparison of their contents and the interpretation put on them by decided cases. On the topics dealt with by the said three Rules of Order 21 there are specific provisions made in the Original Side Rules, and particularly in the said Rule 500-A. Order 21 applies to sales of properties both moveable and immoveable attached in execution of simple money decrees and also to sales under mortgage decrees. Rule 449 of the Ori-

ginal Side Rules contains the procedure for attachment and sale in execution not only of moveable, but also of immoveable properties, i.e. to sales in execution of simple money decrees and provides that the sale shall be by the sheriff. In the case of mortgage decrees it is R. 491 which applies and it provides that the sale shall be by the Commissioner of this Court and a different set of Rules, including the said Rules 497 and 500-A, apply. Mr. Dhanuka conceded and has, as a matter of fact, argued on the basis, that it is the Original Side Rules which apply and not Order 21. In our opinion, no useful purpose would be served by referring to all the decided cases cited at the Bar relating to the said Rr. 72, 84 and 85 of O. 21 of the Code of Civil Procedure, for determining whether the requirement in respect of the deposit of 25 per cent. is or is not mandatory because those decisions do not construe the provisions of the relevant Original Side Rules. Nonetheless, we will refer to some of the decided cases cited on either side on the point whether the provision for deposit of 25 per cent. under R. 84 of O. 21 has or has not been held to be mandatory. (9th March 1971).

18. Mr. Dhanuka in this behalf first relied upon a Judgment of the Supreme Court in *Manilal Mohanlal v. Sardar Sayed Ahmed*, 57 Bom LR 10 = (AIR 1954 SC 349) and particularly upon the following paragraph therefrom appearing at p. 16 (of Bom LR) = (at p. 351 of AIR) which reads:—

"The provision regarding the deposit of 25 per cent. by the purchaser other than the decree-holder is mandatory as the language of the rule suggests. The full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of a set-off. The provision for payment is however, mandatory (Rule 85). If the payment is not made within the period of fifteen days, the court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the Court to re-sell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property (Rule 86)."

He contended that this passage shows that the provision regarding the deposit of 25 per cent. under Rule 84 and the payment of the balance of 75 per cent. under Rule 85 is mandatory. Mr. Dhanuka's argument, however, does not take due notice of what the Supreme Court has said, viz., that these observations apply to a purchaser "other than the decree-holder." It is clear that the Supreme Court has not said, nor had it

an occasion to say that when the purchaser is a decree-holder the requirement of the deposit of 25 per cent. under Rule 84 is mandatory. In the paragraph immediately preceding the paragraph quoted above, the Supreme Court, after analysing the scheme of Rules 72, 84 and 85 of Order 21 has observed:—

"The scheme of the rules quoted above may be shortly stated. A decree-holder cannot purchase property at the court auction in execution of his own decree without the express permission of the Court, and that when he does so with such permission he is entitled to a set-off but if he does so without such permission then the Court has a discretion to set aside the sale upon the application by the judgment-debtor or any other person whose interests are affected by the sale (Rule 72). As a matter of pure construction this provision is obviously directory and not mandatory: See *Radha Krishna v. Bisheshar Sahay*, (25 Bom LR 630) = (AIR 1922 PC 336). The moment a person is declared to be the purchaser, he is bound to deposit 25 per cent. of the purchase-money unless he happens to be the decree-holder, in which case the court may not require him to do so. (Rule 84)."

This quotation clearly shows that according to the Supreme Court the provision about the deposit of 25 per cent. when the purchaser is a decree-holder "is obviously directory and not mandatory."

19. Mr. Dhanuka also relied upon a judgment of a single Judge of the Madhya Pradesh High Court in *Kishanlal v. Kothari Jothmal*, AIR 1959 Madh Pra 115. This judgment is not helpful to determine whether the provision about the deposit of 25 per cent. is mandatory or is only directory. The only point which arose for consideration in that case was as to what was the point of time at which the sale in execution proceedings becomes legally effective and it was held that it becomes effective when the sale is confirmed that the sale becomes absolute and legally effective and that till then the sale does not become complete and legally effective.

20. The third case relied upon by Mr. Dhanuka was also a judgment of a Single Judge of the Andhra Pradesh High Court in *Sivraya v. Lingareddi*, AIR 1966 Andh Pra 201. Mr. Dhanuka's contention is that this judgment holds that a decree-holder who has been granted liberty to bid and set-off under the provisions of Rule 72 of Order 21, purchases the property, the order granting the set-off does not necessarily imply that he has been given liberty to set-off even against the deposit of 25 per cent.,

required to be made under Rule 84 of Order 21 and that there should be a specific order granting liberty to set-off for the amount of the deposit of 25 per cent.

21. In our opinion, out of these three judgments relied upon by Mr. Dhanuka it is only the said judgment of the Andhra Pradesh High Court which holds that the requirement of the deposit of 25 per cent. is mandatory even in the case of the purchaser being a decree-holder and that unless there is a specific order to the contrary, he is bound to make that deposit of 25 per cent. in spite of liberty to bid and set-off having been given to him in general words.

22. Mr. Thakkar, in his turn relied upon three judgments, one of the Rajasthan High Court and two of the Madras High Court to which we will presently refer.

23. The Rajasthan High Court judgment is a judgment of Wanchoo, C. J. who delivered the judgment on behalf of a Division Bench in *Kanhaiyalal v. Sansmal*, AIR 1956 Raj 18. The judgment holds that reading Rules 72 and 84 of Order 21 together it is clear that where a decree-holder is permitted to bid at an auction, there is an implied dispensation also that he need not deposit 25 per cent. of the purchase money unless the sale price is more than the decretal amount, that where the sale price is more than the decretal amounts, the decree-holder must deposit the excess up to 25 per cent. of the purchase money, depending upon the excess of the sale price over the decretal amount and that there is no sense in insisting upon the decree-holder depositing 25 per cent. of the purchase money, when the purchase money is less than or only equal to the decretal amount. This judgment takes a view contrary to that taken in the above Andhra Pradesh High Court judgment and holds that the requirement of the deposit of 25 per cent. can be implied in the circumstances mentioned in the judgment even though the order for set-off is in general words and does not specifically refer to the requirement of the deposit of 25 per cent. The observations in this judgment requiring the deposit of 25 per cent. to be made to the extent mentioned in the judgment when the sale price exceeds the amount of the decree held by the decree-holder purchaser, it should not go unnoticed have been made in the case of the holder of a simple money decree and not a mortgage decree. Unlike as in the case of a mortgage decree in the case of a sale in execution of a simple money decree the complication of rateable distribution can arise and would require

consideration. The second point which would also have to be borne in mind is, firstly, that the sale in execution following an attachment may be made by a Court other than Court which passed the money decree and secondly that the money decree may or may not if the sale falls through be recoverable and is in that sense unsecured unlike as in the case of a mortgage decree where the amount is, at least to the extent of the mortgage security, secured.

24. The second judgment relied upon by Mr. Thakkar was that of a Single Judge in *Bhyraraju Ramaraju v. Lakshmiah*, AIR 1931 Mad 103. The judgment holds that where the holder of a money decree who has been given permission to bid and set off is declared the purchaser, if the amount of his decree be equal to or less than the purchase price, he need not make the deposit of 25 per cent. nor pay the balance, but that if the sale price exceeds the amount of his decree, he can be called upon to deposit the difference only at the time when he is called upon to pay the balance under Rule 85 of Order 21, unless, of course, his decretal amount is not sufficient to cover even the deposit of 25 per cent., in which case he must deposit the short-fall in his decretal amount as compared with the deposit of 25 per cent.

25. The third judgment relied upon by Mr. Thakkar was the judgment of a single Judge of the Madras High Court in *Murugappa v. Ramasami*, AIR 1935 Mad 893. This judgment also is to the same effect as the other judgment of the Madras High Court in the above case of AIR 1931 Mad 103.

26. The provisions of the relevant rules of Order 21 were relied upon by Mr. Dhanuka only by way of a help when construing the provisions of Rule 500-A. We have already pointed out the difference between the two provisions and the cases where they can apply. None-the-less even the judgments relating to the relevant rules under Order 21 do not hold that the requirement as to the deposit of 25 per cent. is mandatory. The judgment of the Supreme Court does not so hold, nor do the said other judgments, except the said judgment of the Andhra Pradesh High Court. The judgments of the Rajasthan and Madras High Courts show that permission granted to a decree-holder in general terms to bid and set-off can be construed, depending on the circumstances of the case, by comparing the amount of the purchase price with the decretal amount due to the decree-holder purchaser, to include a right to set off even against the deposit of 25 per cent. And that for the latter purpose there need

not necessarily be a specific order permitting set-off against the amount of the deposit of 25 per cent. The view taken by the Rajasthan and the Madras High Courts is, with respect to all the judgments referred to above, a view taken not merely on a construction of the relevant rules of Order 21 but based on commonsense. Needless to repeat that that view acquires greater strength when the sale is in pursuance of a decree absolute for sale in a mortgage suit and the decree-holder is the purchaser. We, therefore, hold that if the mortgagee decree-holder is declared the purchaser and he has been granted liberty to bid and set-off, then even though there be no specific order permitting the set-off against the amount of the deposit of 25 per cent. required to be made under sub-rule (i) of Rule 500-A of the Original Side Rules, he is entitled to set-off the amount decreed in his favour by the mortgage decree, to the extent of that decretal amount first against the said deposit of 25 per cent. and thereafter against the balance of his purchase price. We accordingly hold that in this case before us the first respondent was entitled to set-off its mortgage claim, which exceeded the amount of the deposit of 25 per cent. provided for under sub-r. (i) of Rule 500-A of the Original Side Rules, and that it was, therefore, not bound to make the said deposit of 25 per cent. We must, therefore, hold, which we do, that the sale is not an invalid sale, nor can it be set aside on the first ground urged by Mr. Dhanuka.

27. It should be noted that Mr. Thakkar had contended that even if the sale were to be held to be invalid or it were to be set aside on the ground that the first respondent was under an obligation to make the deposit of 25 per cent, but it failed to do so, the appellant had in the present case waived the said requirement of the deposit of 25 per cent. In view of the conclusion which we have reached, it is unnecessary for us to decide this contention of the first respondent about waiver.

28. We will now turn to the second contention urged by Mr. Dhanuka. He contended that under the requirement of sub-rule (ii) of Rule 500-A the first respondent was bound to deposit an amount of the full balance of 75 per cent., without deducting therefrom the said sum of Rs. 75,000/- which the first respondent has in fact deducted for its costs as estimated by it. He contended that on this ground also the sale is an invalid sale and is in any event liable to be set aside.

29. Now the preliminary decree, in so far as it concerns the first respondent,

declares that there was due to the 1st respondent at foot of the mortgage an aggregate sum of Rs. 11,44,617.75 for principal and interest as at the date of the decree and further compound interest at the rate of four and a half per cent per annum with yearly rests from the date of decree till the date fixed for redemption and thereafter at the rate of four and half per cent per annum till payment and "the costs of the suit when taxed as between attorney and client and noted in the margin hereof" with simple interest on such costs at the rate of four per cent per annum "from the date of the decree" till payment. It is clear that the costs awarded by the Preliminary Decree to the first respondent are the costs of the suit till the date of the Preliminary Decree. The Preliminary Decree is silent as to the first respondent's costs subsequent to the preliminary Decree. To that provision for costs the Decree Absolute for sale adds a sum of Rs. 220/- for costs, being the costs of obtaining the Decree Absolute for sale. The amount of Rs. 75,000/-, which the first respondent retained with it when paying the amount of the balance of the purchase price, admittedly represented not only the costs covered by the Preliminary Decree and the Decree absolute for sale, but also the subsequent costs which related to the sale of the property, and according to Mr. Thakkar also the costs which the first respondent as mortgagee had to incur in respect of another suit, the costs whereof were ordered to be costs in the mortgage suit.

30. Now Mr. Dhanuka advanced five arguments in support of his said second contention. His first argument was that under the Preliminary Mortgage Decree, the costs of the suit become payable only when they are taxed and noted in the margin of the decree, but that they have not been taxed much less noted in the margin of that decree. His second argument was that neither of the two Decrees on their wording entitled the first respondent to costs other than the costs of the suit up to the date of the preliminary decree and the said sum of Rs. 220/-. His third argument was that neither of the two decrees, nor even the Original Side Rules, provide for a set-off being made for the costs subsequent to the decree absolute for sale which have not even been ordered to be paid. His fourth argument was that in any event there can be no set off in respect of estimated costs as the same are not an ascertained sum. His fifth argument was that no data whatever has been furnished by the first respondent to show how the first respondent estimated the costs in the sum of Rs. 75,000/- and that in any event the amount of Rs. 75,000/-

is an exorbitant amount. He contended that the deduction of Rs. 75,000/- made the payment actually made an insufficient payment or tender and that the sale must therefore be held to be invalid or should be set aside.

31. Now as regards the first three of these five arguments of Mr. Dhanuka, Mr. Thakkar did not dispute that the costs of the suit have not been taxed or noted in the margin of the preliminary decree nor that neither the preliminary decree nor the decree absolute for sale provides for the first respondent's costs subsequent to the Decree Absolute for sale nor that neither the two decrees nor the Original Side Rules provide for a set-off for such subsequent costs. He contended that nonetheless the first respondent is entitled to estimate such subsequent costs and to set-off the same against the purchase price because of a practice of this court.

32. It is by the first respondent's Attorneys' said letter dated 30th September 1970 addressed to the Commissioner that the first respondent stated that it would retain the sum of Rs. 75,000/-. The Statement contained in that letter in this connection reads:—

"In addition to the aforesaid aggregate amount of Rs. 16,13,163.21 due to my clients for principal and interest further amount would also be due to them for costs. The above suit is of the year 1949 and since considerable costs have been incurred including the costs of so many as 18 auction sales of the mortgaged property held by you since 25th June 1951, the taxation of all such costs would take a long time. My clients roughly estimate these costs at Rupees 75,000/- and request you to allow them to add the said estimated costs to the aforesaid aggregate amount of Rupees 16,13,163.21 P. due to them for principal and interest so as to make their total dues for principal, interest and costs amounting to Rs. 16,88,163.21 P."

Thereafter the first respondent filed with the Commissioner of this Court an affidavit dated 5th October 1970 of Bodhraj Dhandra, the Assistant Secretary of the first respondent, in paragraph 4 whereof the first respondent stated:—

"The plaintiffs corporation therefore hereby undertakes to pay the learned commissioner whatever balance found due and payable by them in respect of their said costs in case the said costs are found less than Rs. 75,000/- on taxation by the Taxing Master of this Hon'ble Court."

The said practice of this court relied upon by the first respondent has been averred in the affidavit in reply filed by the first respondent in the matter of the

said Chamber Summons. It is stated in paragraph 6 thereof as under:—

"The estimated costs of the suit is not only the costs awarded under the decrees herein but is inclusive of the costs of so many as 18 auction sales of the mortgaged property already held by the Commissioner in reference for sale made to him under the Decree Absolute for sale. The suit is of the year 1949 and the plaintiffs have incurred considerable costs in conducting the suit for so many as 21 years and according to Court's practice all costs incurred after the Decree absolute for sale are awarded at the time of confirmation of sale and all such costs in case of the plaintiffs being declared purchasers are allowed by the Commissioner to be set-off and as it usually takes considerable time to have all such costs taxed the Commissioner always makes provision for costs by retaining certain sum out of the sale proceeds in his hands. On 6th October 1970 the plaintiffs sent to the Commissioner their cheque for Rs. 5,00,556.79 P. and not for Rs. 5,00,00,556.79 P. as incorrectly stated in the said para 4. As required by the Commissioner the plaintiffs have given an undertaking by affidavit to pay the balance in case the costs when taxed or settled are less than Rs. 75,000/-. In fact the matter was discussed informally at a meeting held to pass the accounts of the Receiver when V. G. Pittie who has made the affidavit in support of the Chamber Summons was present and when it was decided to follow the aforesaid procedure."

The said affidavit in reply in its paragraph 7 further states as under:—

"The plaintiffs further submit that they are entitled to deduct the costs of the various auction sales which were about eighteen in number out of the purchase price in addition to the other costs awarded to them. Since taxing of all costs would take considerable time the plaintiffs have with the consent of the Commissioner for taxing accounts duly estimated their costs and paid the balance as aforesaid and reserved their right to claim from the said balance and excess amount in case the costs after taxation exceed the said sum of Rs. 75,000/- and have given an undertaking by an affidavit that in case the costs ultimately taxed are less than the said sum of Rs. 75,000/- then the plaintiffs would pay the difference. The plaintiffs submit that this is the only practical way of dealing with the matter."

33. To this affidavit in reply the appellant filed an affidavit in rejoinder of V. G. Pittie dated 3rd November 1970. Paragraph 2 of that affidavit deals with paragraphs 3 to 7 of the said affidavit of Bodhraj Dhandra in reply. The con-

tentions of that paragraph are an outstanding example of supreme vagueness. Its first sentence states that paragraphs 3 to 7 of the affidavit in reply are mainly argumentative and that the deponent had been advised not to aver to the arguments. It then says that those paragraphs also contain allegations of half truths made by the appellant with a view to cause prejudice. What statements are half truths has not been specified either expressly or even by implication. It then purports to point out that in the affidavit in reply it is stated that the property was knocked down after a period of 20 years but the first respondent had not stated that it was for the first time put up for sale only in 1965. Now the record of the Commissioner shows that the auctions were held from time to time since as per books 1951 and innumerable infructuous sales were held before 1965 and this statement is therefore either made without due care or is a deliberate untruth. In paragraph 6 or any where else in the said affidavit not a word is said about the practice either confirming it or denying it or stating anything which is inconsistent with the same. The affidavit in rejoinder being what it is, it must therefore be held that the appellant has not at all denied and has as a matter of fact deliberately avoided denying the existence of the practice as averred by the first respondent in the said affidavit in reply. The existence of a practice be it the practice of the office of the Commissioner or of the court, is a question of fact. It has been so averred in the affidavit in reply and it has not been denied either expressly or even by implication in the affidavit in rejoinder. We, therefore, hold, as we must that the existence of the practice as averred in the affidavit in reply has been proved.

34. But apart from this practice being held established by reason of the assertion of the first respondent and want of denial by the appellant we are satisfied that there is something more to support the conclusion that such practice exists. On the Notice of Motion dated 26th December 1970 taken out by the appellant in this appeal, the first respondent filed an affidavit of Jamshed Phirozeshaw contractor dated 25th January 1971. To that affidavit has been annexed as Ex. No. 1 a copy of the Minutes of the Commissioner of a meeting dated 16th December 1970 held before him in relation to the sale which is the subject-matter of the present appeal. The question before him was concerning the first respondent's retention of the said sum of Rs. 75,000/- and in that connection the commissioner observes in those minutes:

"It is true that what the plaintiff decree-holder is entitled to set-off is the costs of the suit as would be taxed thereafter and that today the said costs are not taxed. In all such cases, the practice followed by this office is to take a statement of account from the plaintiff decree-holder, who is also the auction purchaser showing the different amounts for principal and interest as well as the estimated costs due under the decree and allow such amount of estimated costs to be set-off. This procedure is followed for the reason that the taxing of costs takes a considerable time after the sale is knocked down. It is quite possible that such estimated costs as are sought to be deducted by the decree-holder may be more or less. In order to safeguard the interest of all concerned, an undertaking is taken from the decree-holder on affidavit stating that if the taxed costs turn out to be less than the estimated costs including in the statement of account filed by him, the difference shall be deposited by him after the costs are taxed. On the plaintiffs' letter dated 30th September 1970 I had directed the plaintiffs to give such an undertaking and such undertaking was given by the plaintiffs by affidavit of their assistant Secretary of the Mortgage Department, dated 5th October 1970."

35. The Commissioner of this Court is one of the highest officers of this Court. His statements are prima facie worthy of credit unless some flaw is pointed out. He must have referred to the practice from his own knowledge and what is of greater importance, from the records available in his office.

36. The practice negatives Mr. Dhanuka's arguments that the first respondent was not entitled to set off the costs subsequent to the Decree Absolute for sale and that no set-off could be allowed as the sum of Rs. 75,000/- was not an ascertained amount as no costs whether up to or after the preliminary Decree had been taxed.

37. Mr. Thakkar's contention was that by reason of the existence of such practice it must be deemed to have been incorporated in the Original Side Rules and in the Decree Absolute for Sale or that in any event the payment after deduction of Rs. 75,000/- cannot be held to be an insufficient payment or tender. The existence of such a practice supports this contention of Mr. Thakkar.

38. In connection with the question of practice, it must however, be considered whether the practice is or is not repugnant to or inconsistent with any provisions of law. Under the general law, and particularly under the provisions of the Transfer of Property Act a mortgagee is entitled to all costs properly

incurred by him for realising his security. Such a provision has as a matter of fact, been made in sub-rule (3) of Rule 5 and sub-rule (1) of Rule 4 of Order 34 of the Code of Civil Procedure under which the mortgagee is entitled to his costs charges and expenses subsequent to the Preliminary Decree. The provisions of Rules 10 and 13 of Order 34 are also to the same effect. The Original Side Rules and particularly Rule 1086 provide form No. 35 for a Preliminary Decree and Form No. 37 for a Decree absolute for sale. Neither of these two Forms contain a provision about costs subsequent to the Preliminary Decree and the Decree Absolute for sale respectively. As the mortgagee is entitled to all the costs of realising his mortgage security, there ought to be some provision whereby the mortgagee can recover such subsequent costs. The actual order for costs subsequent to the Decree Absolute for Sale is normally made by this Court at the time when the Court makes the order confirming the sale by ordering all proper costs incurred after the date of the decree absolute for sale till and inclusive of the confirmation of sale to be tacked on to the mortgage claim and to be paid out of the net sale proceeds. But when the mortgagee decree-holder is given liberty to bid and set-off the question of set-off costs against the amount of the balance of 75 per cent. would arise prior to the time when the Court would consider the question of confirming the sale. It stands to reason and commonsense therefore that a practice as referred to by the first respondent and also by the Commissioner has come into existence in this High Court. Such a practice does not appear to be in any way repugnant to or inconsistent with any provision of law. The clear effect of the existence of such a practice would be to read it by way of a necessary implication into the provisions of R. 500-A and into the decrees passed in the Forms prescribed by the Original Side Rules for drawing up Preliminary Mortgage Decrees and Decrees Absolute for sale, unless, of course, there is some order of the Court to the contrary. Moreover, the sales under Mortgage Decrees are conducted by the Commissioner of this Court. The mortgagee initially supplies the funds to the Commissioner to enable the Commissioner to incur the costs of such sale. As such costs are incurred by or through the commissioner, there arises no question of such costs being improper. There are therefore good chances for the mortgagee to ultimately recover the costs of sale out of the sale proceeds. Moreover, the Commissioner has experience as to what the costs, though not taxed would approximately

amount to. If the mortgagee for any reason happens to over estimate his costs, the commissioner would in all normal cases be able to question the mortgage and if necessary ask for a split up and satisfy himself as to what the correct estimate should be such estimate would normally be discussed at a meeting before him where the attorney of the mortgagee and also of the mortgagor would be present. In view of this safeguard so available for checking the estimates of costs, the practice seems not only to be reasonable, but to be consonant with commonsense.

39. It had, however, been contended on behalf of the appellant that under sub-rule (ii) of R. 500-A the time for payment of the balance of the purchase price is mandatory, because sub-rule (iv) provides that upon non-payment within the thirty days prescribed under sub-rule (ii) there should be an immediate re-sale. It was contended that the effect of the said practice would be to postpone the payment to the Commissioner of the amount of the estimated costs beyond the said period of thirty days and that the said practice would be inconsistent with the provisions of Rule 500-A. We are of the opinion, however, that the effect of the practice is to determine the amount which is payable under sub-rule (ii) of R. 500-A as and by way of the balance of purchase price and it is only that amount so determined which is payable within thirty days and to the non-payment whereof within that time the provision of re-sale under sub-rule (iv) is attracted. In other words, the quantum or the amount to which sub-rule (ii) applies would by reason of the practice be the balance of the purchase price as otherwise ascertained reduced by the estimated amount of costs. The said practice is, therefore not repugnant to any provision contained in sub-rule (ii) or sub-rule (iv) of R. 500-A.

40. It was also contended on behalf of the appellant that the amount of Rs. 75,000/- as the estimated costs is exorbitant. Now the word "exorbitant" is vague. This contention was not raised in the affidavit in support of the present Chamber Summons. It was, as a matter of fact, not raised even before the Commissioner. Mr. Thakkar stated that this point was not even argued before the learned Judge. This statement of Mr. Thakkar has not been contradicted on behalf of the appellant. It has certainly not been made a ground in the Memorandum of appeal. After all the correctness of the estimate is a question of fact. Mr. Thakkar stated that in the absence of a dispute raised by the appellant in this connection, the first res-

pondent did not place on record the necessary material to support the estimate of Rs. 75,000/-. As an example, he pointed out, as stated earlier, that the first respondent's costs of defending a suit in this court as a Mortgagee have been made costs in the present suit out of which this appeal arises. Mr. Thakkar's grievance is justified because the appellant should have disputed the correctness of the amount of estimated costs before the commissioner or at least before the Learned Judge and as the appellant has not done so the point cannot be allowed to be argued for want of necessary material before the court. But we do not rest content only at that. We have made a rough estimate ourselves. As it is the mortgagee who has to furnish funds to the commissioner for the costs of the sale and the mortgagor has not at that stage to put his hand in his pocket for that purpose, the mortgagor always desires that the court should give widest publicity to the intended sale. Of course, if it was the mortgagor who had to foot the bill his tune would have been different. The mortgagor has always been a favoured litigant if one may use that phrase, of all courts, and quite rightly because a mortgagor being a debtor, needs protection against any improper tactics by his mortgagee. The Court therefore just to prevent any unfairness relating to the mortgagor leans a little in favour of the mortgagor's demand when the property is to be advertised for sale, and particularly when a large property like the one concerned in this appeal is to be sold. It is well known in Bombay that if an advertisement appears in a newspaper like the Times of India, the costs of advertisement themselves are comparatively much larger than what they would be if the advertisements were to be published in some other newspaper. The costs of infructuous sales thrown away, which should not be confused with the costs of the sale which are larger, used to be estimated and ordered by Chamber Judges at between Rupees 750/- to Rs. 1,000/- till about five or seven years ago. Because of diverse reasons these costs of sale thrown away are now being estimated at between Rs. 1,500/- to Rs. 2,500/-, depending on diverse factors like the newspapers in which the advertisements are inserted etc. There has been a progressive increase in such costs. Costs of nineteen sales have to be estimated on that basis. Moreover it is common ground that because of the long period of 21 years having elapsed between the date of the Decree absolute for sale and the 19th sale, the Commissioner of this court had obtained Valuation Reports for fixing the reserve bids on two occasions and the

Commissioner's records show that he has paid Rs. 6000/- to the valuer for each of the two Valuation Reports. In addition, the Commissioner himself must have spent additional amounts for divers purposes such as, for example, for getting the particulars and conditions of sale printed, etc. To these costs must be added the costs of the lawyers representing the first respondent at the various meetings held before the commissioner and for attending at the auction sale. All of such costs are being allowed in taxation to a mortgagee decree-holder according to the scales of fees prescribed for that purposes. To that must be added the first respondent's costs of the mortgage suit and the other suit of which costs have been made costs in the former suit. Taking into account all these costs which the first respondent as the mortgagee would be entitled to recover out of the mortgage security, i.e., the sale proceeds, we are prima facie satisfied, only on a rough estimate that the estimate of Rs. 75,000/- will if at all, exceed the actual taxed costs by hardly any appreciable amount. To use the word "exorbitant" in this connection without even any material would in our opinion require re-writing of dictionaries relating to that word "exorbitant."

41. Mr. Thakkar had contended that if this court did not uphold the deduction of the said sum of Rs. 75,000/- for estimated costs, this Court should extend the time for making payment of the balance of the amount under sub-rule (ii) of R. 500-A. He pointed out that the deduction was made on the basis of an estimate by placing bona fide reliance on the said practice and that if that practice is now not upheld by this Court for any reason, this case would be the first to so hold and that this court should because of that reason in this case extend the time for paying that amount of Rs. 75,000/- to the Commissioner. He contended that if at all it be necessary, this court might so extend the time even by imposing some conditions on the first respondent, such as payment of interest from the date when that payment should have been made to the Commissioner till such time as this court may extend for making such payment. The appellant countered this contention by saying that in view of the provisions of Rule 500-A if the first respondent at all wanted to apply for extension of time, the first respondent itself should have taken out the necessary proceeding containing such an application, that the first respondent cannot do so in the matter of the present Chamber Summons which is taken out by the appellant for challenging the validity of the sale and that

the first respondent has as a matter of fact, not made even in the matter of this Chamber Summons any such application before the learned Judge and has in any event not placed any material before this court in support of its application for extension of time. Now sub-rule (ii) of Rule 500-A contains the provision for extension of time. Rule 500-A, or for the matter of that no rule in the Original Side Rules, contains a provision which would require that in all such cases for extension of time it would be the first respondent who would be under an obligation to itself apply for extension of time. In other words, even in a proceeding taken out by the mortgagor, the mortgagee can if it is necessary, as and by way of defending against the relief asked for in that proceeding by the mortgagor request the court to extend the time. It is true that this point was not raised before the learned Judge, nor is there any material contained in the affidavits filed on behalf of the first respondent in the matter of the said Chamber Summons. So far as the material is concerned however the only ground relied upon by Mr. Thakkar is a bona fide reliance on the existence of the said practice. No other material having been relied upon, we do not see why if necessary Mr. Thakkar cannot make such an application. It is true that under R. 500-A it is the Chamber Judge who can grant such extension of time. It was contended on behalf of the appellant that this contention not having been raised before the Chamber Judge and the Chamber Judge not having considered or made any order either way in that respect, the extension of time was not the lis before the Chamber Judge and is certainly not the lis in the matter of this appeal. It is, however, pertinent to note that the learned Chamber Judge dismissed the Chamber Summons and it was therefore not necessary for him to consider the question of extension of time. We are of the opinion that the discretion which Rule 500-A vests in the Chamber Judge is also available to this Court when hearing an appeal against the order of the Chamber Judge. An appeal is a continuation of the suit as proceeding out of which the appeal arises. If it was necessary, we would have entertained this application of the first respondent and proceeded to consider whether such extension of time should be given to it or not. It was contended on behalf of the appellant that the provisions of sub-rules (i) and (ii) of R. 500-A being mandatory time for making the payment of the balance of the purchase price cannot be extended after the expiry of the prescribed period of thirty days. This argument completely ignores

the provision of Rule 310 of the Original Side Rules which reads as under:—

"The Court of a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

The power to extend time under R. 310 is very wide. The Rule does not proceed that time can be extended only before the expiry of the prescribed time. The only limitation is such as would exist when a Court exercises its judicial discretion. It is however, unnecessary for us to extend time as requested on behalf of the first respondent, in view of the conclusion which we have reached.

42. We have earlier stated that the mortgagor is in a sense a favoured litigant with courts because he needs protection of the Court against any possible unfair advantage being taken against him by his mortgagee. The contentions raised on behalf of the mortgagor in this case however make us feel that it can not be a universal rule and there can be some cases where it is the mortgagee who needs protection against the mortgagor. This case appears to be one of such cases. The reason why the mortgagor wants to cause delay does not require super intelligence to find it out. The reason is that the decree of 1949 provides for payment of interest subsequent to passing of the decree absolute for sale only at the rate of four per cent. per annum. The rates of interest have since then been continuously rising even the Central and the State Governments are today borrowing at the rate of about 5½ per cent. per annum and under the Bombay Money-lenders Act the rate of interest payable on secured loans has been twice raised from 6 per cent. per annum to 9 per cent. per annum and from 9 per cent. per annum to 12 per cent. per annum.

43. The appellant has failed and we therefore dismiss the appeal with costs we see no reason why the costs should not follow his event. The Costs of the appeal of the first respondent and the third respondent to be tacked on to their respective mortgage claims.

44. The Notice of Motion is also dismissed with costs. The Costs to be costs in the appeal.

45. As Mr. Dhanuka states that the appellant wants to consider its position about the filing of an appeal to the Supreme Court, he applies that the confirmation of sale should not be ordered before the expiry of three weeks from

today. In view of the application, we order that no order for confirmation of sale should be made before Monday the 29th March 1971. The appellant to expeditiously make an application, if any, for leave to appeal to the Supreme Court.

Appeal dismissed.

AIR 1972 BOMBAY 15. (V 59 C 2)

PALEKAR AND VAIDYA, JJ.

M/s. Muralilal Mahabirprasad and others, Appellants v. B. R. Vad, Sales Tax Officer and others, Respondents.

Supreme Court Civil Appln. No 369 of 1970, D/- 27-4-1970, for leave to appeal to Supreme Court against judgment of Palekar and Vaidya, JJ. in Misc. Civil Appln. No. 564 of 1965, D/- 8-12-1969.

Constitution of India, Article 133 — Where a sales tax order, pending appeal against it, is challenged on several grounds in a writ petition, the judgment of the High Court dismissing the petition on the preliminary point of jurisdiction of the authorities to proceed against a dissolved firm being interlocutory is not a judgment within Article 133. Case law discussed.

(Para 3)

Cases Referred: Chronological Paras (1968) AIR 1968 Punj & Har 63

(V 55) = 69 Pun LR 217, Bhagwan Singh v. Chief Settlement Commr. Punjab, Jullundur 2, 3

(1966) AIR 1966 SC 1445 (V 53) = (1966) 3 SCR 198, Ramesh v. Gendalal Motilal 2, 3

(1961) AIR 1961 SC 794 (V 48) = (1961) 3 SCR 754, Jethanand and Sons v. State of Uttar Pradesh 2

(1958) AIR 1958 SC 253 (V 45) = 1958 SCR 1007, Sardar Syedna Taher Saifuddin Saheb v. State of Bombay 2

(1950) AIR 1950 FC 77 (V 37) = 1949 FCR 842, Mohammad Amin Brothers Ltd. v. Dominion of India 2

(1949) AIR 1949 FC 11 (V 36) = 49 Cri LJ 636, Sridhar Achari v. The King 2

(1939) AIR 1939 FC 43 (V 26) = 40 Cri LJ 468, Dr. Hori Ram Singh v. Emperor 2

(1933) AIR 1933 PC 58 (V 20) = 60 Ind App 76, Abdul Rahman v. D. K. Cassim & Sons 2

(1920) AIR 1920 PC 86 (V 7) = 47 Ind App 124, Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand 2

H. K. Shah with M. H. Ganf and J. K. Parikh, for Appellants; R. J. Joshi i/b. M/s. Little & Co. Attorneys, for Respondents.

VAIDYA, J.:— This is an application for certificate under Article 133 (1) (a) and (c) of the Constitution of India filed by the applicants whose Misc. Appln. No. 564 of 1965 (Bom) filed under Article 226 of the Constitution was dismissed by the judgment of this Court D/- 4, 5, 8-12-1969; and the question which arises is whether the said judgment is a judgment in respect of which the High Court can issue a certificate under Article 133 (1) (a) or (c).

2. Now, it is well established that the words "judgment, decree or final order" in Article 133 cannot apply to a judgment recording an interlocutory finding or a finding which does not finally dispose of the rights of the parties. See Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand, 47 Ind App 124 = (AIR 1920 PC 86); Abdul Rahman v. D. K. Cassim & Sons, 60 Ind App 76 = (AIR 1933 PC 58); Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, (1958) SCR 1007 = (AIR 1958 SC 253); Jethanand & Sons v. State of Uttar Pradesh, (1961) 3 SCR 754 = (AIR 1961 SC 794); Dr. Hori Ram Singh v. Emperor, AIR 1939 FC 43; Sridhar Achari v. The King, AIR 1949 FC 11; Mohammad Amin Brothers Ltd. v. Dominion of India, AIR 1950 FC 77. Hence, Mr. Shah, the learned Counsel for the applicant, relying on the decisions in Ramesh v. Gendalal Motilal AIR 1966 SC 1445 and Bhagwan Singh v. Chief Settlement Commr. Punjab, Jullundur, AIR 1968 Punj and Har 63, contended that as Miscellaneous Application No. 564 of 1965 was a petition under Article 226 of the Constitution, it was an original proceeding raising the question of the jurisdiction of the Sales Tax authorities under the Bombay Sales Tax laws to levy, assess and reassess sales tax on a dissolved firm and the judgment dismissing it finally decides the question of jurisdiction so far as this Court is concerned and hence, it is a judgment or final order within the meaning of Article 133.

3. It is true that the writ proceedings are original proceedings under Article 226. But that does not mean that every order passed in a writ petition is a judgment or a final order within the meaning of Article 133. The nature and effect of the order passed must be considered in every case as laid down in AIR 1966 SC 1445. Turning to the nature of Miscellaneous Application No. 564 of 1965, we find that it challenged the validity of the order by the Sales Tax authorities during the pendency of an appeal filed against the order under the Sales Tax legislation on several grounds. The judgment of the Court decided only the question of the jurisdiction of the Sales Tax au-

thorities to proceed against a dissolved firm. This Court refused to deal with the other grounds raised in the petition as the applicant's appeal is pending, for the reasons stated in the judgment. Although the petition is an original proceeding, it springs from and is founded on the proceedings still pending before the Sales Tax Authorities. The judgment, no doubt, decides a preliminary point raised by the applicant in the proceedings. The effect of the judgment is that the applicants have to pursue their rights and remedies on merits before the Sales Tax appellate authorities. They are not finally barred by the judgment of the Court. Though the judgment deals with the jurisdiction of the Sales Tax authorities, it is in substance an interlocutory judgment or finding regarding the powers of the said authorities to deal with the grievances of the applicants in the appeals filed by them. We do not think that the decisions in AIR 1966 SC 1445 and AIR 1968 Punj and Har 63 support the contention of Mr. Shah that the impugned judgment of this Court is a judgment within the meaning of Article 133, having regard to all the facts and circumstances of this case.

4. The above application is, therefore, not maintainable and the rule is discharged with costs.

Rule discharged.

AIR 1972 BOMBAY 16 (V 59 C 3)

PALEKAR AND KANIA, JJ.

Bapusaheb Bhausaheb Patil and another, Appellants v. Smt. Gangabai and others, Respondents.

A. F. O. D. No. 895 of 1968, D/- 14-10-1970, from order of D. D. Pol, Joint Civil J. Sr. Division at Kolhapur, in Original Spl. Civil Suit No. 64 of 1967.

(A) Hindu Succession Act (1956), Section 14 (1) and (2) — Property of female Hindu — Where a coparcener died before the coming into force of Hindu Women's Rights to Property Act 1937, and the right of his widow was and recognised in an award or decree by allotting property to her, the widow in possession of such property on the date of commencement of the 1956 Act would get full ownership to these properties under Section 14 (1). Her case would not be covered by Section 14 (2). AIR 1967 Mad 429 and AIR 1970 Orissa 131, Dissented from; Observation in AIR 1968 Bom 308 held to be obiter. Case law discussed. (Paras 9 to 13, 17, 21, 22, 26)

Sub-section (2) to Section 14 covers only those cases of grants where the interest in the grantee is created by the grant itself or, in other words, where the gift, will, instrument, decree, order or award is the source of origin of the interest created in the grantee. Where, however, the instruments referred to above are not the source of interest created but are merely declaratory or definitive of the right to property antecedently enjoyed by the Hindu female, sub-section (2) has no application; and it matters not if in such instruments it is specifically provided in express terms that the Hindu female had a limited estate or that she shall not alienate the property or that the property would revert on her death to the next reversioner such terms are merely the reiteration of the incidents of the Hindu Law applicable to the limited estate. (Para 11).

(B) Hindu Succession Act (1956), Section 14 (1) — Limited ownership and restricted estate — An absolute estate may be restricted or limited in a variety of ways in point of duration, enjoyment, disposal or the like, and all such cases are covered by the Explanation without differentiating between the several kinds of restrictions. Limited ownership is also restricted ownership and every case of limited ownership will fall within the meaning of "restricted estate" in sub-section (2). (Para 18)

(C) Hindu Succession Act (1956), S. 14 (1) — "In any other manner whatsoever" — The expression "in any other manner whatsoever" in S. 14 (1) is wide enough to include property acquired under an award or a decree. (Para 19)

Cases Referred: Chronological Paras

(1970) AIR 1970 Mad 257 (V 57) =	
(1970) 2 Mad LJ 331, P. Pattabiraman v. Parijattam Ammal	11
(1970) AIR 1970 Pat 348 (V 57) =	
1970 BLJR 735, Sumeshwar v. Swami Nath	13, 23
(1970) AIR 1970 Orissa 131 (V 57) =	
36 Cut LT 567, Narayan Patra v. Tara Patrani	14, 23
(1969) AIR 1969 SC 1118 (V 56) =	
(1969) 3 SCR 789, Rani Bai v. Yadunandan	15, 25
(1968) AIR 1968 Bom 308 (V 55) =	
69 Bom LR 795, Udhav Shankar v. Tarabai	24
(1968) 70 Bom LR 611 = 1968 Mah LJ 828, Yamunabai Gangadhar v. Parappa	13, 23
(1967) AIR 1967 Mad 429 (V 54) =	
(1967) 1 Mad LJ 454, Gurunadham v. Navaneethamma	14, 23, 25
(1966) AIR 1966 SC 1879 (V 53) =	
(1966) 2 SCR 626, Eramma v. Veeruppane	25

- (1966) AIR 1966 Pat 191 (V 53) =
1966 BLJR 82, Lachhia v. Ram
Shankar 12
- (1965) AIR 1965 Andh Pra 66
(V 52) = (1964) 2 Andh WR 470,
Gadani Reddayya v. Venkataraju
14, 23
- (1965) AIR 1965 Orissa 59 (V 49) =
ILR (1964) Cut 498, Raghunath
Sahu v. Bhimsen Naik 12
- (1964) AIR 1964 Punj 114 (V 51) =
ILR (1964) 1 Punj 485, Sharbati
Devi v. Hiralal 13, 23
- (1963) AIR 1963 Mad 50 (V 50) =
(1962) 2 Mad LJ 464, Sampath-
kumari v. Lakshmi Ammal 12
- (1962) AIR 1962 Cal 438 (V 49),
Sasadhar Chandra v. Tara Sundari 12
- (1943) AIR 1943 Bom 412 (V 30) =
45 Bom LR 802, Dattatraya
Putto v. Tulsabai Chidambar 21
- (1938) AIR 1938 Bom 321 (V 25) =
40 Bom LR 422, Secy. of State
v. Ahalyabai 21
- (1894) ILR 18 Bom 452, Yellawa
v. Bhimangavda 15

N. S. Shrikhande with L. G. Khare,
for Respondents Nos. 2 to 6; K. J.
Abhyankar, for Respondents Nos. 2 and 3.

PALEKAR, J.:— This is an appeal by the plaintiffs whose suit for possession has been dismissed by the learned Joint Civil Judge Senior Division, Kolhapur. The suit was for the recovery of possession of some agricultural lands and a house in village Shrati in Kolhapur District. The lands are about 35 acres in extent and are assessed to land revenue of Rs. 211-5-9.

2. The plaintiffs and defendant No. 1 are the daughters of one Appa alias Jangonda and their mother's name was Hirabai. Appa was the only son of one Devgonda. Devgonda had a brother named Jingonda, who appears to have been deaf and dumb. Defendants Nos. 2 to 6 are the grand-sons of this Jingonda, being the sons of Nemgonda alias Balgonda.

3. Jingonda died sometime before Devgonda leaving behind him his son, Nemgonda alias Balgonda. In about 1902 Devgonda and his son Appa went on a pilgrimage. When they were on the pilgrimage Devgonda died first in 1902 and Appa soon thereafter. So, Devgonda's branch in 1902 consisted of Appa's widow Hirabai and her three daughters viz., the plaintiffs and defendant No. 1. It appears that the two brothers Devgonda and Jingonda were members of a Hindu joint family and it can, therefore, be said that after the death of Devgonda, Jingonda and Appa, the only male member of Hindu joint family was Nemgonda alias Balgonda. All the properties of the family, many of which had been acquired by Dev-

gonda, were in the possession of Devgonda's branch, and, naturally, on death of Devgonda and Appa in 1902, Hirabai came into possession of all the agricultural lands belonging to the family and also the houses. Disputes arose between Nemgonda and Hirabai and the same were referred to an Arbitrator, who gave his award on 15-10-1903. This award was filed in Court and a decree in terms of the award was passed on 24-10-1903. Broadly, the result of this decree was that, out of about 130 acres of lands and six houses and house sites, 65 acres of lands and one house were allotted to Hirabai. Out of the 65 acres, 30 acres were ear-marked for the provision of maintenance and marriage of the three daughters and the rest of the property was ordered to be retained by Hirabai for life with certain restrictions. The 30 acres of lands given to the daughters were by way of absolute gift. But, so far as the lands allotted to Hirabai were concerned, they were to be in her possession only for her lifetime whereafter they were to revert to Nemgonda.

4. Accordingly, the daughters obtained possession of their thirty acres and there is no dispute about them before us. The dispute is confined to the remaining thirtyfive acres and the house. Hirabai was in possession of this property, which is the subject-matter of the suit, till her death on 25-2-1967. At that time Nemgonda was dead and his sons, viz. defendants Nos. 2 to 6, were in the village. They got their names entered in the revenue records in respect of this property and obtained possession of the same.

5. The plaintiffs, who are two daughters out of the three daughters of Hirabai, filed this suit for possession of these properties claiming title to the same through Hirabai. They alleged that Hirabai, who was the limited owner of these properties under the award, had become the full owner of the same after the commencement of the Hindu Succession Act, 1956 and, therefore, the two plaintiffs and their sister, defendant No. 1, were entitled to succeed to the properties of their mother after her death. They further alleged that the suit properties had been allotted to Hirabai by the award in lieu of maintenance.

6. Defendants Nos. 2 to 6 contested the suit and the principal contention with which we are now concerned is, whether Hirabai got full ownership of these properties after the commencement of the Hindu Succession Act, 1956. It is not disputed that if Hirabai is held to have become the full owner of the properties by reason

of Section 14 of the Hindu Succession Act, 1956 (hereinafter referred to as the Act), the plaintiffs and defendant No. 1 would be her heirs and, therefore, entitled to the possession of the said properties. On the other hand, if Hirabai had not become the full owner of the properties, her estate being limited to her lifetime, then under the terms of the award the suit properties were liable to revert to Nemgonda and his branch in which case defendants Nos. 2 to 6 would be entitled to the suit properties. The learned Civil Judge held that by reason of the award-decree dated 24-10-1903, Hirabai was merely constituted a limited owner of the properties for her lifetime within the contemplation of Section 14 (2) of the Act and, therefore, neither the plaintiffs nor defendant No. 1 was entitled to those properties. It is on that ground that he dismissed the suit.

7. The plaintiffs have, therefore, come in appeal and Mr. Shah, appearing on their behalf, submits that the learned Civil Judge erred in holding that the case fell within Section 14 (2) instead of Section 14 (1) of the said Act. His contention is that by reason of the award-decree Hirabai was constituted a limited owner and as she was in possession of these properties at the commencement of the Act, she became the full owner thereof. Mr. Shah further contended that sub-section (2) of Section 14 of the Act had no application to this case, because the award-decree did no more than define and recognise Hirabai's right to the family properties for her maintenance. According to Mr. Shah, the said sub-section comes into play only when a restricted estate has its origin, for the first time, in the grant, decree or award, and the grant, decree or award do not merely give expression to a pre-existing or antecedent right to or against the family properties. On the other hand, it is contended by Mr. Shrikhande, appearing on behalf of the contesting respondents, that the learned Judge was right in holding that the case fell within sub-section (2) of Section 14 of the Act and not sub-section (1) thereof. That is the only point at issue before us.

8. Section 14 of the said Act is as follows:

"(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation—In this sub-section "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise,

or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property".

The object of this particular enactment is clear. The object is to assure equality of rights to property to all Hindu males and females and to remove the artificial disparity in the capacity to hold property imposed by the Hindu Law on the Hindu female. In circumstances where a Hindu male was entitled to obtain full ownership of the property, a Hindu female could not be condemned to hold property as only a limited owner because of the restrictions imposed on her by the Hindu Law. On the other hand, where in circumstances it was lawful for a Hindu male to hold property as only a limited owner it was not the intention of the legislature that a Hindu female should hold the property as a full owner. Sub-section (1) of Section 14 of the Act takes care of the former while sub-section (2) takes care of the latter.

9. For the purpose of sub-section (1) we must be concerned with property which is in the possession of a Hindu female after the commencement of the Act of 1956. That Act came into force on 17-6-1956. If such property was acquired by her, whether before or after the commencement of the said Act, it would be held by her as a full owner and not as a limited owner in spite of the restrictions placed by the Hindu Law. Then there is an explanation of the word "property" referred to in sub-section (1). By this explanation all kinds of properties are attempted to be included in sub-section (1). Though the explanation purports to give an inclusive meaning of the word "property" it is really an exhaustive explanation, because after enumerating the various kinds of properties acquired by a Hindu female, traditionally mentioned in all the text books on Hindu Law, the explanation includes property acquired by a Hindu female "in any other manner whatsoever". To make the explanation

all pervasive it also includes property held by a Hindu female as stridhana, because although it is well known that under the Hindu Law stridhana property is the property of the female with absolute ownership therein, under certain schools of the Hindu Law a few types of properties though regarded as stridhana are not disposable by the wife without the consent of her husband. The explanation, thus, brings under its purview all properties traditionally acquired by a Hindu female in which merely by reason of the incidents of the Hindu law she has limited ownership. In other words, sub-section (1) read with this explanation provides that any property, howsoever acquired and in possession of a Hindu female after the commencement of the Act shall be held by her as a full owner in all cases where she formerly held merely limited ownership. As a matter of fact, this sub-section proceeds on the basis that there are several categories of properties of which a Hindu female, under the provisions of the Hindu Law, is merely a limited owner. By this enactment her rights are enlarged and wherever under the Hindu Law she would merely obtain limited ownership, she would, after the commencement of the Act obtain full ownership.

10. Sub-section (2) of Section 14 of the Act comes by way of exception as is clear from the words with which the sub-section itself commences. If sub-section (1) had stood alone, a Hindu female would obtain full ownership in all properties however partial or limited interest in them a grant may create in her favour. If, for example, by a will or a gift a life interest is created in her favour with the remainder vesting in another, sub-section (1) would have the effect of making her the full owner thereof and destroy the remainder. This result, however, is not intended. In similar circumstances, a life interest created in a Hindu male would give him no more than a life interest and it would impair the principle of parity of rights between the Hindu male and female, if a similarly worded grant gives a Hindu male a life interest but a Hindu female an absolute estate. To prevent this anomaly sub-s. (2) is enacted. It emphasized that in all cases where a grant can lawfully create a limited estate in favour of a Hindu male grantee, it can equally do so in the case of a Hindu female grantee and the general rule of sub-section (1) would have no application. It is in that sense that sub-section (2) is read as an exception to sub-section (1).

11. There is consensus of judicial opinion with regard to the ambit of

sub-s. (2) of S. 14 of the Act. It covers only those cases of grants where the interest in the grantee is created by the grant itself or, in other words, where the gift, will, instrument, decree, order or award is the source or origin of the interest created in the grantee. Where, however, the instruments referred to above are not the source of interest created but are merely declaratory or definitive of the right to property antecedently enjoyed by the Hindu female, sub-section (2) has no application; and it matters not if in such instruments it is specifically provided in express terms, that the Hindu female had a limited estate or that she shall not alienate the property or that the property would revert on her death to the next reversioner such terms are merely the reiteration of the incidents of the Hindu Law applicable to the limited estate. (See *P. Pattabiraman v. Parijatham Ammal*, AIR 1970 Mad 257, and the cases referred to in paragraphs 2 and 3 of that judgment).

12. It, therefore, follows that in cases arising out of the Hindu Women's Rights to Property Act, 1937, which on the death of a coparcener gave a Hindu widow a share in the coparcenary property, the Hindu woman's limited estate would be enlarged into full ownership in spite of any subsequent instrument, award or decree declaring or redefining her rights as a limited estate. (See *Raghunath Sahu v. Bhimsen Naik*, AIR 1965 Orissa 59; *Sasadhar Chandra v. Tara Sundari*, AIR 1962 Cal 438; *Sampathkumari v. Lakshmi Ammal*, AIR 1963 Mad 50 and *Lachhia v. Ram Shankar*, AIR 1966 Pat 191).

13. In cases where a coparcener died before the Hindu Women's Rights to Property Act, 1937 came into force, the widow did not have normally a share in the joint family property but only a right to be maintained out of the joint family property. In numerous instances this right was assured to her by allotting property to her for life whether under an instrument, award or decree or even by an oral arrangement. The difficult question which arises in such a case is whether the widow in possession of such properties on the date of the commencement of the Act of 1956 gets full ownership to these properties under sub-section (1). There is divergence of judicial opinion on this question between the various High Courts, some holding that she does and other holding that she does not. And that is the precise question which arises in the present case. Those cases which hold that the Hindu female gets full ownership proceed on the footing that a right to be maintained from the family property is a right crystallised,

declared and recognised in the instrument, award or decree, having been in existence antecedent to those documents, and hence not covered by sub-section (2) of Section 14 of the Act. (See *Yamunabai Gangadhar v. Parappa*, (1968) 70 Bom LR 611; *Gadam Reddaya v. Venkataraju*, AIR 1965 Andh Pra 66; *Sumeshwar v. Swami Nath*, AIR 1970 Pat 348 and *Sharbatl Devi v. Hiralal*, AIR 1964 Punj 114).

14. Other cases hold that her right to be maintained out of the family property was not "a right to property" which, according to them, she gets for the first time under the instrument, decree or award and hence she falls under sub-section (2) of Section 14 of the Act. (See *Gurunadham v. Navaneethamma*, AIR 1967 Mad 429 and *Narayan Patra v. Tara Patrani*, AIR 1970 Orissa 131).

15. The first question for decision is whether Hirabai was a limited owner of the suit properties on the date of the commencement of the Act of 1956. For the present it may be conceded that she had no title to these properties before the date of the award except to the extent of a possessory lien for her maintenance which is recognised in this State for more than a hundred years. (See *Yellawa v. Bhimangavda*, (1894) ILR 18 Bom 452). It has been held in that case that the Court will not allow the heir to recover family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her. This position in law has been recently recognised by the Supreme Court in *Rani Bai v. Yadunandan* (AIR 1969 SC 1118) where it is pointed out that the widow was entitled to remain in possession if she could establish that she had entered into possession by virtue of her claim or right to maintenance until the person laying the claim to the estate made proper arrangement for payment of maintenance to her. But, after the date of the award, Hirabai was undoubtedly constituted a limited owner with some restricted powers to alienate the properties. It would appear from the award that she was entitled to remain in possession for her lifetime, the right to alienate being confined to raising of a loan on the security of the properties for the purpose of paying Government revenue.

16. It is true that the award (Exh. 67) dated 15-10-1903 does not in so many words say that the suit properties were given to Hirabai in lieu of maintenance. But, we have no doubt that this was the case. Nemgonda, who was the other party to the dispute, had specifically asked in the plaint which

he filed before the arbitrator that maintenance should be provided for Hirabai and all the properties which were in Hirabai's possession should be handed over to him. The arbitrator, while dealing with this aspect of the case, observed as follows:—

"... .. Devgonda was the Karta and an honoured gentleman. It would appear that since Jingonda was dumb he was not useful to conduct the day-to-day affairs. Since Devgonda was the Karta, both the parties agreed that it was Devgonda himself who developed the income of the properties. The plaintiff (Nemgonda) fully admits that it was Devgonda who retained the Patilki Watan in the family after putting forth great efforts in the dispute that had arisen. On the whole, there is no dispute before me that Devgonda was the Karta. The defendant Hirabai is the daughter-in-law of such a Karta member and to pass an order merely to give her maintenance as requested by the plaintiff (Nemgonda) would amount to ignoring the real position of those nearest to the man who had after great endeavours developed the properties. Therefore, having regard to the status of Devgonda and the relationship between Devgonda and the defendant (Hirabai) I do not desire to give to the defendant (Hirabai) bare maintenance as if she is an unsheltered woman".

Reliance was placed upon these observations made by the arbitrator in the award to contend that the award does not really give these properties to Hirabai in lieu of maintenance but that the award is an anomalous instrument wherein the rights of the parties were for the first time decided. We are unable to accept this submission. So far as could be gathered from the award it would appear that while Hirabai was saying that she should get all the properties and maintenance should be given to the other side, Nemgonda was contending that he should get all the properties from Hirabai and Hirabai should be merely paid some maintenance. That was the issue which was before the arbitrator. He found that they were all members of a joint family and against that background he had to pass the award. Nemgonda being the only surviving male coparcener could not be side-tracked by merely providing him with maintenance. On the other hand, having regard to the fact that Hirabai under the Hindu Law would be only entitled to maintenance, the arbitrator thought that it would be unfair to give her merely a pittance for her maintenance as a widow in the joint family and, therefore, he decided to make a liberal provision for her in

lieu of her maintenance. Having regard to the manner in which the family properties had been increased and developed by the personal efforts of Devgonda, the arbitrator thought that Hirabai deserved to be provided on a liberal scale. As a matter of fact, a specific allegation was made in the plaint in the present suit that the suit properties were given to Hirabai under the award in lieu of maintenance, and we do not find any specific denial of the same in the written statement. We, therefore, hold that the suit properties had been allotted to Hirabai in lieu of her maintenance which is also the finding of the learned trial Judge.

17. Thus we find that the suit properties were allotted to Hirabai under the award in lieu of maintenance for life with a very restricted power of alienation only in cases where the land revenue fell in arrears. The Explanation appended to sub-section (1) of Section 14 of the Act assumes that property acquired by a Hindu female in lieu of maintenance is property of limited ownership a concept not inconsistent with the Hindu Law. Gupte in his book on the Hindu Law, 2nd Edition, at page 565 in paragraph 44 has stated as follows:

".....Although the division of property into stridhana and non-stridhana is based upon certain conceptions peculiar to Hindu law it corresponds to the division of property into absolute and limited. Absolute ownership means and connotes that (1) the owner has certain unqualified rights over the property such as (A) the exclusive right to its possession, (B) the right to its management, (C) the right to its exclusive enjoyment, and (D) the right of disposition by an act inter vivos or will, and (2) on the death of the owner the property devolves by succession on his heirs. Where any of these essentials (of the content) of absolute ownership is lacking, the property is not regarded as absolute but limited. Limited property would therefore be property the ownership of which is limited in some way or other irrespective of the manner in which it may be limited in any particular case".

We have no difficulty, therefore, in holding that on the date of commencement of the Act of 1956 Hirabai was a limited owner within the contemplation of sub-section (1) of Section 14 of the Act. It would then follow that Hirabai was entitled to become the full owner of the suit properties on that date in which case on her death after that date, her daughters would be entitled to inherit the suit properties.

18. It is, however, contended by Mr. Shrikhande that the case falls within the exception embodied in sub-section

(2) of Section 14 of the Act. His contention is that the award in this case creates a restrictive estate within the meaning of sub-section (2) and not a limited estate or limited ownership an expression which is to be found in sub-section (1). He contends that this is a restrictive estate because Hirabai was less than a limited owner and for this he refers to the restrictive terms of the award which lay down that Hirabai's right to alienate was strictly restricted to the purpose of raising a loan to pay the land revenue. The argument assumes that a restricted estate is different in quality from limited ownership. That is not so. "Restricted estate" is a generic term by which all kinds of limited ownerships are covered. The expression "limited ownership" has been used in sub-section (1) of Section 14 of the Act, because that is an expression generally found in the text books on Hindu law and has almost acquired a technical connotation in connection with the estate of a Hindu female. Sub-section (2), on the other hand, does not want to move within the technical concept of "limited ownership". Therefore, sub-section (2) has used a more generic term "restricted estate", which in its wide ambit can take into account all limited ownerships within sub-section (1). Indeed, the expression "limited ownership" within the Explanation appended to sub-section (1) accounts for a wide variety of cases as shown by Gupte in the passage already referred to. They range from Stridhana on the one hand, to acquisition in lieu of maintenance on the other. An absolute estate may be restricted or limited in a variety of ways in point of duration, enjoyment, disposal or the like, and all such cases are covered by the Explanation without differentiating between the several kinds of restrictions. In our opinion, Limited ownership is also restricted ownership and every case of limited ownership will fall within the meaning of "restricted estate" in sub-section (2).

19. Mr. Shrikhande next contended that the words "award or decree or order of a Court" are not specifically mentioned in sub-section (1) and, therefore, where a limited ownership or restricted estate is created by an award or decree, the case entirely falls within sub-section (2) and not sub-section (1) of Section 14 of the Act. We are unable to accept this submission. It is true that sub-section (1) does not in terms refer to an award or a decree of a Civil Court. But the Explanation to sub-section (1) is wide enough to include property acquired under an award or a decree. The property as explained therein, not only includes the seve-

ral kinds of acquisition by a Hindu female under the Hindu law but the explanation winds up by providing that property acquired "in any other manner whatsoever" by the Hindu female would be property referred to in sub-section (1). The expression "in any other manner whatsoever" is wide enough to include property acquired under an award or a decree. Nor is there any substance in the further contention of Mr. Shrikhande that the words "the decree or award" are not mentioned in sub-section (1) but mentioned in sub-section (2) because of the higher respectability which is attached to a decree or award. They are adjudications by either a domestic court or by a Civil Court and, therefore, they stand on a higher footing. That is the reason why Mr. Shrikhande says that property acquired under a decree or award was intended to be excluded from the operation of sub-section (1). We do not really see why a decree or award passed on an agreement between the parties or on the basis of a settlement between them should have greater value than a private arrangement amicably arrived at. Moreover, sub-section (2) does not provide for acquisitions made only under an award or a decree but it also makes provision for the property acquired under a gift or will or any other instrument. They are all of the same quality and the only purpose for which sub-section (2) was enacted was to make it clear that where under these several documents a new restricted right to property is created for the first time, sub-section (1) will have no application to such a case.

20. That brings us to the really vexed question in the present case. Mr. Shrikhande does not dispute that when a limited or restricted estate apparently created by the means referred to in sub-section (2) is only a redefinition or recognition of an antecedent right to property, sub-section (1) will not cease to have effect. In such a case, he concedes that it will not be possible to argue that the limited interest created in favour of the grantee has its foundation or origin in the grant itself. The grant, instrument or decree will have only to be regarded as working out the Hindu female's antecedent right to property which is thereby recognised. He, however, contends that where a Hindu female has no right or interest directly to any property antecedent to the documents referred to in sub-section (2), there is no question of that right being recognised in the documents and, therefore, if a restricted estate is given by these documents they alone should be regarded as the foundation or source of the grant and such a grant would fall

under sub-section (2). According to Mr. Shrikhande, Hirabai being a widow in the joint family had no direct interest in or right to the family properties prior to the award. Her right was confined to a mere claim for maintenance out of the joint family properties. Hence though her right of maintenance was antecedent to the award it was not a right to any property, that is to say, she had no proprietary right to any property, and hence the right to the limited estate created by the award has its origin in the award itself. Therefore Mr. Shrikhande contends, Hirabai's case falls under sub-section (2) of Section 14 of the Act. In other words, the emphasis, according to Mr. Shrikhande, is on the question whether the antecedent right of the Hindu female is a proprietary right or not. If it is not a proprietary right, the right which is given under the grant in sub-section (2) would be a restricted right having its origin in the grant itself.

21. The right of a Hindu widow to be maintained out of joint family properties has, amongst others, the following characteristics:

1. Under Hindu Law, where a person has succeeded by survivorship to the share of the deceased coparcener, he takes it subject to the burden of maintaining the widow and unmarried daughters of the deceased coparcener. The burden attaches to the property. The holder of such interest for maintenance amounting as it does to a burden on the property is entitled as a matter of right to ask the Court to create a formal charge on such property; (See *Secy. of State v. Ahalyabai*, 40 Bom LR 422 = (AIR 1938 Bom 321)).

2. A widow is entitled not only to claim maintenance out of the joint family property in possession of a coparcener but also from the property of the joint family which has been purchased by a stranger with notice of the existence of the widow. (See *Dattatraya Putto v. Tulsabai Chidambar*, 45 Bom LR 802 = (AIR 1943 Bom 412)).

3. If a widow entitled to maintenance is in possession of the joint family property, she is, as already pointed out, not to be ousted from the joint family property even by an heir unless arrangement is made for providing her with maintenance.

4. The liability to maintain a widow is attached to the joint family property. It is true that all these characteristics mentioned above do not amount to any proprietary right to any portion of the joint family property. Nevertheless, a right to maintenance is a right attached to the family property. The question is whether this distinction determines

the application of sub-section (1) or sub-section (2) of Section 14 of the Act, as the case may be. In our opinion, this emphasis on the nature of the antecedent right is not as important as the question whether the instrument, decree or award in sub-section (2) is the real source or originator of the restricted estate granted thereunder. It is conceded that a widow having a share in the coparcenary property under the Hindu Women's Rights to Property Act, 1937, cannot be prevented from claiming absolute estate under sub-section (1) by the mere fact that an instrument, decree or award which came into existence after 1937 allotted her some joint family property specifically declaring that she will have only a life estate. The reason is that the instrument, decree or award is not the source or foundation of the limited grant. Such a widow is entitled to say:

"The property which I have now in my possession is in lieu of my share in the joint family property. I was given nothing under the instrument or the decree. My antecedent right to a share in the property is merely translated into another form through the medium of the instrument, decree or award and hence sub-section (2) does not apply to me".

It appears to us that a similar contention can be made by a widow when some joint family property is allotted to her in lieu of maintenance. She can say:

"I have an antecedent right attached to the family property for my maintenance. What is given to me through the medium of the instrument decree or award is in lieu of my right to maintenance. My former right is merely translated into another form through the medium of the instrument, decree or award. Therefore, it is not the source or foundation of the right to property I have now in possession. Therefore, sub-section (2) does not apply". On principle we see no difference between the two cases. The emphasis is not on the nature of the antecedent right claimed against the joint family property but on the question whether the instrument, decree or award was the originator of the right conferred under it. Since in both types of cases the instrument, decree or award serves merely as a medium which translates one form of right into another it cannot be regarded as the originator of the right conferred under it.

22. It may be interesting to observe that under the Hindu Law the right to a share in coparcenary property given to some widows was held equivalent to the right to maintenance out of the family property. After the Hindu

Women's Rights to Property Act, 1937, came into force, the situation is explained by Mulla in his book on Hindu Law, 13th Edition, at page 98, as follows:—

"... The share she gets on partition, it has been held, is in lieu of maintenance and if she can get a share in all the coparcenary property including agricultural lands, her right to maintenance would cease. The right of claiming partition conferred upon a widow under the Act is personal to her. The right being personal would come to an end on her death if no partition had taken place. It has been held in a number of cases that, if she died pending a suit for partition, her undivided interest would devolve by survivorship and would not go to her husband's heirs as reversioners. The reason generally adopted is that she got her interest in lieu of maintenance and the right conferred upon her being personal would not be crystallised until actual partition by metes and bounds."

The passage cited above seems to suggest that a widow gets a share after 1937 in lieu of her maintenance. We have gone through the cases noted in the foot-note on that page. But, we have not been able to find therein any direct decision that a share has been granted to her under the Act in lieu of maintenance. That seems to be the learned author's inference from the fact that the share enures only for the lifetime of the widow, that the right given to her to share in the property is only personal to her and that if she gets such a share she is no longer entitled to get maintenance. The conclusion from these facts may well lead to the inference that the share which was for the first time granted to a widow in 1937 was in lieu of maintenance. Moreover, even before the Hindu Women's Rights to Property Act, 1937, when some schools of Hindu Law permitted the wife, mother and grand-mother to share in the coparcenary property on actual partition, the share which was given to them was not because they had any direct or proprietary interest in the coparcenary property but in lieu of maintenance. Some of the favoured widows under the Hindu Law obtained a share in the property in lieu of maintenance, while others did not obtain any share but only got maintenance. It appears to us that in the context of the Hindu widows the right to maintenance conferred under the Hindu Law is indistinguishable in quality from her right to a share in the family property. That may well be the reason why the explanation to sub-section (1) of Section 14 of the Act makes the female allottee of property "in lieu of maintenance" as much a

limited owner as when the widow acquires on "inheritance" or "at a partition". And if in the latter two cases it is conceded that sub-section (2) does not apply on the ground of antecedent right to the family properties, we do not see any rational justification to exclude a widow who has an equally sufficient claim over the family properties for her maintenance.

23. One has to see the anomalous results which follow on a narrow construction of Section 14 of the Act. Before and after 1937 there were widows in the joint family who did not get a share in the family properties but were only entitled to maintenance e.g. the widow of a pre-deceased son prior to 1937 would be entitled to maintenance and not to a share. If such a widow is allotted under an oral arrangement family properties of which she remains in possession till 1956, she would directly come under sub-section (1) of Section 14 of the Act and there is no question of the application of sub-section (2) since there is no instrument whatsoever under which she claims. Then again, if after she is allotted family properties orally, her rights to the same are confirmed in a document some years later but before 1956, she would still become the full owner of these properties after 1956. (See *Sharbati Devi v. Hiralal*, AIR 1964 Punj 114). But, if the same widow lives amicably in the family and in order to prevent future trouble some family properties are allotted to her for maintenance sometime before 1956, the Madras case (AIR 1967 Mad 429) and the Orissa case (AIR 1970 Orissa 131) referred to above would have it that her case should fall under sub-section (2) and not under sub-section (1) of Section 14 of the Act. We do not see any justification for coming to such an unjust result which could not have been within the contemplation of the legislature when it enacted sub-section (2). The provision therein which comes by way of exception must be strictly construed and would have no application to cases except those where for the first time a new right to property is created, unrelated to the antecedent right or interest in the grantee either in respect of the actual property which is the subject-matter of the grant or the family property the claim against which is crystallised in the allotted property. With respect, therefore, it is not possible to agree with the view taken by the Madras High Court in *Gurunadham's case* AIR 1967 Mad 429 or by the Orissa High Court in *Narayan Patra's case* AIR 1970 Orissa 131. We respectfully agree with the view taken by Mr. Justice Deshpande in *Yamunabai Gangadhar's case* (1968) 70 Bom LR

611) and also the view taken in *Gadam's case* (AIR 1965 Andh Pra 66), *Sharbati Devi's case* (AIR 1964 Punj 114) and *Sumeshwar's case*, (AIR 1970 Pat 348).

24. We must, however, draw attention to another judgment of this Court in *Udhav Shankar v. Tarabai* (69 Bom LR 795) = (AIR 1968 Bom 308). It is a decision of Mr. Justice. Patel sitting singly and we are in respectful agreement with him on the point which was necessary to be decided on the facts of that case. The learned Judge held that in Section 14 (2) of the Act of 1956 the word "acquired" means acquired for the first time under any of the instruments there mentioned or under a decree. When the Hindu female has already by reason of law or otherwise an interest in the property, then she does not "acquire" any interest in it by reason of the instrument or the decree, and in that case the restriction imposed cannot be effective. However, in the last paragraph of his judgment the learned Judge has observed as follows: (page 796 of Bom LR) = (at page 309 of AIR):

"... In both these cases the husbands of the widows had died prior to the coming into force of the Hindu Women's Rights to Property Act, 1937, and on their husbands' death they had only a right of maintenance. In lieu of maintenance they were given a share in the properties with the restriction of their interest to their lifetime. Evidently, the interest was 'acquired' under the decrees of the Court."

These observations were made by the learned Judge with a view to distinguish the two cases which had been cited before him. The question with regard to property acquired in lieu of maintenance — whether it falls under sub-section (1) or sub-section (2) of Sec. 14 of the Act was not directly before the learned Judge in that case. The observations are, therefore, merely obiter. There is no full discussion also of the basis on which the learned Judge made those observations.

25. In the present case, there is a further reason to hold that *Hirabai* had not only a right to enforce her claim for maintenance against the family properties which was antecedent to the award, but she had also a sufficient possessory title to the lands. She was in possession of the lands after the death of her father-in-law and her husband. That gave her a possessory title which could not have been displaced by the coparcener without making proper arrangement for her maintenance. We have already referred in this connection to the decision in *Rani Bai's case* (AIR 1969 SC 1118). Therefore, even

if the narrow view of the Madras case in (AIR 1967 Mad 429) referred to above was the correct view, Hirabai would have a possessory lien sufficient to create an interest in the suit properties and she would, therefore, fall within sub-section (1) and not sub-section (2) of Section 14 of the Act. Mr. Shrikhande referred to the decision in *Eramma v. Veerupane* (AIR 1966 SC 1879) and contended that a widow in the joint family who had no proprietary interest in the joint family properties would be deemed to be a trespasser if not in possession with the consent of the coparceners. That case was not similar to the case of a widow who was in possession of the property in lieu of her maintenance. The widow therein claimed to be an heir by inheritance under Sections 6 and 8 of the Act although the provisions thereof did not apply to her. She maintained that she was the heir of the deceased and it was in that capacity that she claimed title. She also claimed that as she was in possession of the property at the time when the Act of 1956 came into force, she should be regarded as having enlarged her limited ownership into full ownership. Their Lordships in the first instance pointed out that she had no title by inheritance. On the other question, they held that in order that the widow may claim full title under sub-section (1) of Section 14 she must have some proprietary interest in the property however small it may be. They pointed out that the appellant before them did not show that in fact she possessed some vestige of title, her mere possession not being sufficient and that possession was held to be the possession of a trespasser. We do not think that that case has any application to the facts of the present case. There is nothing in the award before us to show that Hirabai was regarded as a trespasser when the award was made. Mere allegations and counter-allegations made in the pleadings before the arbitrator cannot be taken into account for the purpose of deciding now whether she was really a trespasser. Nemgonda in his plaint claimed the whole of the property as the last surviving coparcener and requested the arbitrator only to pay maintenance to Hirabai. This was countered by Hirabai by saying that she alone was entitled to the whole of the property and Nemgonda should be granted maintenance. The fact that both of them were saying that the other should get maintenance would go to show that the status of the joint family was not denied and the property also was claimed as joint family property. In a case like this, the position would be that Hirabai was in possession in exer-

cise of her possessory lien over the property as no provision had been made for her maintenance. In that view also sub-section (2) of Section 14 of the Act will have no application to this case. Dated The 14th October, 1970:

26. In the result, therefore, we hold that Hirabai who was in possession of the suit properties till the commencement of the Act, obtained full ownership over them thereafter, and, therefore, after her death in 1967 her daughters viz., the two plaintiffs and defendant No. 1, would be the owners of the said properties. Since defendants Nos. 2 to 6 are in possession of the properties after Hirabai's death, the plaintiffs and defendant No. 1 would be entitled to recover possession of the same from them.

27. The appeal, therefore, succeeds, the order passed by the learned Civil Judge, Senior Division, Kolhapur, is set aside and a decree is passed in favour of the plaintiffs and defendant No. 1 for possession of the suit properties from defendants Nos. 2 to 6. Inquiry to be made under Order 20, Rule 12 (1) (c), Civil P. C. for mesne profits from the date of the suit. The plaintiffs shall get their costs in both the Courts from defendants Nos. 2 to 6.

Appeal succeeds.

AIR 1972 BOMBAY 25 (V 59 C 4)

WAGLE, J.

Sahadu Bala Botra and another, Petitioners v. Namdeo Bapuji Karale and others, Opponents.

Special Civil Appln. No. 1133 of 1964, D/- 18-6-1970.

Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Section 84-A, Second Proviso — Transfer resulting in eviction — The expression "Any person other than the tenant in actual possession" does not include a group of persons which includes a tenant in possession. (para 6)

Where a land is transferred by a landlord jointly in favour of a group of persons one of whom is a tenant and others non-tenants and the tenancy is not terminated it would result in eviction of the tenant from the share purchased by non-tenants if the effect is given to the transaction. It would be a transaction in favour of any person other than the tenant in actual possession within the proviso and would be invalid. The fact of non-tenant making a joint purchase with tenant will not change his status as non-tenant and a validation certificate would not be

IO/JO/E791/71/MNT/G

issued to him under the section. AIR 1961 Raj 18, Dist. (Para 7) Cases Referred: Chronological Paras (1961) AIR 1961 Raj 18 (V 48) = 1960 Raj LW 219, Hari Pratap v. Ramgopal 7

Y. S. Chitale with D. K. Ghaisas, for Petitioners; M. V. Paranjpe with N. D. Hombalkar, for Opponents Nos. 1-A to 1-F and 2 to 4.

ORDER:— An interesting point of law that arises in this case is whether the expression "any person other than the tenant in actual possession" used in the second proviso to Section 84-A of the Tenancy Act would include a person other than a tenant jointly purchasing along with the tenant. The facts of this case which have led to this Special Civil Application are the following.

2. S. No. 59 of Sudawadi measuring about 106 acres belonged to the family of Natus which consisted of three branches. On December 18, 1948, an agreement was executed by two of the three branches, viz. Shankar and Harihar, for transfer of their one third share in the joint property to petitioner No. 1 and opponent No. 1. In pursuance of the agreement to sell, deeds of sale were executed on July 15, 1949 by Shankar and Harihar. Even vendor transferred his one-third share jointly in favour of petitioner No. 2 and Opponents Nos. 2 to 4 in one-half shares. Instead of the purchase being effected in the names of petitioner No. 1 and Opponent No. 1, it was effected in the names of their respective sons. The property, however, continued in the possession of the purchasers.

3. Civil Suit No. 158 of 1955 was filed by the present petitioners Nos. 1 and 2 against opponents Nos. 1 to 4 for partition and possession of their one-half share in the two thirds property purchased by them jointly. A contention was taken that the deeds were void under the Tenancy Act, as the purchase was effected by petitioner No. 1 and petitioner No. 2, neither of whom was a tenant. The petitioners, however, had taken up a contention that they were also the tenants. A reference was necessitated and the same was made by an order dated November 9, 1956.

4. In the reference, which was heard by the Revenue forum, petitioner No. 1 as well as opponent No. 1 were both held to be tenants. However, in Appeal No. 21 of 1957 decided on February 28, 1958, petitioner No. 1 was held to be a non-tenant. In order to validate the transaction, proceedings were taken by petitioner No. 1 on June 4, 1958, under Section 84-A for validation

of the transaction. Ultimately, the District Deputy Collector by his order dated April 21, 1962, held that since the transaction resulted in the eviction of a tenant, a validation certificate could not be issued. This decision was confirmed by the Maharashtra Revenue Tribunal on March 3, 1964. The present petition is filed by the two petitioners original plaintiffs challenging the orders of the District Deputy Collector and the Maharashtra Revenue Tribunal.

5. Mr. Chitale, who appears for the petitioners, contends that the provisions of Section 84-A have to be construed very strictly if the rights of a purchaser who has paid consideration have to be denied to him. According to Mr. Chitale, the provisions of the second proviso to Section 84-A of the Tenancy Act would not bar a validation certificate being issued to petitioner No. 2 for validating the transaction which was not valid when entered into. The proviso reads as follows:—

"Provided further that if any such transfer is made by the landlord in favour of any person other than the tenant in actual possession, and such transfer is made either after the unlawful eviction of such tenant, or results in the eviction of the tenant in actual possession; then, such transfer shall not be deemed to be validated....." I am not concerned with the rest of the proviso. The argument that was accepted by the District Deputy Collector and the Revenue Tribunal was that if the transaction was validated, then, in respect of one-half of two thirds, opponent No. 1, who was a tenant would be evicted. Both the authorities, therefore, held that the provisions of the second proviso squarely applied to the circumstances of this case. Mr. Chitale's argument, however, was that this would not be the correct position.

6. The expression "any person other than the tenant in actual possession" would not include a group of persons which includes the tenant in possession. If a group purchases the property and in the group one purchaser is a tenant in possession, then, according to Mr. Chitale, it cannot be urged that this is a transaction in favour of any person other than the tenant in possession. Since the possession is joint, each purchaser is entitled to contend that he has a share in the entire two-thirds purchased. Although his share may be delimited by one-half, still, since the property is held jointly, it cannot be held that the tenant is evicted from any particular piece of land out of the two thirds that was purchased. Mr. Chitale's argument, therefore, was that since the purchase was jointly made by some persons and

amongst those persons there was one person who was the tenant in possession, the provisions of the proviso would not apply in the circumstances of the case.

7. In support of his contention, Mr. Chitale cited a decision of the Rajasthan High Court in *Hari Pratap v. Ramgopal*, AIR 1961 Raj 18. In the Rajasthan case, the facts were that a tenant of a shop had taken it on lease from three landlords. After being the tenant, he purchased the interest of one landlord. The two landlords thereafter filed a suit for possession by terminating the tenancy. The claim made by the landlords was that they were the landlords and the defendant was a tenant. The defendant had taken on tenancy the shop. The tenancy having been terminated, the two out of the three landlords were entitled to get possession of the entire shop. Their claim was negated by the High Court which held that at best the two landlords would be entitled to joint possession of two thirds share of the shop along with the one-third which remained with the tenant. This case has no application to the facts of the instant case. The facts of the Rajasthan case make it clear that if at all the tenancy continued after the purchase of one-third share by the tenant himself, the tenancy could only operate on two-thirds. It was therefore, held that the two landlords could only obtain what they had rented out and they were not entitled to obtain possession of what was rented out by the third landlord. In the instant case, however, the facts are that a purchase is effected by one group. The group includes a tenant. There is no termination of a tenancy which continued in the name of opponent No. 1 in spite of the purchase made by opponents Nos. 2 to 4 of one-half of the two-thirds. If, therefore, one-half of the two-thirds has been purchased by a person who is a non-tenant and it would result in the eviction of the tenant, if effect is given to the transaction, the case falls squarely within the provisions of the proviso to Section 84-A. The fact that the purchase is made jointly by a tenant and a non-tenant does not give additional right to the non-tenant. His status continues to be that of a non-tenant in spite of the fact that he had made a joint purchase along with the tenant.

8. A further argument was advanced by Mr. Chitale that the tenancy in respect of the two-thirds portion had been terminated as can be seen from the contentions made by the defendants in the suit. In the written statement a contention is made as follows:—
 “प्रतिवादी हा सर्व जमिनीपैकी २/३ हिस्साचा मालक व १/३ हिस्साचा कूळ आहे.”

Great reliance was placed on this submission in the written statement on behalf of opponent No. 1 that since the opponents or the defendants had become the owners of that two-thirds, the tenancy had automatically come to an end. This argument apparently looks quite good. But the statement made in the written statement cannot be dissociated from the circumstances under which it is made. The contention of the defendants in the suit was that the purchase was wholly effected by the opponent No. 1 who had paid the entire consideration and that no consideration had proceeded from the petitioners or either of them. On the basis of this submission, a further submission was made that the defendants had become the owners of two thirds. The plaintiff's contention, however, is that they are the owners of one-third and the question under Section 84-A has got to be construed by reference to what the petitioners contend. If the petitioners' contention is correct and the suit can proceed only on the basis that the same is correct, then the petitioners are the owners of one-half of the two-thirds. If that is so, the possession of that one-half of the two-thirds would definitely evict opponent No. 1. The District Deputy Collector and the Revenue Tribunal rightly took the view that the provisions of the proviso to Section 84-A would apply to the facts of this case and a validation certificate could not be issued.

9. Rule discharged with costs.

Petition dismissed.

AIR 1972 BOMBAY 27 (V 59 C 5)

N. A. MODY AND G. N. VAIDYA, JJ.

The German Democratic Republic, Appellant v. The Dynamic Industrial Undertaking Ltd., Respondents.

Appeal No. 114 of 1970 (Suit No. 528 of 1969). D/- 16-10-1970.

(A) Civil P. C. (1908), S. 11 — Principle of *res judicata* — Earlier decision on Chamber Summons in suit refusing to try issues as preliminary does not operate as *res judicata* in subsequent proceedings on Notice of Motion in the same suit to dismiss suit in limine. (Para 13)

(B) Civil P. C. (1908), S. 11 — Principle of *res judicata* — Issue disposed of on its own merits, in the Notice of Motion will not be allowed to be re-agitated subsequently even if the hearing of the suit proceeds — Only way the issue can be re-agitated is by way of an appeal and not in the same suit.

(Para 13)

GO/IO/C916/71/VBB/G

(C) Civil P. C. (1908), S. 11 — Interlocutory order — What is — Order made on Notice of Motion not necessarily interlocutory — Order dismissing Notice of Motion filed by defendant disallowing prayer claiming immunity as foreign Independent State under International Law is not interlocutory but final.

An interlocutory order is an order by way of an aid to the proper adjudication of the claims and disputes arising in the suit itself, for example orders by way of receiver, injunction, issuing of a commission for examination of witnesses, discovery, inspection, etc. Such orders do not finally dispose of any dispute or claim in the suit itself. The mere fact that an order has been made on a Notice of Motion cannot by itself lead to the conclusion that the order is an interlocutory order. It is the relief asked for and the order made thereon which determines whether a particular order is or is not an interlocutory order. The normal procedure in the High Court of Bombay for asking for a decree on admission or for a decree on award is by way of a Notice of Motion. If a decree is in fact passed on such a Notice of Motion, it cannot be said that the Motion and the order thereon were interlocutory. They clearly are final.

(Para 14)

Where the relief asked for by the defendant in the notice of motion was dismissal of the suit in limine on the ground of immunity of the defendant as a foreign Sovereign State under International Law, the order rejecting the prayer in dismissing the Notice of Motion is not an interlocutory order but final order.

(Para 14)

(D) Letters Patent (Bom.), Cl. 15 — 'Judgment' — Order in the Notice of Motion in the suit filed on the Original Side of Bombay High Court refusing defendant's claim to immunity as foreign Sovereign State and want of jurisdiction against it is a judgment within Cl. 15 and is therefore appealable.

(Para 25)

The defendant as a result will be compelled to enter upon its defence on the merits of the cause of action and claim made in the suit. The defendant's claim to immunity has been finally negatived.

(Para 25)

A decision can, in certain circumstances, be a "judgment" and therefore appealable even if it affects an independent contention raised by the defendant, a contention which does not at all concern or raise a dispute about any part of the plaintiff's cause of action or claim in the suit. (1872) 8 Beng LR 433 & (1874) 13 Beng LR 91 & AIR 1933 Bom 85 & AIR 1953 Bom 117 & AIR 1957 Cal 727 & AIR 1953 SC 198 & AIR 1926 Bom 136 & AIR 1966 Cal 319 (FB), Ref.

(Para 24)

(E) Civil P. C. (1908), Ss. 86, 87-A, 151 — Suit on Original Side of Bombay High Court — Claim by defendant to immunity from being sued in municipal courts as foreign Sovereign State — Procedure — Question can be raised on Notice of Motion — (X-Ref:— International Law — Private).

Although there is no specific procedure provided for a claim to immunity as a foreign Sovereign State in the Code of Civil Procedure or in the Original Side Rules of the Bombay High Court, basically it is necessary that a claim to immunity should be decided at the earliest opportunity and that the party who makes such a claim should have an opportunity to "move" the Court, i.e. apply to the court, for such an early decision.

(Para 29)

The only procedure by which the defendant could make and get an opportunity to establish its claim to immunity so far as the Original Side of the High Court of Bombay is concerned, would be by way of a Notice of Motion.

(Para 29)

The procedure by way of a Notice of Motion can be held to be the correct procedure by the Court even under its inherent powers under Section 151, Civil P. C. AIR 1932 Bom 271 & AIR 1966 Cal 319 (FB), Rel. on.

(Para 29)

The fact that the defendant has filed its written statement does not by itself make any difference. A foreign Sovereign State which claims such immunity need not file any written statement at all till the claim for immunity, if raised, has been adjudicated upon and rejected.

(Para 29)

(F) Civil P. C. (1908), Ss. 86, 87-A — Doctrine of immunity of foreign Sovereign State from being sued in municipal courts under International Law — Principles apply in India but as modified by S. 86 — (X-Ref:— International Law (Private)).

A foreign Sovereign State is entitled to immunity from being sued in municipal courts under the principles of International Law. The principles of International Law would be applicable in India, but in its application Section 86 creates an exception. In International Law the immunity is absolute, subject only to the exception or exceptions recognised in International Law, one of such exceptions being when the foreign Sovereign State waives the privilege of immunity. Section 86 creates another exception, the exception being where the requisite consent is given by the Government of India as provided under Section 86. But the provisions of Section 86 would to that extent operate as another exception and to that extent modify the principles of International Law. But

subject to such exception the relevant principle of International Law would still be applicable in India. AIR 1966 SC 230, Foll; (1921) 3 KB 532 & 1924 AC 797 & 1939 AC 256 & (1967) 1 AC 853 & AIR 1962 SC 797, Ref.; Observations that principles of International Law have no application whatever in India in AIR 1966 Cal 319 (FB) held overruled by AIR 1966 SC 230. (Para 49)

The doctrine has yet not been curtailed in England to exclude its applicability to commercial transactions. If the doctrine which is well established for over a large number of years requires, in view of changed circumstances, to be at all modified in India, it is highly desirable that the Supreme Court as the highest Court of the land should, in a proper case, lay down the principles. (Para 43)

The Court should obtain the necessary information about recognition of a foreign Sovereign State, whether de facto or de jure, from the Government of India. The Court has to reach a decision on the relevant information made available to the Court by the Government of our country. (Para 36)

The recognition, de jure or de facto, has the same value for the purpose of deciding whether a particular foreign State is a Sovereign State and is entitled to immunity under International Law or not. Order of Vimadalal, J. dated 18-9-1970 on Notice of Motion dated 14-8-1970 Reversed. (Para 47)

Cases Referred: Chronological Paras

- (1967) (1967) 1 AC 853, Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) 35
- (1966) AIR 1966 SC 230 (V 53) = (1966) 1 SCR 319, Mirza Ali Akbar Kashni v. The United Arab Republic. 49
- (1966) AIR 1966 Cal 319 (V 53) = 69 Cal WN 767 (FB), Royal Nepal Airline Corporation v. Mono Rama Mehar Singh 24, 29, 43, 49
- (1964) AIR 1964 SC 993 (V 51) = (1964) 5 SCR 946, Arjun Singh v. Mohindra Singh. 13
- (1962) AIR 1962 SC 797 (V 49) = (1962) 2 SCA 401, N. Masthan Sahib v. Chief Commr., Pondicherry 38
- (1960) AIR 1960 SC 941 (V 47) = (1960) 3 SCR 590, Satyadhyam Ghosal v. Deorajin Debi 13
- (1957) AIR 1957 Cal 727 (V 44) = 61 Cal WN 129, Shorab Merwanji Modi v. Mansata Film Distributors 20
- (1953) AIR 1953 SC 198 (V 40) = 1953 SCR 1159, Ashrumati Debi v. Rupendra Deb 21

- (1953) AIR 1953 Bom 117 (V 40) = 54 Bom LR 844, Jai Hind Iron Mart v. Tulsiram Bhagwandas 19
- (1939) 1939 AC 256 = (1939) 1 All ER 719, Spain Republic v. Arantzazu Mendi 34, 39
- (1933) AIR 1933 Bom 85 (V 20) = 35 Bom LR 15, Jivanlal Narsi v. Pirojshaw R. Vakharia 18
- (1932) AIR 1932 Bom 271 (V 19) = 34 Bom LR 714, B. Mohanlal and Co. v. Yolibai 29
- (1926) AIR 1926 Bom 136 (V 13) = 27 Bom LR 1496, Govardhan Lalji v. Chandraprabhavati 22
- (1924) 1924 AC 797 = 93 LJCH 343, Duff Development Co. v. Kelantan Government 32, 39
- (1921) 3 KB 532 = 90 LJKB 1202, Aksionairnoye Obschesloy A. M. Luther v. James Sagor and Co. 31
- (1897) ILR 21 Bom 351, Chandulal Khushalji v. Awad 49
- (1874) 13 Beng LR 91 = 21 WR 303, Hadjee Ismail Radjee Hubbee Hubeeb v. Hadjee Mahomed Hadjee Joosub 17, 74
- (1872) 8 Beng LR 433 = 17 WR 364 The Justices of the Peace v. The Oriental Gas Company 16

M. P. Amin with Rajani Patel, Suresh Parekh, P. R. Mridul and P. M. Amin I/b. M/s. Khambatta and Nalin Kapadia Attorneys, for Appellants; F. S. Nariman with N. D. Vyasa I/b. M/s. Mulla and Mulla Craige Blunt and Caroe Attorneys, for Respondents.

MODY, J.:— (14th Oct. 1970): This is an appeal against the Order of Vimadalal, J. dt. 18th September 1970 passed by him on the Notice of Motion dated 14th August 1970 dismissing the Notice of Motion.

2. The suit in which the Notice of Motion was taken out was filed on 5th June 1969. The plaintiffs are a company carrying on business in Fertilizers. There are three defendants to the suit. It is stated in the plaint that the first defendant is a body corporate controlled by and/or is a department of the second defendant. The second defendant is the German Democratic Republic. The third defendant is a Bank and is not directly concerned in the Notice of Motion. The plaintiffs entered into two contracts in writing with the first defendant for sale and supply of certain goods as more particularly mentioned in the two contracts. It is stated in the plaint, as also in the main contracts, that the same were within the frame work of the Trade Agreement dated 18th December 1959 between the Government of the 2nd defendant and the Government of India. It is further averred in the plaint that there was an implied term of each of the two contracts that any agreement which may

subsequently be arrived at between the Government of India and the 2nd defendant in connection with the exports from the 2nd defendant to India and from India to the second defendant under the Trade Agreement would be binding between the plaintiffs and the first defendant. The plaintiffs claim by this suit from the first and 2nd defendants a sum of over Rs. 20,00,000/- as and by way of payment of the balance of the price payable to the plaintiffs. Although the contracts were entered into between the plaintiffs and the 1st defendant, the plaintiffs seek to make the 2nd defendant liable on the ground that the first defendant was merely a Department of the second defendant.

3. After the Writ of Summons was served on the second defendant, the second defendant filed an appearance in the suit specifically stating therein that it was under protest. Thereafter the second defendant filed its written statement. It is stated in the first paragraph of the written statement that the second defendant has filed the written statement under protest and without prejudice to the rights and the contention of the second defendant that this Court had no jurisdiction to try or entertain or dispose of the suit against the second defendant for the reasons therein stated. The reasons stated are that the second defendant is a Sovereign Independent State and that all Sovereign States are subject to International Law and enjoy immunity according to the general principles of International Law. It is further stated in the written statement that for many years the Government of India has treated the second defendant as a Sovereign Independent State and has continued to do so and that since the year 1954 there have been several Trade Agreements between the Government of India and the Government of the second defendant. It is further stated that in order to look after certain commercial interests of the Government of India in the second defendant it was agreed that if and when a Trade Representative is appointed he will enjoy the same rights and privileges that are accorded to the Trade Representation of the second defendant in India and that in pursuance of that agreement a Trade Representation of the second defendant was set up in India and that it continues to enjoy diplomatic privileges of cypher and mail bag, as also certain other privileges. Later in the written statement, in its paragraphs 10 and 11, it is stated that the suit having been filed without prior consent of the Government of India as contemplated under Section 86 of the Code of Civil Procedure, the suit against the second defendant is liable to be dismissed.

After taking such preliminary objections and after again specifically stating that in the event of the Court holding that the second defendant was not immune from the process of this Court, the written statement contains averments on the facts and submissions contained in the plaint. In support of its claim for immunity under International Law, the Written Statement relies upon certain Statements made by three Prime Ministers of India, being Pandit Jawaharlal Nehru, Lal Bahadur Shastri and Mrs. Indira Gandhi. The first is a statement made by Jawaharlal Nehru on 17th August 1961 in the Lok Sabha, as appearing from the "Lok Sabha Debates" to the effect that "India had trade relations with the East German Government that de facto India recognised it and that they have got a Trade Representative in India and that India is dealing with them in many ways." The second is also a Statement made by Pandit Jawaharlal Nehru on 2nd September 1961 as appearing in "Jawaharlal Nehru's Speeches", Volume Four, to the effect that it seemed to him obvious that certain facts of life should be recognised, that there are two independent entities; the Government of the Federal Republic of Germany and the Government of the German Democratic Republic. The same position was reiterated by Lal Bahadur Shastri in the Indo-Soviet Communique issued by him jointly with his Soviet counterpart, specifically stating that at that time the fact of the existence of the two German States could not be ignored. The same position was again re-affirmed in the Indo-Soviet Communique dated 16th July 1966 to which Mrs. Indira Gandhi was one of the two parties.

4. Thereafter the second defendant took out a Chamber Summons dated 10th March 1970 praying for an order that the issues mentioned in the Schedule "A" to that Summons, with or without modifications, be tried and determined as preliminary issues so far as the second defendant was concerned and a date may be fixed for hearing of the preliminary issues. The four issues mentioned in the said Schedule "A" are:—

(1) Whether the defendant No. 2 enjoys immunity according to the general principles of International Law?

(2) If the answer to the first issue is in affirmative, then, whether this Honourable Court has jurisdiction to try or entertain or dispose of the suit?

(3) Whether the suit against the defendant No. 2 is barred by the provisions of Section 86 of the Code of Civil Procedure?

(4) If the answer to issue No. 3 is in affirmative, whether this Honourable

Court has jurisdiction to try or entertain or dispose of the suit?"

5. By his order dated 16th March 1970 Kantawala, J. dismissed that Chamber Summons. The second defendant's appeal against that order was dismissed by the Appellate Court on 6th July 1970 on the ground that the order of dismissal of the Chamber Summons was not a judgment within the meaning of Cl. 15 of the Letters Patent of this Hon'ble Court and was therefore not appealable.

6. Thereafter the second defendant took out a Notice of Motion dated 14th August 1970, the two substantive reliefs prayed for therein being—

"(a) That the suit herein filed by the plaintiffs against the defendant No. 2 be dismissed;

(b) In the alternative to prayer (a) above this Honourable Court would be pleased to pass an order that the issues mentioned in Schedule 'A' herein with or without modification be tried and determined as preliminary issues as far as defendant No. 2 is concerned."

The issues in the said Annexure "A" are the same identical four issues which were mentioned in the Annexure "A" to the said Chamber Summons and which we have re-produced above in our judgment.

7. To the affidavit in support of that Notice of Motion is annexed a copy of the letter dated 1st April 1970 addressed by the Attorneys of the second defendant to the Secretary, Ministry of External Affairs, Government of India, New Delhi. The letter referred to the present suit and the second defendant's contention about its immunity under International Law as well as under Section 86 of the Code of Civil Procedure and requests for answers to the two questions mentioned in that letter. The first question was whether, inter alia, the plaintiffs in this suit had made any application to the Government of India under the said Section 86 for filing this suit and what was the answer given by the Government of India. The second question was whether the German Democratic Republic was recognised de facto by the Government of India. There is also annexed to the affidavit a copy of the letter dated 1st August 1970 which is a letter in reply to the said letter dated 1st April 1970. The reply states:

"This is to certify that the Government of India has de facto relations with the German Democratic Republic. Accordingly that Government should enjoy immunity from jurisdiction of the local courts in suits and other proceedings similar to those enjoyed by any other Government, unless that Government has expressly waived its immunity."

The letter is addressed from the Legal and Treaties Division of the Ministry of External Affairs, Government of India, New Delhi, and bears the signature "K. K. Chopra", the Law Officer in that Department. The affidavit states that on 3rd August 1970 Mr. Swaran Singh, the Minister of External Affairs, Government of India, had, inter alia, made an announcement in the Parliament as follows:—

"The stage has now come when we feel that our growing economic, commercial and cultural relations should be reflected officially by the establishment of consular relations."

8. In the affidavit in reply filed on behalf of the plaintiffs on that Notice of Motion it was contended that the certificate dated 1st August 1970 purported to be issued by Mr. K. K. Chopra was not issued by or on behalf of the Government of India and that in any event it was not a certificate of which judicial notices can at all be taken and that the certificate went no further than the said statements made by Pandit Jawaharlal Nehru.

9. In view of the said contention raised in the plaintiffs' affidavit in reply about the said certificate dated 1st August 1970, the second defendant obtained another certificate dated 15th September 1970 and annexed a copy of it to its affidavit in rejoinder. The certificate shows that it was issued by the Under Secretary, Ministry of External Affairs, Government of India, over the signature of Mr. Girish Dhume as Under Secretary. The certificate states that it was in continuation of the said certificate dated 1st August 1970 of Mr. K. K. Chopra, the Law Officer of that Ministry, and that Mr. Girish Dhume was directed on behalf of the Government of India to certify that the Government of India had and continues to have de facto relations with the German Democratic Republic and that accordingly that Government should enjoy immunity from jurisdiction of the local courts in suits and other proceedings similar to those enjoyed by any other Government unless that Government has expressly waived its immunity. To that affidavit in rejoinder is annexed another letter dated 18th August 1970 from the Foreign Secretary, Ministry of External Affairs, New Delhi, to the Consulate General of the second defendant, New Delhi. It states that following the establishment of the Consulate General of the second defendant in India at New Delhi all the appropriate authorities in India were being informed about the change in the status of the Regional Trade Representation of the second de-

fendant at Bombay, Calcutta and Madras to that of Consulates of the second defendant and about the appointment of Mr. Herbert Fischer as their Consul General at New Delhi. It further states that the Government of India presumed that necessary facilities would be accorded for the establishment of an equal number of Indian Consulates in the German Democratic Republic on a reciprocal basis as and when the Government of India decided to establish such Consulates.

10. As stated earlier, Vimadala, J. by his said order under appeal dismissed the Notice of Motion.

11. It is necessary to bear in mind the exact applications made by the Notice of Motion and the contents of the order made thereon. Before the Notice of Motion was taken out, an application had been made by the earlier Chamber Summons for the trial of the same four issues again repeated in the Notice of Motion as preliminary issues. The four issues divide themselves into two groups, issues Nos. 1 and 2 relating to the claim for immunity under International Law and issues Nos. 3 and 4 relating to the contention for dismissal of the suit in view of the provisions of Section 86 of the Code of Civil Procedure. That Chamber Summons had been dismissed, as also the second defendant's appeal in respect of the same. In view of those facts the same relief was again asked for by the Notice of Motion, but as prayer (b) thereof and in the alternative to prayer (a). It is clear that prayer (a) was made to predominate over prayer (b). By prayer (a) the 2nd defendant invited the court to dismiss the plaintiffs' suit. Prayer (a) was a new prayer and distinct from prayer (b). The object sought to be achieved by each of those two prayers (a) and (b) was similar, but there was a little distinction which should not go unnoticed. Prayer (b) only sought that the four issues be tried as preliminary issues and made an application for fixation of the date of such trial of preliminary issues. If either of the two groups of issues were tried as preliminary issues and either of them succeeded, the second defendant would achieve its object of having the entire suit dismissed as against itself. But that would happen only if and when the four issues were ordered to be tried as preliminary issues and were actually tried as such. But such a result depended on the issues being tried as preliminary issues. Prayer (a) went a step further and invited the Courts to dismiss the suit as against the second defendant at the stage of the Notice of Motion itself, in limine, without raising any preliminary issues.

(15th October 1970).

12. This distinction between the two prayers will have to be borne in mind when considering the arguments advanced before us in this appeal.

13. Mr. Nariman, the learned Counsel for the respondents, raised a preliminary objection, the same being that no appeal lies because of two grounds: The first ground is that on a construction of the Order under appeal, the Order does not dispose of prayer (a) and that prayer (a) is yet to be decided. The second ground is that the Order under appeal is not a "judgment" within the meaning of Cl. 15 of the Letters Patent and that it is therefore not appealable. In order to appreciate these two contentions it is necessary to know the exact phraseology of the Order under appeal. It is as follows:—

"Notice of Motion dismissed with costs on two grounds:—

(i) It is barred by the principles of *res judicata* in view of the order passed by Kantawala, J. on 16-3-1970 (AIR 1960 SC 941 and AIR 1964 SC 993). In my opinion, there are no new facts which would make the principles of *res judicata* inapplicable.

(ii) Even if the subsequent correspondence now relied upon is taken to be in the nature of 'new facts' the same do not disclose any clear recognition of the 2nd defendant within the terms of Section 87-A (1) (a) of the Civil P. C., and the question still remains a question of fact, in regard to which, it is well settled, no preliminary issues can be framed or tried."

The operative part of the Order makes it clear that what is dismissed is the entire Notice of Motion, which would include both prayers (a) and (b). It is true, as pointed out by Mr. Nariman, that if the said four issues were to be tried either as issues in the suit itself or even as preliminary issues, a regular hearing would have to take place and it would have been open to the parties to lead such evidence as they wanted to. But so far as the first two of the said four issues are concerned, both prayers, prayer (b) as well as prayer (a), concern the same (relief) (sic). Prayer (b) was merely for a direction that the first two issues be tried as preliminary issues and for fixing a date of hearing for that purpose. But, as seen earlier, prayer (a) is, in a sense, totally different. Prayer (a) does not seek the decision of the first two issues as preliminary issues, but invites the Court in limine to dismiss the suit at the stage of the hearing of the Notice of Motion itself without the raising of any issues or trying any of them as a preliminary issue. Now the first ground stated by the learned Judge in support

of his order is that the Notice of Motion was barred by the principles of *res judicata* in view of the orders made on the Chamber Summons and in the appeal against that Order. An analysis of these two orders on the Chamber Summons shows that the second defendant's application for trial of the four issues as preliminary issues was rejected. Prayer (b) sought to re-agitate for the same relief and it was held to be barred by *res judicata*. Prayer (a), however, was different. The earlier decision on the Chamber Summons was a refusal to try these issues as preliminary issues. It did not deal with the point as to whether the suit should be dismissed in limine. As a matter of fact no such application had been made. That being the position, it would be erroneous to say that prayer (a) was barred by the principles of *res judicata*. Prayer (a) had therefore to be disposed of on its own merits. The result, however, of the dismissal of prayer (a) of the Notice of Motion now is that that application has been heard on the Notice of Motion and disposed of. Even if the hearing of the suit proceeds, the said issues Nos. 1 and 2 will be deemed to have been disposed of on the Notice of Motion itself and will not be allowed to be re-agitated at the hearing. The effect of the order dismissing prayer (a) is therefore, that so far as the suit is concerned, the claim of the second defendant to immunity as a foreign Sovereign State has been finally disposed of and the only way the second defendant can agitate the same is by way of an appeal and certainly not in the suit itself.

14. Mr. Nariman also contended that the Order under appeal is an interlocutory order. In our opinion, there is no substance in this contention. An interlocutory order is an order by way of an aid to the proper adjudication of the claims and disputes arising in the suit itself, for example, orders by way of receiver, injunction, issuing of a commission for examination of witnesses, discovery, inspection, etc. Such orders do not finally dispose of any dispute or claim in the suit itself. This entire contention of Mr. Nariman appears to originate in the fact that the order has been made on a Notice of Motion. In our opinion, the mere fact that an order has been made on a Notice of Motion cannot by itself lead to the conclusion that the order is an interlocutory order. It is the relief asked for and the order made thereon which determines whether a particular order is or is not an interlocutory order. The normal procedure in this High Court for asking for a decree on admission or for a decree on award is by way of a Notice of Motion. If a decree is in fact passed on such a Notice

of Motion, it cannot be said that the Motion and the order thereon were interlocutory. They clearly are final. Therefore, looking to the nature of the relief asked for by prayer (a) and the order made thereon, it is clear that the second defendant's claim to immunity has been finally disposed of so far as the hearing of the suit itself is concerned. It now remains to be considered whether the order under appeal is a "judgment" within the meaning of Cl. 15 of the Letters Patent and is therefore appealable.

15. So far as the order disposing of prayer (b) is concerned, the order is identical to that made on the Chamber Summons. In the appeal filed against that order it has already been held by a Division Bench that it is not a judgment and is therefore not appealable. That judgment is binding upon us. We must therefore hold that the order dismissing prayer (b) is for the same reasons not appealable. There is, however, another point of view from which the order dismissing prayer (b) can be looked at. The learned Judge has dismissed prayer (b) on the ground that it is *res judicata*. That aspect has, however, not been pressed into service by either party and we need not therefore consider the same. We, therefore, hold that the order dismissing prayer (b) is not a "judgment" and is therefore not appealable. The consideration of the preliminary objection that the order is not appealable must, therefore, be confined to the extent that it dismisses prayer (a).

16. The order under appeal has been passed by a Single Judge of this High Court sitting on the Original Side. In order to be appealable, that order must amount to a "judgment" within the meaning of Cl. 15 of the Letters Patent of this High Court. A similar provision appears in the Letters Patent of various High Courts in India and there is a wide divergence of opinion between different High Courts as to the interpretation of that word "judgment." As far back as in 1872, in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Company*, (1872) 8 Beng LR 433, the Chief Justice Sir Richard Couch said:

"We think that 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

17. The interpretation of that word "judgment" again arose before the same High Court a couple of years

later in *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*, (1874) 13 Beng LR 91. The order which fell for consideration in that case was an order refusing to rescind leave granted under Cl 12 of the Letters Patent. The order was held to be a "judgment" because it went to the whole subject-matter of the suit and decided whether the suit was to go on or not. These two judgments and interpretation put on the word "judgment" by the Calcutta High Court has consistently been followed in this High Court upto now. Some other High Courts have, however, put a different interpretation on the word "judgment", but in view of the Calcutta High Court and this High Court having taken the view which they have taken for such a long time, it is not necessary to refer to the judgments of other High Courts taking any other view.

18. In *Jivanlal v. P. R. Vakharia and Co.*, AIR 1933 Bom 85, a Division Bench of this High Court held that the decision of a Judge under Section 10 of the Code of Civil Procedure is a "judgment" within Cl. 15 as it was not a mere order relating to the procedure in the suit and as it affected the question whether the Court had jurisdiction to entertain a suit which involved a determination of a right of a party who might be adversely affected if the court determined that it had jurisdiction and that it was therefore appealable as a "judgment" under Cl. 15. Apart from saying that it was not a procedural order, the test adopted was that the question involved was whether the court had jurisdiction to entertain the suit, and secondly, that it would involve the determination of the party's right adversely affected by it. If the order for stay was granted, the party's right to litigate that suit in the court in which it was filed would get stayed as provided for under Section 10 of the Code of Civil Procedure. It therefore affected the party's right to proceed or not to proceed with the suit before the forum in which it was filed.

19. The same point arose for consideration before a Division Bench of this High Court in *Jai Hind Iron Mart v. Tulsiram*, 54 Bom LR 844 = (AIR 1953 Bom 117). It was held that an order refusing stay under Section 10 of the Code of Civil Procedure is a "judgment" and therefore appealable under Cl. 15 on the same ground, viz., that the order was not merely procedural, but was an order dealing with the jurisdiction of the Court.

20. Later on the identical point arose before the Calcutta High Court and a Division Bench of that High Court in *Sohrab Modi v. Mansata Film Distributors*, AIR 1957 Cal 727, held that an order refusing stay of a suit under Sec-

tion 10 of the Code of Civil Procedure was appealable as a "judgment" under Cl. 15 because it affected the question of jurisdiction of the court to entertain or proceed with a suit or proceeding and the decision on that question affected the merits of the controversy between the parties because an order refusing to stay involved assumption of jurisdiction and in so far as it negated the defendant's contention that the suit cannot be proceeded with and upheld the plaintiff's claim that the suit must proceed, it affected the merits of a part of the controversy between the parties, the particular controversy being a controversy in the suit as to where the subject-matter should be tried.

21. In *Ashrumati Debi v. Rupendra Deb*, AIR 1953 SC 198, an occasion arose for the Supreme Court to interpret the word "judgment" as occurring in Cl. 15 of the Letters Patent of the Calcutta High Court. The order which fell for consideration before the Supreme Court was an order for transfer of a suit under Cl. 13 of the Letters Patent. It was held that such an order for transfer neither affected the merits of the controversy between the parties to the suit itself, nor did it terminate or dispose of the suit on any ground and that it was therefore not a "judgment" and not appealable. The divergent views of the different High Courts as to the interpretation of the word "judgment" were pointed out in that case before the Supreme Court, but after referring to some of them the Supreme Court has rested content by deciding the particular case which arose before it without laying down any general interpretation which directly or impliedly resolves such divergence of opinion between different High Courts. In our opinion, therefore, the earlier judgments of this High Court on the point continue to apply with full effect without in any way being doubted or shaken by this particular judgment of the Supreme Court.

22. Mr. Nariman, however, relied upon a judgment of a Division Bench of this High Court in *Govardhan Lalji v. Chandraprabhavati*, 27 Bom LR 1496 = (AIR 1926 Bom 136). In the judgment delivered by him on behalf of the Bench Macleod, C. J. has, after considering certain judgments cited before him, observed:—

"After considering very carefully what was set forward as a definition of 'judgment' in that case, I prefer myself to consider each decision as it comes before me, and to form my own opinion whether it is a judgment or not for the purpose of deciding whether an appeal lies."

This remark occurring in this very judgment, as also a perusal of the judgment generally, show that the decision in that case was confined to the facts of that case and cannot be of any assistance by way of yielding a principle for determination of the meaning of "judgment" as it occurs in Cl. 15.

23. The ratio of the three above decisions holding that an order refusing to stay a suit under Section 10 is a "judgment" is that the decision refusing to stay affected the merits of a part of the controversy between the parties and finally decided the question as to jurisdiction of the court. The point to notice is that the order refusing stay did not concern any controversy as to procedure in the suit and what is more, it did not dispose of any dispute raised by the defendant as to the facts constituting the plaintiff's cause of action or any claim made by the plaintiff in the suit. The defendant's application for stay totally bypassed any contention as to the cause of action and the claim of the plaintiff in the suit. These three decisions are instances where what was in controversy between the parties and what was decided by the order under appeal in each of them, did not concern the plaintiff's cause of action or claim in the suit, but concerned a totally independent contention urged by the defendant as to whether the suit should at all be allowed to be proceeded with. We have, therefore, not referred to the decisions of the Calcutta High Court or of this Court which have determined the meaning of "judgment" from other view points, for example, as to whether the decision partly or wholly decided the case or finally decided only a part of the plaintiff's claim in suit because what was considered was the plaintiff's claim and whether it was wholly or partly decided or whether it was finally decided or not.

24. A decision can, in certain circumstances, be a "judgment" and therefore appealable even if it affects an independent contention raised by the defendant, a contention which does not at all concern or raise a dispute about any part of the plaintiff's cause of action or claim in the suit. As a matter of fact, the point decided in the said case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*, (1874) 13 Beng LR 91, was that an order refusing to revoke the leave granted under Cl. 12 of the Letters Patent was a "judgment" and the ratio was that it was appealable as it affected the jurisdiction of the court. Similar was the position in the case of *R. N. Airline Corpn. v. Manorama*, AIR 1966 Cal 319. It was an appeal against an order of a Single Judge of the Calcutta High Court refusing the defen-

dant's application for dismissal of the suit made on the ground that the court had no jurisdiction to entertain the suit because of the Sovereign immunity claimed by the defendant Corporation as a department of a foreign Sovereign State, and the Appellate Court held that as the judgment under appeal had determined a right or liability affecting the merits of the controversy between the parties and as the decision affected the whole subject-matter of the suit and decided the question whether the suit was to go on or not, it was a "judgment" within the meaning of Cl. 15.

25. In the case before us the position is identical as that in the last case referred to decided by the Calcutta High Court. The point decided by the refusal of prayer (a) on the Notice of Motion is, as noticed earlier, that the second defendant's claim as to immunity and want of jurisdiction against it has been finally disposed of adversely to the second defendant. The second defendant, as a result, will be compelled to enter upon its defence on the merits of the cause of action and claim made in the suit. The second defendant's claim to immunity has been finally negated. It is, therefore, in our opinion, a "judgment" within the meaning of Cl. 15 of the Letters Patent and is therefore appealable.

26. Mr. Amin, the learned Counsel for the second defendant, contended that the second defendant is entitled to immunity as a foreign Sovereign State, firstly, under the principles of International Law and, secondly, in view of the provisions of Section 86 of the Code of Civil Procedure.

27. So far as the second claim under Section 86 is concerned, it was sought to be tried as preliminary issues, being issues Nos. 3 and 4 of the four issues referred to earlier. The Chamber Summons making that application was dismissed and so was the appeal filed against the same dismissed. Prayer (b) of the Notice of Motion in so far as it concerns the said issues Nos. 3 and 4 is identical. The effect of the order of dismissal of the Chamber Summons and the appeal against the order thereon is that those two issues will have to be dealt with at the hearing of the suit. The Notice of Motion merely repeats that prayer and as no appeal lies against the order dismissing that prayer, we hold that it is not competent for the second defendant to again agitate it in this appeal against the order passed on the Notice of Motion. The result is that what remains to be considered in this appeal is the claim for immunity as made by the 2nd defendant in prayer (a) of the Notice of Motion.

28. In respect of this contention which survives for our determination Mr. Nariman advanced two contentions. The first was that it is an issue in the suit itself and that it was not competent to the second defendant to raise the point and invite its decision on a Notice of Motion. His second contention was that in view of the provisions of Section 86 of the Code of Civil Procedure, the privilege of claiming immunity as a foreign Sovereign State, even to the extent that may be available under the principles of International Law, is not available in India.

29. So far as the first contention of Mr. Nariman is concerned, he argued that even the claim for absolute immunity under International Law can be tried only at the hearing of the suit as there is no procedure in India permitting it to be tried otherwise. He pointed out that in England a specific procedure is provided for under O. 22, R. 8, of the Supreme Court Rules as applicable in 1970, the corresponding provision prior thereto being contained in O. 22, R. 30. He pointed out that the procedure so provided is by way of an application to set aside the Writ. Now it is true that there is no specific provision in India corresponding to the said provision in England either in the Code of Civil Procedure or in the Rules of this Court applicable on its Original Side. Procedural rules are, however, only to secure a fair and orderly determination of claims to substantive rights, whether made in a suit or in any other legal proceeding. In the matter before us the second defendant claims immunity from being sued in this court. That claim is a claim to a substantive right. From the nature of things it is obvious that it is necessary to decide that claim first as, if that claim is upheld, it would obviate the necessity of the second defendant being compelled to defend the suit on other points and having to undergo all the procedure like discovery, inspection, participating at the trial by cross-examination and leading its own evidence and possibly an appeal or appeals thereafter against the decision in the suit. It is true that the second defendant has in fact filed its written statement and the claim for immunity has been made in it at the forefront. The point about waiver of the immunity has not been advanced. Now the fact that the second defendant has filed its written statement does not, by itself, so far as this point is concerned, make any difference. A foreign Sovereign State which claims such immunity need not file any written statement at all till the claim for immunity, if raised, has been adjudicated upon and rejected. Although there is no specific procedure provided in the

Code of Civil Procedure or in the Original Side Rules of this Court basically it is necessary that a claim to immunity should be decided at the earliest opportunity and that the party who makes such a claim should have an opportunity to "move" the Court, i.e., apply to the court, for such a early decision. Now a Notice of Motion means, as the very phrase indicates, that a person gives notice to all the concerned parties that the applicant, who usually is, though not necessarily so, a party to the suit intends to make a "motion", i.e., "move" the Court for the reliefs mentioned in the notice which is given. Some applications are permitted under the Original Side Rules to be made if they are of the nature specified in Rule 89 by way of a Chamber Summons. Applications not falling within the items specified in R. 89 must, if the suit or legal proceeding in which they are to be made is not on a daily board, be made in open court and the only procedure followed in the High Court for making such an application is by way of a notice of motion. There are provisions in the original Side Rules which mention specifically some of such applications as having to be made by way of a notice of motion, as, for example, receiver, injunction, decree on award, etc. Such provisions requiring the procedure of a Notice of Motion are, however, not exhaustive. By long practice many other applications like, for example, those for recording a compromise, for a decree on admission, for setting aside a decree, for committal for contempt of court and a host of others are made by way of Notices of Motion. Justice requires that the 2nd defendant should be allowed to apply for an early determination of its claim for immunity in order to avoid the necessity of defending the claims made in the suit as mentioned earlier. In our opinion, therefore, the only procedure by which the 2nd defendant could make and get an opportunity to establish its claim to immunity so far as the Original Side of this High Court is concerned, would be by way of a Notice of Motion. We, therefore, hold that the procedure by way of a Notice of Motion adopted in this case by the 2nd defendant was the correct procedure. But it may be stated that even if we had reached a contrary conclusion, we would have yet held the procedure to be correct in the exercise of our inherent powers under Section 151 of the Code of Civil Procedure. The judgment in *B. Mohanlal & Co. v. A. Yolibai*, 34 Bom LR 714 = (AIR 1932 Bom 271) is an authority for the proposition that where the rules of procedure do not provide for any specific procedure to be followed, the procedure by way of a Notice of Motion

can be held to be the correct procedure by the Court under its inherent powers under Section 151 of the Code of Civil Procedure. A similar view was also taken by a Full Bench of the Calcutta High Court in AIR 1966 Cal 319 where it was held that although there is no provision in the Code for the foreign Government entering a conditional appearance to the suit as is provided for in the Supreme Court Rules in England, nor is there provision in the Code of Civil Procedure for giving notice of motion for an order that the Writ should be set aside on the ground that it had impleaded a foreign Sovereign State, the procedure by way of a Notice of Motion is the correct procedure and that a foreign Ruler or a foreign State directly or indirectly impleaded in the proceedings filed in a court in India would not be left without any remedy by the absence of any specific procedure in the Code of Civil Procedure. It was further held that since laws are general rules, they cannot regulate all cases that may possibly happen and any particular point not specifically dealt with must be governed by general principles.

30. Mr. Nariman's second contention was that the doctrine of immunity of a foreign Sovereign State as available under International Law is not available in India in view of the provisions of Sections 86 and 87-A of the Code of Civil Procedure. Before dealing with this point, we will first consider what is the position in International Law.

31. The doctrine of immunity of a foreign Sovereign State from being sued in the Municipal Courts of England was recognised in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, (1921) 3 KB 532. That case further lays down certain principles which are of help to us in deciding this case. The first is that the Courts in England will not inquire into the validity of the acts of a foreign government which has been recognised by the Government of England. The second principle is that in that respect whether the foreign government has been recognised as a Government *de jure* or *de facto* would make no difference. The third point to be noted from this judgment is that evidence about the status of being a foreign Sovereign State was allowed to be led not only during the hearing of the appeal, but even "since writing the judgment."

32. The doctrine of immunity in International Law was again recognised in England in the judgment of the House of Lords in *Duff Development Co. v. Kelantan Government*, (1924) AC 797. Moreover, it was held in that case that it was the settled practice of the Courts in England to take judicial notice of the

status of any foreign Government and for that purpose, in any case of uncertainty, to seek information from a Secretary of State; and the information so received was conclusive. In his Speech Viscount Cave observed:—

"No doubt the engagements entered into by a State may be of such a character as to limit and quality, or even to destroy, the attributes of sovereignty and independence x x x x x; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined not by the Courts, which must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our courts. In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognise the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of the State thus clearly and positively made as conclusive proof upon the point."

33. Later, in his Speech Viscount Finlay observed:—

"It is settled law that it is for the court to take judicial cognizance of the status of any foreign Government. If there can be any doubt on the matter the practice is for the court to receive information from the appropriate department of His Majesty's Government, and the information so received is conclusive. x x x x x Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance."

34. The principle of immunity of a foreign Sovereign State in International Law was again re-affirmed by the House of Lords in the *Spain Republic v. Arantzazu Mendi*, (1939) AC 256. A perusal of the Speeches in that case shows that the procedure followed for ascertaining whether the foreign State was a Sovereign State was by the Court directing a letter to be written to the Foreign Office asking

whether the particular Government of the foreign state was recognised by the English Government as a Sovereign State and placing reliance on the information received by way of a reply to that letter.

35. The same doctrine was again recognised in England in the judgment of the House of Lords in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No. 2), (1967) 1 AC 853. It so transpired that in that case no point was originally taken as to whether the English Government had recognised *de jure* or *de facto* the German Democratic Republic or its Government or as to the application in the English Courts of the East German legislation or decrees. In the appeal to the Court of Appeal, however, a request was made that a letter be written to the Foreign Secretary requesting him to certify whether, *inter alia*, the English Government had granted recognition *de jure* or *de facto* to the German Democratic Republic or its Government and if yes, when. A contention having been urged before the House of Lords about the evidence having been produced for the first time only before the Court of Appeal, the House of Lords held that recognition was a matter which the Court of its own motion was bound to consider and that therefore the information so received could be relied upon. The point for determination, shortly stated, was whether the Court was bound to have regard to the basis on which the German Democratic Republic purported to act and that as the English Government had never granted recognition *de jure* or *de facto* to that Republic or its Government, the English Court must refuse to recognise as effective all legislation emanating from it, and all acts done under such legislation. Now what had happened in that case was that the information received by the court mentioned a part of the history since after the Second World War and what had happened as regards the coming into existence of the German Democratic Republic. The House of Lords, after analysing all the contents of the certificate, observed that the U. S. S. R. may have purported to confer independence or sovereignty on the German Democratic Republic, but that the certificate clearly required the Court to hold that whatever the U. S. S. R. may have purported to do, they did not in fact set up the German Democratic Republic as a Sovereign or independent State and that as the U. S. S. R. retained their right to govern its territory, they could not possibly have done so and the certificate required the Court to hold that they did retain that right. The House of Lords further held that if they were bound to hold that the German Democratic Republic was not in fact set up as a Sovereign independent

State, the only other possibility was that it was set up as a dependent or subordinate organization through which the U. S. S. R. was entitled to exercise governing authority indirectly.

36. It should not go unnoticed that the decision of the House of Lords just referred to dealt with the German Democratic Republic, which appears in this suit also as the second defendant. Now this decision of the House of Lords does not in any way militate against the doctrine of immunity of the foreign Sovereign State. It also re-affirms that Court should obtain the necessary information about recognition of a foreign Sovereign State whether *de facto* or *de jure* from the Government of England. In that case it was held that the German Democratic Republic was not recognised by the British Government as an independent, i.e., Sovereign, State. Now it must be borne in mind that that conclusion was reached because of the contents of the certificate given by the British Government. The Court analysed the contents of that certificate and on the statements contained therein reached the conclusion which it did as mentioned by us earlier. As the conclusion reached in that case is in respect of the same foreign Government with which we are concerned, viz., the second defendant, two points have to be borne in mind. The first point is that the Court has to reach a decision on the relevant information made available to the Court from the Government of the country of that Court. We cannot reach the same conclusion as was reached by the House of Lords merely on the basis of the information supplied in that case to the English Court by the British Government. What we will have to rely upon is the information supplied to this Court by the Government of our country. The second point to be borne in mind is that it is the principles of International Law under which the second defendant has made a claim to immunity. It is a well-known fact that the same foreign Government may be recognised by a second Government and may not be recognised by a third Government. Therefore, the point which we have to consider is not whether the British Government recognised the second defendant as a Sovereign State, but whether the Government of our country has recognised the second defendant as a foreign Sovereign State.

37. The principles of International Law relating to immunity accepted by England as seen above have also been recognised in the United States of America. See *American Jurisprudence*, Vol. 14, page 385, Art. 191.

38. We will now turn to some of the decisions in our country on this point.

39. In *N. Masthan Sahib v. Chief Commr., Pondichery*, AIR 1962 SC 797, the Supreme Court considered some of the above referred to English decisions, and particularly that reported in (1924) AC 797 and (1939) AC 256 and stated that the proposition laid down in the English decisions that a conflict is not to be envisaged between the executive Government and the judiciary appeared to the Supreme Court to rest on sound reasoning and except possibly in extreme cases the statement of the Government must be held binding on the court and to be given effect to by it.

40. At this stage it is convenient to see what well-known authorities on International Law have to say as regards the doctrine of immunity. A passage in *Cheshire on International Law*, 7th Edition, 1965, appearing at page 91, reads as under:—

"In accordance with the maxim *par in parem non habet imperium*, the English Courts are fully committed to the view that they will not exercise jurisdiction over the person or the property of a foreign sovereign State unless it is willing to submit to process."

41. It is stated in paragraph 115a in *Oppenheim's book on International Law*, 8th Edition, 1954, at page 264 as under:—

"The third consequence of State equality is that — according to the rule *par in parem non habet imperium* — no State can claim jurisdiction over another. Therefore, although States can sue in foreign courts, they cannot as a rule be sued there, unless they voluntarily submit to the jurisdiction of the court concerned. This rule applies not only to actions brought directly against foreign states, but also to indirect actions, as when, for instance, a sum in rem is brought against a vessel in the possession of a foreign State. Although, in giving effect to this rule, courts occasionally refer to the 'comity of nations' as the basis of their decision, the principle of immunity of sovereign States from the jurisdiction of the Courts of other States has in fact been treated by courts of most countries as a rule of International Law."

42. Dicey on "The Conflict of Laws", 8th Edition, 1967 (at page 126) states:—

"Sovereign immunity is not limited to actions arising out of the foreign sovereign's official acts but extends also to his commercial activities and even to personal contracts like contracts to marry. No distinction is drawn between *acta imperii* and *acta gestionis*. Such a distinction, though it is clearly very difficult to draw, is discernible in the practice of

many other States, and it may well be that English Courts have extended the doctrine of sovereign immunity considerably further than international practice strictly requires. The results have proved unfortunate and have led to widespread dissatisfaction."

43. It may be stated that in recent years many States embark on industrial, business and commercial activities which are not confined only to their own territories but extend beyond their territories. Modern writers on International Law have expressed their own opinions as to whether the doctrine of immunity available to a foreign Sovereign State should be made available in respect of such transactions which are purely of a commercial nature. The point about making exception in the case of commercial activities, is, to say the least, in a very fluid state and it is very likely that it will take considerable time to boil down to a well recognised principle of International Law. Mr. Nariman did invite our attention to some other passages, but, in our opinion, it is not necessary to refer to them. We have already referred to decided cases and some well-known authorities on International Law and it is quite clear that the doctrine of immunity has yet not been curtailed in England so as to exclude the doctrine of immunity from applying to commercial transactions. So far as English Courts are concerned, it is a settled doctrine till it is hereafter revised. It has also been recognised in India. See, for example, AIR 1966 Cal 319. In International Law a foreign Sovereign State has absolute immunity. To carve out an exception is a matter having wide ramifications. Basically the matter concerns relations between India and foreign States. In a matter of that importance we are of the opinion that no occasion should arise for different High Courts to take differing views. It would result in chaos. If the doctrine which is well established for over a large number of years requires, in view of changed circumstances, to be at all modified, it is highly desirable that the Supreme Court as the highest Court of the land should, in a proper case, lay down the principles. We, for ourselves, prefer to follow the well-established doctrine.

44. At this stage it should be noticed that the said certificate dated 1st August 1970 given by the Law Officer in the Ministry of External Affairs, Government of India, New Delhi, uses the phraseology "the Government of India has de facto relations with the German Democratic Republic." The word used here is "relations" and there is no mention of any "recognition." In the later letter dated 15th September 1970 written

by the Under Secretary in the Ministry of External Affairs, Government of India, New Delhi, the phraseology is "the Government of India had and continue to have de facto relations with the German Democratic Republic." Even here the word used is "relations" and not "recognition". In view of the English decisions approved by the Supreme Court in the above judgment it is the Court which has to ascertain whether the Government of the country recognises a foreign Government as a Sovereign State and that for that purpose necessary evidence can be allowed to be adduced even at the stage of an appeal. In view of these principles Mr. Amin tendered before us a letter dated 28th September 1970 written by the Under Secretary in the Ministry of External Affairs, Government of India, New Delhi, addressed to the Attorneys of the second defendant in reply to a further inquiry made by their letter dated 15th September 1970 and as Mr. Nariman stated that he did not object to this letter being made a part of the record in view of the authorities — already referred to by us, we took it on the record and marked it as Ex. A in this appeal.

45. We will now consider the effect of the evidence available to us on the record to ascertain whether the Government of India has recognised the second defendant as a Sovereign State, as it is not for the Court to pronounce any opinion on the point except on the information made available to the Court by the Government of India. Firstly, reliance has been placed on the said Statements made by three Prime Ministers of India, and India has had only three Prime Ministers since India attained independence. We refer only to the material words. Pandit Jawaharlal Nehru in his said statement dated 17th August 1961 has stated: "De facto we recognise it". In his second statement dated 2nd September 1961 he stated: "It seems to me obvious that certain facts of life should be recognised. There are two independent entities: The Government of the Federal Republic of Germany and the Government of the German Democratic Republic." This Statement clearly refers to the Government of the German Democratic Republic, i.e., the 2nd defendant, as an independent entity. Having been referred to as the Government, the reference must be construed to mean when the adjective "independent" is used that the second defendant was characterised as an independent i.e., Sovereign Government. In the said extract from the Indo-Soviet Joint Communiqué dated 20th May 1965 it is stated, *inter alia*, that at present the fact of the existence of the two German States cannot be ignored. The reference to one of the two German

States referred to was obviously the second defendant. Lal Bahadur Shastri and Mrs. Indira Gandhi have subsequently reaffirmed the position as mentioned earlier. Next there is the evidence of several Trade Agreements between the two Governments, the Government of India and the Government of the German Democratic Republic. Those Agreements are Government to Government Agreement and they are entered on the basis that both the Governments which were parties to those Agreements were contracting as Sovereign States. Moreover, as seen earlier, there has been an exchange of Trade Representatives between the two countries. Later on the second defendant has established Consulate General in New Delhi and three Consulates in Bombay, Calcutta and Madras. It has already been stated earlier that the Government of India expects to correspondingly establish a Consulate General and Consulates within the territory of the second defendant. These are authoritative statements and acts of the Government of India. But, as seen earlier, these are not the only factors on the basis of which alone this court is required to reach a conclusion whether the Government of India recognises the second defendant as a Sovereign State.

16-10-1970.

46. By the said letter dated 1st August 1970 from the Law Officer Ministry of External Affairs, New Delhi, it has been certified that the Govt. of India has de facto relations with the second defendant. Thereafter by the said letter dated 15th September 1970, which is over the signature of the Under Secretary to the Ministry of External Affairs, it has been certified that the Government of India had and continues to have de facto relations with the second defendant. By the said letter dated 28th September 1970, Ex. A before us, a correction has been made in the said certificate dated 15th September 1970. The letter, read with this correction, amounts to a certificate that the Government of India de facto recognises the second defendant. The last two letters go further and state that the second defendant should enjoy immunity from jurisdiction of the local courts in suits and other proceedings similar to those enjoyed by any other Government unless that Government has expressly waived its immunity. This last statement is really a consequence which should normally follow from the recognition of the second defendant by the Government of India and it is a conclusion which normally it is for the court to reach. The only utility of this last portion, however, is that it confirms that what the Government of India intended to convey by their certificate was that the Government

of India has accorded *de facto* recognition to the second defendant as a foreign Sovereign State.

47. Mr. Nariman, however, contended that in order that the second defendant may be held to be entitled to immunity, the recognition must be *de jure* and not merely *de facto*. The English authorities to which we have already referred do not make any such distinction. This is further supported by the following passage which occurs in Greig's International Law, 1970 Edition, at page 101:—

"The statement that a particular entity has been recognised *de jure* or *de facto* is a convenient shorthand form of saying it has been recognised as a *de jure* or *de facto* Government. In other words, its status as a Government, and not the recognition, that is *de jure* or *de facto*."

It is unnecessary to multiply further authorities to show that the recognition, *de jure* or *de facto*, has the same value for the purpose of deciding whether a particular foreign State is a Sovereign State and is entitled to immunity under International Law or not.

48. We, therefore, hold that the second defendant is a foreign Sovereign State and is entitled to immunity as claimed by it under the principles of International Law.

49. Mr. Nariman then contended that in India this principle of International Law can have no application because of the provisions contained in Section 86 of the Code of Civil Procedure. He contended that the Code being a codifying enactment and inasmuch as the principle of International Law has been recognised under Sections 86 and 87-A to the extent mentioned in those sections, only the relevant provisions of the Code can be looked at and the said principles of International Law can have no application whatever in India. This argument was advanced before the Supreme Court in the case of *Ali Akbar v. United Arab Republic*, AIR 1966 SC 230. In that case immunity was claimed both under the principles of International Law and under the said Section 86. In that case, in the earlier part of his judgment Chief Justice Gajendragadkar has stated that it being the view of the court that Section 86 created a bar in that case, the court did not propose to consider whether the absolute immunity under International Law was available in that case. Dealing with the argument which is the same argument as the one advanced by Mr. Nariman as just stated, the Supreme Court observed:—

"It is true that this provision exempts the property of any such Ruler

from execution of any decree that may be passed against a Ruler, and apparently, the High Court thought that this tends to show that the Ruler of a foreign State within the contemplation of Section 86 (1) must be the Ruler himself and not the State. In our opinion, this view is not well-founded. The provision that a decree passed against the Ruler of a foreign State shall not be executed against the property of such Ruler, rather tends to show that what is exempted is the separate property of the Ruler himself and not the property of the Ruler as the head of the State. A distinction is made between the property belonging to the State of which the Ruler is recognised to be the head, and the property belonging to the Ruler individually. We are, therefore, satisfied that Sec. 86 (1) applies to cases where suits are brought against Rulers of Foreign States and that foreign States fall within its scope whatever be their form of Government. We have already indicated that whenever a suit is intended to be brought by or against the Ruler of a foreign State, it has to be in the name of the State, and that is how the present suit has, in fact, been filed.

The effect of the provisions of Section 86 (1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law. It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal Courts. That being so, it would be legitimate to hold that the effect of Section 86 (1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal Courts of India with the consent of the Central Government and when such consent is granted as required by Section 86 (1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, Section 86 (1) is not merely procedural; it is in a sense a counterpart of Sec. 84. Whereas Section 84 confers a right on a foreign State to sue, Section 86 (1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the

limitations prescribed by it. That is the effect of Section 86 (1).

In *Chandulal Khushalji v. Awad*, (1897) ILR 21 Bom 351, at pp. 371-372, Strachey, J. had occasion to consider this aspect of the matter in relation to the provisos of Section 433 of the Code of 1882. What Section 433 does, said the learned Judge, 'is to create a personal privilege for sovereign princes and ruling chiefs and their ambassadors and envoys. It is a modified form of the absolute privilege enjoyed by independent sovereigns and their ambassadors in the Courts in England, in accordance with the principles of International Law. The difference is that while in England the privilege is unconditional, dependent only on the will of the sovereign or his representative, in India it is dependent upon the consent of the Governor-General in Council, which can be given only under specified conditions. This modified or conditional privilege is, however, based upon essentially the same principle as the absolute privilege, the dignity and independence of the Ruler, which would be endangered by allowing any person to sue him at pleasure, and the political inconveniences and complications which would result'. We are inclined to think that this view correctly represents the result of the provisions of Section 433 as much as of those contained in Section 86 (1)."

What has to be noted is that the Supreme Court has held that the effect of Section 86 (1) is "to modify to a certain extent" the doctrine of immunity recognised by International Law and has further observed that it is a modified form of the absolute privilege enjoyed by independent sovereigns and their ambassadors in the Courts in England in accordance with the principles of International Law. The word used is "modified". It signifies that the doctrine of immunity applies in India but only with the modification as made by Section 86. We do not read this judgment to mean or imply that Section 86 wholly supplants the relevant doctrine under International Law. The word "modified" shows that the principles of International Law would be applicable in India but that in its application Section 86 creates an exception. In International Law the immunity is absolute, subject only to the exception or exceptions recognised in International Law, one of such exceptions being when the foreign Sovereign State waives the privilege of immunity. Section 86 creates another exception, the exception being where the requisite consent is given by the Government of India as provided under Sec. 86. But the provisions of Section 86 would to that extent operate as another exception and to that extent "modify" the

principles of International Law. But subject to such exception the relevant principle of International Law would still be applicable in India. We have earlier referred to the case of AIR 1966 Cal 319. In that case the view taken was that Sections 86 and 87 have no relation to the principles of private International Law based on the independence of a foreign sovereign or of a foreign State, but these provisions of the Code afford an additional protection or privilege to a foreign sovereign providing immunity from being sued in the Municipal Courts of this country without previous permission of the Central Government being obtained to the institution of such suits. This Calcutta Judgment envisages that principles of International Law about immunity apply in India and that simultaneously, that is, in addition, Section 86 also confers such immunity but to the extent provided in that section. In view of the above Supreme Court Judgment, however, in our view, it must be held that the principles of International Law about immunity apply in our country, but that they stand modified by the provisions of Section 86 and the modification, in our opinion, is to create an exception in cases where consent of the Government of India is obtained under Section 86. To the extent that the Calcutta Judgment is inconsistent with the said Supreme Court Judgment it must be deemed to be overruled or no longer good law.

50. Mr. Nariman contended that the said three certificates granted by the Government of India in its Ministry of External Affairs are not sufficient to establish that the Government of India has in fact recognised the second defendant as the de facto Sovereign State. He contended, that we should obtain information from the Government of India on the following three questions:—

(1) Whether the Government of India recognises the Government of the second defendant as entitled to exercise governing authority in respect of the territories known as East Germany;

(2) Whether the Government of India recognises the State, that is, the second defendant, and the Government of U. S. S. R. or any other State or Government as de jure entitled to exercise governing authority in respect of those territories;

(3) Whether the Government of India recognises the second defendant as an independent foreign State.

In view of the conclusions which we have already reached on the material already on the record it is not necessary for this Court to have these further inquiries made of the Government of India.

51. It may be stated that Mr. Nariman has not at all argued that the second defendant has waived the privilege of immunity as a foreign Sovereign State and it does not therefore arise for decision.

52. In our opinion, therefore, the second defendant is entitled to the immunity available to a foreign Sovereign State under the principles of International Law. We therefore hold that prayer (a) of the Notice of Motion should have been and should be granted as the Government of India has recognised the second defendant as a de facto Sovereign State. We, therefore, dismiss the suit as prayed for in prayer (a) of the Notice of Motion.

53. The costs must follow the event and we therefore direct that the plaintiffs to the suit do pay the second defendant's costs of this appeal and of the Notice of Motion.

54. The amount of Rs. 500/- deposited as security for the costs of the respondents in this appeal be refunded to the Appellants.

* * * * *

Appeal allowed.

AIR 1972 BOMBAY 43 (V 59 C 6)

NAIN, J.

Pitamber Govinda Bhavsar, Appellant v. Abdul Gafur Abdul Rajak and others, Respondents.

A. F. A. D. No. 245 of 1963, D/-24-9-1970 against order of B. B. Tambe, Asstt. J., Jalgaon in Appeal No. 446 of 1960.

(A) Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947), S. 40 — Section 40 makes alienation invalid whether any one wished to avoid it or not — Whether the alienation is invalid or illegal there is no question of taking advantage of one's wrong.

(Para 8)

(B) Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947), S. 40 — Alienation in contravention of S. 40 is invalid — But a lease which is not a transfer of ownership and title but only a transfer of a right of enjoyment, is not an alienation within the meaning of S. 40 — Therefore, a lease by a debtor without previous sanction of the Court is not invalid under S. 40 and the lessees or their transferees are not trespassers — (X-Ref:— Words and Phrases — 'Alienation'). AIR 1930 Bom 534 & (1911) 13 Bom LR 883, Referred.

(Para 16)

(C) Limitation Act (1908), Art. 144 — Adverse possession — Where a lease is invalid the possession of lessee or his transferee becomes adverse from the start and the lessor's suit for possession filed

beyond 12 years from the lease is time barred — Payment of rent in the meantime will not make lessee's possession lawful and save limitation — But in such a case the lessee or his transferee cannot acquire by prescription a right higher than the right conveyed to him viz., the right of enjoyment. AIR 1957 Pat 321, Rel. on. (Para 18)

(D) Interpretation of Statutes — Marginal Notes — In absence of any evidence that marginal notes have been inserted in the Act with the assent of Legislature they cannot be referred to for the purpose of construction of the provisions of that Act. (Para 9)

Cases Referred: Chronological Paras

(1957) AIR 1957 Pat 321 (V 44), Alakhdeo Singh v. Gaya District Board	18
(1946) AIR 1946 Bom 193 (V 33)= 47 Bom LR 962, Pandappa Mahalingappa v. Shivlingappa Murteppa	18
(1930) AIR 1930 Bom 534 (V 17)= 32 Bom LR 1249, Narayan Raghunath Kulkarni v. Krishnaji Govind Kulkarni	13
(1911) 13 Bom LR 883 = ILR 35 Bom 462, Haji Abdulla Haji Sumar v. Secy. of State for India	14
(1897) 1897 AC 22 = 75 LT 426, Salomon v. Salomon & Co.	15

M. R. Kotval, for Appellant; V. M. Limaye, for Respondents Nos. 1 (A) to 1 (D); V. G. Madbhavi, for heirs of Respondent No. 4.

JUDGMENT:— This is an appeal by the original defendant No. 5 against the appellate judgment dated 31st December 1962 of the learned Assistant Judge, Jalgaon. Respondents 1-A to 1-D are the heirs and legal representatives of the original plaintiff. Respondent No. 4 is the heir and legal representative of the original defendant No. 3. Respondents Nos. 2, 3 and 5 are respectively the defendants Nos. 1, 2 and 4. They have not appeared.

2. On 8th May 1946 the plaintiff granted a lease of an area admeasuring 115 feet x 125 feet out of survey No. 284/1 in Pachora, District Jalgaon, to the defendants 1 and 2 for constructing a cinema house thereon by lease deed Ex. 54. On 31st December 1948 defendants 1 and 2 assigned their leasehold rights to defendant No. 3 who constructed a cinema house on the said land. He gave the cinema house to defendants Nos. 4 and 5 for running it. On 22nd November 1956 the defendant No. 3 assigned the leasehold rights to defendants Nos. 4 and 5. It appears, the defendant No. 3 had not paid rent to the plaintiff. Therefore in 1955 the plaintiff filed against the defendant No. 3 a suit for recovery of arrears of rent. The defendant No. 3 thereafter paid up the said arrears.

3. On 9th June 1958 the plaintiff filed against the defendants Nos. 1 to 3 the suit from which the present appeal arises in the court of the learned Civil Judge, Junior Division, Chalisgaon, for recovery of possession of the suit land alleging that the lease Ex. 54 was invalid being in contravention of Section 40 of the Bombay Agricultural Debtors' Relief Act, 28 of 1947 (hereinafter referred to as to B. A. D. R. Act). The plaintiff contended that the defendants Nos. 1 to 3 were therefore in unauthorised or illegal possession of the suit property and were liable to handover possession to him.

4. The defendants took several contentions, including one that the lease was not void. They also contended that the suit was barred by the law of limitation.

5. Defendants Nos. 4 and 5 were added as party defendants on 24th February 1959. They raised the same contentions as raised by defendants Nos. 1 to 3. They further contended that in any case so far as they were concerned, the suit was time barred.

6. The trial court decided the above issues against the defendants and decreed the suit. The defendants Nos. 3 and 5 appealed to the District Court at Jalgaon. In the said appeal the appellants took inter alia the same contentions that they had taken in the trial court. The learned Assistant Judge who heard the appeal dismissed the same with costs. Against the said decision, the defendant No. 5 alone has filed the present appeal.

7. The first contention taken before me by Mr. Kotwal on behalf of the appellant is that Section 40 of the B. A. D. R. Act was enacted for the benefit of the creditor and not for the benefit of the debtor. The plaintiff was not a "creditor", but was a "debtor". The plaintiff was therefore not entitled to avoid the lease in respect of the suit land. He further contended that in any case the lease was created by the plaintiff and he could not take advantage of his own wrong.

Section 40 of the B. A. D. R. Act read as under:—

"Notwithstanding any law or contract no alienation of any property belonging to a debtor who is a party to any proceeding under this Act or an award registered under this Act, made by him before all his debts are discharged shall be valid, except with the previous sanction of the Court."

8. It is admitted by the parties that the plaintiff was on 8th May 1946 a debtor, that he was a party to a proceeding under the B. A. D. R. Act, and that all his debts were not discharged. It is also admitted that the lease was not created with the previous sanction of the

Court. In such circumstances, Section 40 clearly lays down that the "alienation of any property" shall be invalid. The section does not say that such alienation shall be voidable at the instance of the creditor. If it had so said, there would have been substance in the contention of Mr. Kotwal. The section makes the alienation invalid, whether any one wished to avoid it or not. Whether the alienation is invalid or illegal, there is no question of taking advantage of one's wrong. This contention must therefore be rejected.

9. There is more substance in the next contention of the appellant. This contention is that the lease Ex. 54 is not an "alienation of any property" within the meaning of that expression in Section 40 of the B. A. D. R. Act. Unfortunately, the word "alienation" is not defined in the B. A. D. R. Act. Section 28, however, refers to fraudulent "alienations or incumbrances" on the debtor's property. The use of the two words in the said section indicates that an "incumbrance" is not included in the word "alienation". On the other hand, Section 53 provides that a debtor shall not "hypothecate or sell the standing crops". The marginal note describes this hypothecation or sale by one word "alienation" of standing crops indicating that perhaps hypothecation would be covered by the word "alienation". Marginal notes to the sections are, however, not to be referred to for the purpose of construction, unless they have been inserted with the assent of the Legislature. We have no evidence that in the case of the B. A. D. R. Act, marginal notes have been inserted with the assent of the legislature. We therefore find that we do not derive much help from the B. A. D. R. Act itself in construing whether a lease is an "alienation".

10. Section 105 of the Transfer of Property Act, 1882 provides that "a lease of immovable property is a transfer of a right to enjoy such property." It does not provide that a lease is a transfer of property. It merely provides that it is a transfer of a right to enjoy such property. Section 5 of the Transfer of Property Act defines "transfer of property" as meaning an act by which a living person conveys property. In a lease there is no conveyance of property. There is no transfer of ownership. There is only a transfer of a right of enjoyment. The title remains in the lessor. We have therefore to see whether this transfer of right of enjoyment of property is an alienation.

11. The Concise Oxford Dictionary, 1961 Edition, states that in law the meaning of the word "alien" is "transfer of ownership of." The meaning of

the word "alienate" is given as "transfer ownership of". The meaning of the word "alienation" is given as "transference of ownership." It would therefore appear that the ordinary literary meaning of the word "alienation" implies transfer of ownership, and not merely a transfer of a right of enjoyment.

12. Law Lexicon published by the Madras Law Journal Office states that the word "alienation" is generally applied to absolute conveyances of immovable property. To use the word "alienation" is as much to say as to make a thing another man's or to alter or put the possession of lands or other things from one man to another. "Alienation" imports an actual transfer of title.

13. In the case of Narayan Raghunath Kulkarni v. Krishnaji Govind Kulkarni, AIR 1930 Bom 534= (32 Bom LR 1249), the question was whether a devise by will was included in the word "alienate" in the Bombay Hereditary Offices Act, 1874. Patkar, J. observed as follows:

"The question therefore in the case is whether the word 'alienate' excludes a devise by will. It is urged on behalf of the appellant that the word 'alienate' means to transfer by sale. It is conceded on behalf of the appellant that the watandar can make a gift of the watan property to a watandar of the same watan. If a watandar can alienate the property by gift inter vivos, he would presumably have the right to alienate by will in favour of a watandar of the same watan. The word 'alienation', according to Stroud's Judicial Dictionary, Vol. I, p. 65, means 'to make a thing another man's'. 'Alienate', according to Wharton's Law Lexicon, means 'to transfer property.' Alienation would, therefore, include a devise by gift if the effect of it is to make the property another man's by means of a bequest."

14. The word "alienated" is defined by the Bombay Land Revenue Code, 1879, Section 2 (2) as meaning "transferred wholly or partially to the ownership of any person." The definition of that word in Section 2 (2) of the Maharashtra Land Revenue Code, 1966 is the same. In these enactments the word "alienation" would be transfer of ownership to another person. Section 2 (15) of the B. A. D. R. Act provides that "words and expressions used in this Act but not defined have the meaning assigned to them in the Code of Civil Procedure, 1908 or the Bombay Land Revenue Code, 1879, as the case may be." The word "alienation" or any of its grammatical variations is not used in the Code of Civil Procedure. We must therefore turn to the definition of that word in the Bombay Land Revenue Code,

1879. In the case of Haji Abdulla Haji Sumar v. Secy. of State for India, (1911-13 Bom LR 883) the question whether a lease was an "alienation" within the meaning of that word in the Bombay Land Revenue Code arose before a Division Bench of this Court consisting of Chandavarkar and Hayward, JJ. In the judgment of Chandavarkar, J. it is observed:—

"Therefore, there cannot be any doubt that this kowl is no more than a lease, that Government parted with their rights as lessors in favour of the grantee as a lessee, and imposed upon him certain conditions. None of those conditions brings the contract within the definition of the term 'alienated' village, in Cl. 19 of Section 3 of the Bombay Land Revenue Code."

15. The learned Assistant Judge observes in his judgment that a lease is a transfer of some interest which the lessor has in the property and such transfer is bound to affect the property and the creditors are bound to run the risk of reducing their security. He goes on to observe that the very purpose of Section 40 to keep the property of the debtor intact and available for the purpose of discharging the debts would be nullified, unless a lease was interpreted as an "alienation". I regret, I am unable to accept this reasoning. The learned Assistant Judge has strayed in the realm of speculation as to the intention of the Legislature. Lord Watson has said in the case of Salomon v. Salomon & Co., 1897 AC 22 at p. 38 that the

"intention of the Legislature is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

If the Legislature had intended to include a lease or any other transfer in the word "alienation", nothing would have been simpler than to say so and to use the words "transfer, sale, mortgage or lease" or whatever the Legislature intended to prohibit. It is reasonable to suppose that the Legislature knew the literary meaning of the word "alienation", as also its meaning in the Bombay Land Revenue Code, 1879, the definitions in which were being made applicable by Section 2 (15) of the B. A. D. R. Act.

16. Mr. Limaye on behalf of the plaintiff made an attempt to argue that

in Section 40 of the B. A. D. R. Act the word "alienation" was used synonymously with the word "transfer". In view however of what I have stated hereinabove, I cannot accept this contention. In my opinion "alienation" means transfer of ownership of property to another person. The word applies to absolute conveyances of immovable property and imports an actual transfer of title. It does not include a lease. The lease Ex. 54 therefore is not an "alienation" within the meaning of that word in Section 40 of the B. A. D. R. Act and is not invalid. The lease being valid the plaintiff is not entitled to possession on the footing that the defendants are trespassers. This suit must therefore fail.

17. The next contention of Mr. Kotwal on behalf of the appellant is that the suit of the plaintiff was time barred. The lease was granted on 8th May 1946. The suit was filed against the defendants 1 to 3 within time, but the present appellant was joined on 24th February 1959, beyond a period of 12 years from the date of the lease. The contention is that under Art. 144 of the Indian Limitation Act, 1908, the period of limitation for a suit for possession of immovable property is 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. Mr. Kotwal contended that where a lease is invalid the possession of the defendant is adverse from the start and a suit beyond a period of 12 years from the lease is time barred.

18. In view of my finding that the lease is not invalid, this contention as to limitation really does not survive. Both the trial court and the lower appellate court have, however, held that the suit was not time barred. I do not find that these findings of law are correct on the basis that the lease was invalid. I shall, therefore, deal briefly with this point on the assumption that the lease was invalid. In the case of Alakhdeo Singh v. Gaya District Board, AIR 1957 Pat 321, a Division Bench of the Patna High Court has held that where a person enters into possession of property by virtue of an instrument of lease which is void and inoperative, his possession is adverse to the true owner from the very beginning for the simple reason that the transfer conveyed him no title. When his possession was adverse to the true owner from the very beginning, the payment of rent will not make the possession lawful. It will only affect the nature of the interest that he was prescribing by virtue of his adverse possession. When a person enters into possession of land under a void transaction and remains in possession for the full statutory period, the only question for determination is as to the nature

of the interest that he has acquired by prescription. He cannot acquire by prescription a right higher than the right which the instrument of lease purported to convey to him. The transaction was admittedly a transaction of lease and therefore when he entered into possession under a void lease, he can acquire only the right of a lessee by prescription. In the case before me, originally defendants Nos. 1 and 2 entered into possession. They transferred their rights to defendant No. 3 who ultimately transferred them to defendants 4 and 5. It has been held in the case of Pandappa Mahalingappa v. Shivalingappa Murteppa, 47 Bom LR 962 = (AIR 1946 Bom 193) that where the possession of one trespasser is a continuation of the trespass of the previous occupant through whom he claims, the adverse possession of the one can be tacked on to that of the other, and if the total period exceeds 12 years, that possession ripens into full ownership under Section 28 and Art. 144 of the first schedule to the Indian Limitation Act, 1908. In such a case, it is essential that one trespasser should derive his liability to be sued from the other. Now, if this position be correct, even according to the learned Assistant Judge the suit against the defendant No. 5 was beyond the period of limitation. He, however, thought that as the defendant No. 3 had paid rent in 1955, his possession was permissive up to that date. As I have stated hereinabove, the Patna High Court has taken a different view from the above and I think rightly. This payment will not save the period of limitation. In my opinion, the suit against the present appellant was time barred, if the lease was invalid. In view of the fact however that in my opinion the lease is valid and the plaintiff is not entitled to recover possession the question of limitation does not survive.

19. In the result, the appeal is allowed and the decree of the trial court as well as the lower appellate court are set aside. The suit of the plaintiff will stand dismissed. There will be no order as to costs.

Appeal allowed.

AIR 1972 BOMBAY 46 (V 59 C 7)

BHASME, J.

Mangharam Chuharmal, Petitioner v. B. C. Patel and others, Respondents.

Spl. Civil Appls. Nos. 1819, 1786 to 1788 of 1969, D/- 22-9-1970, to set aside the order of Appellate Bench, Sm. C. C. Bombay, D/- 30-4-1969.

IO/JO/E790/71/BNP

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sec. 13 (1) (i) — Classification under, is reasonable — Not hit by Art. 14 of Constitution — (X-Ref:— Constitution of India, Art. 14).

There is a clear cut intelligible differentiation which formed the basis of classification. Tenants of buildings are different from tenants of open pieces of lands. On considering the object of the Rent Act, it is also evident that there is a rational basis for the above mentioned classification. For good reasons different conditions are prescribed by the various clauses of Section 13 as conditions precedent for passing an order of eviction against tenants. Article 14 of the Constitution does not insist that legislative classification should be scientifically perfect or logically complete. Unless the classification is wholly arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. (Para 21)

(B) Civil P. C. (1908), S. 11 — Decision in previous suit when operates as res judicata.

In the previous suit when a number of findings are recorded and the suit is finally decided one way or the other, it is important to find out whether the decision of the suit was based on some or all the findings recorded in the suit. Where a previous decision is supported on two or more findings all the findings will necessarily operate as res judicata. Where the previous suit was dismissed on a technical ground which made the suit untenable, findings recorded on the merits would normally be obiter dicta. Similarly, if the Court which decided the prior suit has itself based the decision on only some of the findings recorded by it, or if under the circumstances of the case its decision can be fairly attributed to only some of the findings so recorded, the other findings would not operate as res judicata. In other cases, where the previous decision is based upon, and is attributable to, several findings, all the findings will have the force of res judicata. (Para 29)

Where the earlier decision was based only on the point of defective notice and other findings were recorded only to avoid a further remand such findings could not operate as res judicata. (Para 30)

(C) Civil P. C. (1908), S. 11 — A fresh suit for possession on the ground of reasonable and bona fide requirement based on identical facts but pleading change of circumstances is not barred by res judicata. AIR 1951 Bom 336, Rel. on. (Para 31)

(D) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13 (1) (i) — Tenancy of open plot — Subsequent construction thereon by tenant cannot make S. 13 (1) (i) inapplicable.

The expression "premises" in Section 13 (1) refers to the subject-matter of letting for which rent is payable and in respect of which there is a relationship of landlord and tenant. (Para 33)

Where the landlord had let out only an open plot of land and the rent payable by tenant was only for the open land the fact that the tenant built some structures on such land and is recovering rent for those structures from his tenants will not concern the tenancy it being not the subject matter of tenancy between landlord and tenant. (Paras 33, 34)

(E) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 14 — Effect of on rights and liabilities of sub-tenant.

By virtue of Sections 12, 14 and 15 a person remaining in possession after determination of the contractual tenancy becomes a statutory tenant. He can remain in possession but cannot enforce terms of the original tenancy. He is a statutory tenant but has no contractual interest in the premises. He cannot create lawful sub-leases in favour of others. It is not necessary to terminate the statutory tenancies before instituting proceedings against them under any of the provisions of the Rent Act. AIR 1965 SC 414, Foll. (Para 35)

(F) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 14 — Interpretation of.

A closer look at Section 13 (1) will show that the various grounds on which the landlord can seek possession are not of the same kind and they are different in material particulars. Grounds under Section 13 (1) (a), (b), (c), (d) and (e) can be said to be personal to the tenant, who by his act, has rendered himself liable to be evicted. Grounds under Section 13 (1) (g), (h), (hh), (hhh), (i) and (ii) are mainly concerned with the premises held by the tenant. They are not in the nature of defaults which could be committed by the tenant. The landlord must establish those grounds before he can ask for a decree in ejectment against the tenant. If in a suit against the tenant other persons are joined on the allegation that they are sub-tenants and if an eviction is sought only on the grounds which are personal to the tenant then a decree in ejectment against him will result in conferring direct tenancy

rights on the lawful sub-tenants. They cannot be ejected in that suit on those grounds. On the other hand, if the landlord seeks a possession on the grounds which are not personal to the tenant and which concern the premises themselves, then it is open to the landlord in the same suit to plead and prove those grounds not only against the tenants but against the other persons impleaded in the suit and who are ultimately held to be lawful sub-tenants. In such a case the issues would be heard and decided between the landlord on the one side and the tenants and sub-tenants on the other. If the sub-tenants are not impleaded even in such a suit then the landlord, after obtaining a decree against the tenant, will have to file a fresh suit against the sub-tenants, who by then had become his direct deemed tenants by virtue of Section 14 of the Rent Act. AIR 1967 Bom 210, Dissented from. (Para 40)

(G) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 13 (1) — "Reasonable and bona fide requirement" — Meaning of.

Bona fide means honestly and not actuated by bad faith or oblique motive. Reasonably means, according to the dictionary that which is rational, just, not excessive. As these two words are used to govern the word 'require' all the three words must be construed in a manner which would be consistent with the object of the Rent Act in general, and Section 13 in particular. The landlord's contractual right to evict his tenant is recognised in a limited way in Section 13 so as to cause the minimum hardship to the tenant in the event of his eviction from the premises. While considering the proof of bona fides and reasonableness of the requirement, a number of factors are bound to overlap. The words "reasonably and bona fide" are not, and are not intended, to be used disjunctively. In a given case facts established must prove the bona fides without reference to the reasonable requirement. If want of bona fides, amounting to mala fides, is proved, courts can readily infer or hold that the requirement is unreasonable. If the requirement is wholly unreasonable that will also have a bearing on the question of bona fides of the landlord. Even on that basis the court will find that the requirement is not bona fide. But at the same time it is possible to hold that the landlord has succeeded in establishing his bona fides, but that, by itself, will not give him a right to evict the tenants; he must further prove that in addition to his bona fides, his requirement also is reasonable. Case law discussed. (Para 59)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 SC 691 (V 54)= 1967-1 SCR 15, Jalan Trading Co. v. Mill Mazdoor Sabha		14
(1967) AIR 1967 SC 1853 (V 54)= 1967-3 SCR 343, Hiralal Vallabh- ram v. Sheth Kasturbhai Lalbhai		35
(1967) AIR 1967 Bom 71 (V 54)= 68 Bom LR 221, Satwant Kaur v. Abdul Kadar		35
(1967) AIR 1967 Bom 210 (V 54)= 66 Bom LR 338, Indian Coffee Workers Co-op. Stores Ltd. v. Bachoobhai Cawasjee Dhanjee- shaw		36
(1966) AIR 1966 SC 1024 (V 53)= 1966-1 SCJ 601, K. R. Kundapur v. Krishnaji Karan		33
(1966) AIR 1966 Mad 14 (V 53)= 78 Mad LW 326, Chandarsekhara v. Chetty's Charities		52
(1965) AIR 1965 SC 414 (V 52)= 1964-4 SCR 892, Anand Niwas (Pvt.) Ltd. v. Anandji Kalyanji's Pedhi		35
(1963) AIR 1963 SC 499 (V 50)= 1962 Supp (2) SCR 623, Neta Ram v. Jivan Lal		49
(1962) 64 Bom LR 798 = 1963 Mah IJ 125, Nimbibai R. Onkar Mall v. R. P. Malli		51
(1961) AIR 1961 Bom 218 (V 48)= 63 Bom LR 152, Laxman v. Saraswati	26, 28, 29	29
(1959) AIR 1959 Punj 103 (V 46), Labhu Ram v. Ram Parkash		55
(1958) AIR 1958 SC 538 (V 45)= 1959 SCR 279, Ramkrishna Dalmia v. Justice Tendolkar		12
(1958) AIR 1958 Cal 229 (V 45), Deb Kumar Mukerjee v. A. Banerjee		54
(1958) 1958 Cal LJ 149, Tulsi Charan Bairagi v. Debendra Nath Sil		58
(1953) AIR 1953 SC 404 (V 40)= 1954 SCR 30, Kedar Nath Bajora v. State of West Bengal		13
(1951) AIR 1951 Bom 336 (V 38)= 53 Bom LR 174, N. J. Gor v. M. G. Raval	26, 31	31
(1951) 1951-1 All ER 710 = 1951-2 KB 92, Cresswell v. Hodgson		53
(1950) AIR 1950 PC 80 (V 37), Shankarlal Patwari v. Hiralal Murarka		28
(1950) AIR 1950 Cal 74 (V 37)= 54 Cal WN 366, Bhulan Singh v. Ganendra Kumar		57
(1950) AIR 1950 Cal 249 (V 37)= 54 Cal WN 20, Basant Lal Shah v. P. C. Chakravarty		58
(1947) AIR 1947 Bom 392 (V 34)= 49 Bom LR 87, Bhiku Appa Kura v. Dattatraya Chandrayya		28
(1947) AIR 1947 Cal 221 (V 34)= 48 Cal WN 421, Hiralal Murarka v. Mangtulan Bagaria		28

(1929) 1929 AC 72 = 139 LT 642, Viscount Tredegar v. Harwood	56
(1928) AIR 1928 Bom 5 (V 15) = 29 Bom LR 1551, Bombay Steam Navigation Co. Ltd. v. Vasudeo Baburao Kamat	64
(1924) AIR 1924 Mad 469 (V 11) = 46 Mad LJ 198, Ramaswami Reddy v. Marudal Reddy and Co.	27
(1922) AIR 1922 PC 241 (V 9) = ILR 48 Cal 460, Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy	27
(1897) ILR 24 Cal 900, P. M. Mukerjee v. Ambika Churn	26, 28

In Spl. C. A. No. 1819 of 1969:

N. H. Pardasani with S. P. Kanuga,
for Petitioner; S. J. Sorabjee with M. O.
Chinoy and A. G. Parikh, for Respond-
ents Nos. 1 and 2 (In all Appls.); M. R.
Parpia i.b. M/s. Little and Co., for the
State (In all Appls.).

In Spl. C. A. No. 1786 of 1969:

K. K. Singhavi with D. R. Dhanuka
and K. R. Dhanuka, (for Nos. 1 to 7),
M. V. Paranjpe with M. L. Bansal (for
No. 8) and N. H. Pardasani and S. P.
Kanuga (for No. 10), for Petitioners.

In Spl. C. A. No. 1787 of 1969:

D. R. Dhanuka and K. R. Dhanuka,
for Petitioner.

In Spl. C. A. No. 1788 of 1969:

M. V. Paranjpe with M. L. Bansal,
for Petitioner.

JUDGMENT:— These four petitions
are filed by the 15 petitioners the alleged
sub-tenants of Defendant No. 1 who are
aggrieved by the order of ejectment
passed against them by the Appellate
Bench of the Court of Small Causes. As
common questions of fact and law are
involved in these petitions, I propose to
dispose them of by one common judg-
ment. The proceedings arise out of the
ejectment suit filed by the respondents
against Defendant No. 1 and the peti-
tioners.

2. A few facts leading to this
litigation are as follows: The suit pro-
perty comprises of an open plot of land
measuring about 1050 square yards situate
at Mahul Road, Chembur, Greater Bom-
bay. The respondents are the owners of
this plot. In February 1954 Respondent
No. 1 let out the said open plot of land
to Defendant No. 1 Shaikh Hassan Shaikh
Razack for his char-coal business. The
agreed rent per month was Rs. 100/- and
it is said that the lease was for a period
of three years. No written document
evidencing the lease is placed on the
record of these proceedings. But it is
admitted that the said lease was in the
first instance for a period of 3 years. The
rent of Rs. 100/- per month was sub-

sequently reduced to Rs. 80/- per month
as a result of proceedings between the
parties. It appears that Shaikh Razack
put up shop structures on the open plot
of land in or about the month of August
1954 and let out the said structures to
various sub-tenants. On 25-2-1957 Res-
pondent No. 1 gave a notice to quit to
Razack and on the basis of that notice
Respondent No. 1 filed a suit on 11-4-1957
seeking the eviction of Razack and some
other defendants (those defendants are
some of the defendants in these proceed-
ings also) on various grounds. Possession
was sought on the ground on non-pay-
ment of rent, breach of the terms of
tenancy, erection of permanent structures,
unlawful sub-letting, illegal profiteering
and also on the ground that the plot of
land was required reasonably and bona
fide for construction of a building. The
suit was initially filed only against De-
fendant No. 1 and the defendants who
were alleged to be sub-tenants, were later
on impleaded at their own instance. That
suit was decreed on 21-7-1960. Defend-
ant No. 1 Razack preferred an appeal and
the other defendants also challenged that
decree in appeal Court. In all three ap-
peals were filed against the decree in
ejectment passed by the trial Court. On
31-8-1961 the Appellate Bench of the
Court of Small Causes allowed the ap-
peals and directed the dismissal of the
suit. The appellate Bench held that the
defendants were in fact sub-tenants of
the structures and not the sub-tenants of
the land. Only one defendant was held
to be a sub-tenant of the land. The
Court also found that the plaintiff had
not established any breach of the terms
of the tenancy. The Court further held
that the plaintiff had failed to prove pro-
fiteering by the tenant; that the struc-
ture put up by the tenant was not a
permanent structure within the meaning
of the relevant provisions of Section 13
of the Rent Act and that the plaintiff had
failed to prove that the premises were
required by him reasonably and bona
fide for his own occupation after erecting
the new building. The Appellate Bench
also came to the conclusion that the suit
filed on the basis of the quit notice dated
25-2-1957 was premature and the suit
was liable to be dismissed. It was held
that the lessor had not given one clear
month's notice before the institution of
the suit.

3. On 21-9-1961 the Respondents
gave another notice terminating the ten-
ancy of defendant No. 1 Razack. As the
respondents felt that the notice was defect-
ive they, by way of abundant caution,
gave another notice on 21-11-1961 ter-
minating the tenancy of defendant No. 1
Razack. On 17-2-1962 they filed a suit
against Razack claiming possession of the

suit premises on various grounds. They alleged that Razack had erected permanent structures without their consent in writing; that he had illegally sub-let portions of the plot to others; that he was profiteering by charging his tenants rent far in excess of the standard rent which he was paying to the Respondents. In addition to these grounds the respondents also sought possession of the premises on the ground that they reasonably and bona fide required the same for erecting a new building. The present suit was first filed against defendant No. 1 and defendants 2 to 11. Later on, at the instance of the plaintiffs, the other defendants were also joined as necessary parties. That is how the suit came to be filed by the respondents against the defendant No. 1 and the present petitioners.

4. Defendant No. 1 died after the institution of the suit. Defendants 1-A to 1-D were brought on the record as his legal representatives and they filed the defences in which they contended that defendant No. 1 was not liable to be evicted on the various grounds mentioned in the plaint. In other words, they denied the fact of illegal sub-letting and profiteering. They also denied the defendant No. 1 had erected any permanent structure. They contended that the Respondents did not require the premises for erecting a new building. It was their defence that the suit was barred by res judicata in view of the earlier decision of the appellate Bench of the Court of Small Causes. The other defendants filed separate defences substantially supporting the case of the heirs of defendant No. 1. They claimed to be lawful sub-tenants and stated that by virtue of Section 14 of the Rent Act even if defendant No. 1 was liable to be evicted, they would become the direct statutory tenants of the plaintiffs. The learned trial Judge framed a number of issues and after considering the oral and documentary evidence came to the conclusion that the suit was not barred by res judicata. Defendant No. 1 had not unlawfully sub-let any portion of the suit premises; that defendant No. 1 was guilty of profiteering as he was charging the sub-tenants rent in excess of the standard rent and permitted increases; that the plaintiffs have failed to prove that the premises are reasonably and bona fide required for the erection of a new building. The learned trial Judge held that defendant No. 1 was liable to be evicted on the ground that he was guilty of profiteering. As regards the allegation of erection of permanent structures, he held that defendant No. 1 was not guilty of any breach of the terms of tenancy. The learned trial Judge accordingly held that the plaintiffs were not entitled to claim pos-

session on the ground that defendant No. 1 had erected permanent structures. He also held that defendants 2 to 16 were lawful sub-tenants of the land. He passed a decree in ejectment only against the heirs of defendant No. 1. He held that by virtue of Section 14 of the Rent Act, the rest of the defendants had become the direct tenants of the plaintiffs. In the result he dismissed the suit of the plaintiffs against the defendants 2 to 16.

5. The heirs of defendant No. 1 preferred an appeal challenging the decree passed against them. The plaintiffs also filed an appeal against the decree in so far as it directed the dismissal of their suit for possession against defendants Nos. 2 to 16. The Appellate Bench of the Court of Small Causes heard the two appeals. The Appellate Bench dismissed the appeal filed by the heirs of defendant No. 1. The Appellate Bench disagreed with the various findings recorded by the trial Court against the plaintiffs. It also held that the suit was not barred by res judicata. It held that the defendant No. 1 was guilty of erecting permanent structures and profiteering. In respect of some defendants it is found that defendant No. 1 was liable to be evicted on the ground of illegal sub-letting. The Court also came to the conclusion that the plaintiffs have proved that they required the premises reasonably and bona fide for erection of a new building. In the result the appeal filed by the plaintiffs was allowed and the suit in ejectment was decreed against all the defendants including the heirs of the deceased defendant No. 1.

6. The petitioners, who are defendants 2 to 16, are challenging the decree passed by the Appellate Bench of the Court of Small Causes on various grounds. It must be noted that the heirs of the deceased defendant No. 1 have accepted the finality of the adjudication in so far as it concerned them. They have not approached this Court by making any grievance about the said decision. Before these petitions were taken up for hearing, the advocate for the petitioners pointed out that in these proceedings the vires of Section 13 (1) (i) of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 was challenged on the ground that that section infringes the fundamental right guaranteed under Article 14 of the Constitution. Notice was, therefore, ordered to be issued by this Court to the Advocate-General of Maharashtra. After the notice was returned served, the applications were fixed for final hearing. No appearance was entered on behalf of the Advocate-General. On the adjourned date Mr. Parpia, instructed by M/s. Little and Co., gave an applica-

tion on behalf of the State of Maharashtra, for leave of the Court to appear on behalf of the State of Maharashtra. I granted the application and Mr. Parpia appears for the State of Maharashtra.

7. Mr. Singhvi, appearing on behalf of some of the petitioners, has raised the following points of law in support of the petition:

(1) That Sec. 13 (1) (i) of the Rent Act infringes the fundamental right under Art. 14 of the Constitution and is to that extent void under Art. 13 (1) of the Constitution;

(2) That the present suit of the landlords is barred by *res judicata* on account of the findings recorded in the earlier eviction suit;

(3) That Section 13 (1) (i) of the Rent Act applies to open land and the landlords will not be entitled to possession when the land is not open land at the date of the suit;

(4) The effect of Section 14 of the Rent Act vis-a-vis the rights of the petitioners who are the lawful sub-tenants under the original tenant;

(5) That the finding of the appellate Bench of the Court of Small Causes about the bona fide and reasonable requirement of the landlords under Section 13 (1) (i) of the Rent Act is a result of the misreading of that provision. Besides the findings of fact about sub-letting, etc. are erroneous in law, and

(6) Jurisdiction of this Court under Art. 227 of the Constitution of India.

8. Mr. Singhvi generally addressed me on all these points. Mr. Dhanuka, who appears for some of the petitioners, advanced supplementary arguments. Mr. Pardasani has endorsed the say of Mr. Singhvi and Mr. Dhanuka. Mr. Paranjpe, who also appears for one of the petitioners, confined his argument only to the interpretation of Section 13 (1) (i) of the Rent Act and submitted that the Appellate Court has not adopted a correct approach while recording the relevant findings.

9. In reply Mr. Sorabjee, who appears for the respondents plaintiffs, submitted that the decision of the Appellate Bench of the Court of Small Causes is based on appreciation of oral and documentary evidence and this Court cannot interfere with the said findings of fact. Even the points of law arising in this case have been correctly decided by the lower Court. He then submitted that Section 13 (1) (i) of the Rent Act does not in any manner infringe the fundamental rights under Art. 14 of the Constitution, and its constitutional validity is not open to challenge.

10. Mr. Parpia, on behalf of the State of Maharashtra endorsed all that

was said by Mr. Sorabjee and pin-pointed the various features of the impugned legislation which go to show that it does not conflict with Art. 14 of the Constitution. I will consider these points of law in the order in which I have mentioned them.

11. Mr. Singhvi, as stated above, vehemently argued that Section 13 (1) (i) of the Rent Act unreasonably discriminates between tenants of one class against the tenants of another class. According to his submission the discrimination is wholly arbitrary and inconsistent with the known object of the Rent Act. Before I consider the criticism levelled against the impugned provision of the Rent Act, I would first enumerate the recognised tests or guidelines which are laid down by the Supreme Court. It is well settled that the constitutional provision which secures equal protection of the laws forbids class legislation and not reasonable classification. A law based on or involving a classification founded on intelligible differentia having a rational relation to the object sought to be achieved is considered constitutionally valid.

12. In *Ramkrishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 at p. 547 the Supreme Court has enunciated the following principles. These principles have been consistently adopted and applied in all the cases. I am reproducing only those tests which are strictly relevant for deciding the point at issue:

"(a)

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d)

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitu-

tionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

13. As is stated by the Supreme Court in the above case, these principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the law.

14. In an earlier decision of the Supreme Court (*Kedar Nath Bajora v. State of West Bengal*) reported in AIR 1953 SC 404 at p. 407, the following observation is made which may also be relevant while examining the constitutionality of the impugned legislation:—

"Article 14 does not insist that legislative classification should be scientifically perfect or logically complete."

The Supreme Court also added that merely because there is no such scientific perfection or logical infallibility in the mode of classification it cannot be said that the Act is based on no intelligible differentia and is, therefore, arbitrary. I also find that in *Jalan Trading Co. v. Mill Mazdoor Sabha*, AIR 1967 SC 691, the Supreme Court pronounced yet another principle which can be usefully followed while testing the validity of the impugned classification:—

"If the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. With a view to secure particular objects a scheme may be selected by the Legislature, wisdom whereof may be open to debate; it may even be demonstrated that the scheme is not the best in the circumstances and the choice of the Legislature may be shown to be erroneous, but unless the enactment fails to satisfy the dual test of intelligible classification and rationality of the relation with the object of the law, it will not be subject to judicial interference under Art. 14."

15. In a nutshell the argument of Mr. Singhvi against the constitutional validity of Section 13 (1) (i) is as follows:

16. While restricting the landlord's right to evict the tenants from premises on certain grounds mentioned in Section 13 of the Rent Act, the Legislature has in fact made class-legislation which favours one category of tenants by conferring on them rights and privileges in the matter of evidence. These are denied to the category of tenants to which the petitioners belong. The right of the landlord to evict tenants from premises which are buildings or structures under Sec-

tion 13 (1) (g), (h), (hh) are hedged in by stricter conditions and provision is also made to minimise the evicted tenants' hardships. By contrast under Section 13 (1) (i) the landlord is awarded possession of premises as soon as he establishes that his requirement is reasonable and bona fide. Section 13 (3) and Section 17 make provision for certain safeguards in favour of the tenants but they are illusory and not as efficacious as those enjoyed by the privileged class of tenants of premises comprising of buildings or structures. Mr. Singhvi argues that the Rent Act seeks to protect tenants of premises against eviction whether they are occupying buildings or open land, or they occupy structures put up by them or their landlord. There is no good reason why there should be any discrimination in the matter of eviction clause. All these tenants irrespective of the nature of the premises held by them need the protection of laws against unscrupulous landlords. If the tenants of open lands have lawfully constructed their own structures on the demised property, they certainly stand in the same position as the tenants who occupy buildings built by their landlords. Section 13 (1) (i) when so considered and compared with the other relevant clauses of Section 13, clearly show that the classification is arbitrary and the same also suffers from want of an intelligible differentia.

17. At this stage I find it necessary to ascertain the object of the Bombay Rents, Hotel and Lodging House Rates (Control) Act 1947. The preamble of the said Act and the various clause notes accompanying the amendments effected in the Act from time to time show that the Rent Act was enacted, inter alia, to control evictions and wherever possible to boost and encourage the building activity by enabling landlords to rebuild dilapidated building and also to erect structures or buildings on vacant plots. The later object of the enactment is evident from Section 13 (1) (hh), (i) and (ii).

18. Section 12 (1) of the Rent Act provides that the landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the amount of the rent and permitted increases, if any, and performs the other conditions of the tenancy in so far as they are consistent with the provisions of the Act. Section 12 (3) (a) provides that the tenant who falls in arrears of rent for more than six months forfeits the protection against eviction given by Section 12 (1) of the Act. The landlord is not free to evict the tenant as and when he chooses to do so. But Section 13 enacts that the landlord shall be entitled to recover pos-

session of any premises if the Court is satisfied about the existence of the several grounds mentioned in that sub-section. Section 13 relaxes the rigour of law in favour of the landlords on certain limited grounds. The various clauses which contain different grounds for eviction are not the same. They differ in material particulars and in the result the tenants are granted protection against eviction in varying degrees under varying circumstances.

19. When Mr. Singhvi criticises this arrangement of the several clauses of Section 13 (1), he overlooks two important factors, and those factors betray the hollowness of his attack. The Rent Act protects tenants against unreasonable eviction from the demised premises. When the demised premises are either land or building, they are not the same and identical. Equal protection of laws cannot be claimed under unequal circumstances. Merely because the tenant of the land has lawfully constructed a structure of his own on the demised land it makes no difference. When we consider the legal position it is clear that the structure built by the tenant belongs to him at all times. Under Sec. 108 (B) (h) of the Transfer of Property Act, the tenant has, even after the determination of the lease, the right to remove all things which he has attached to the earth. He can take away his fixtures or the material which he may have used for putting up the structure when his tenancy of the land is determined for one reason or the other. As the landlord has no proprietary interest in such structure or building, there was no reason to extend the protection of the rent Act to the tenants of the lands in respect of their structures. This is the first aspect which must be given due importance while appreciating Mr. Singhvi's submission.

20. Then there is difference in legislative protection and that is also founded on a rational basis consistent with the known object of the enactment. The landlords of open lands should not find it burdensome when they propose to undertake building activity. Section 13 (1) (i), till it was amended by Bombay Act (No. 61) of 1963 allowed the landlord vacant possession of the plot only when he required it for erection of a new residential building. The note on clause which precedes that amendment justifies the dropping of the word "residential" on this ground. So the amendment was thought necessary to give greater incentive to builders.

21. Mr. Singhvi is right when he submitted that the tenants of lands will suffer hardship similar to those suffered by tenants of buildings. But that was

inevitable. The difference, if any, cannot in any manner affect the validity of the classification. As observed by the Supreme Court, the matter cannot be examined scientifically and with meticulous precision. When the legislators undertake to mitigate a major social evil and provide for greater good of the greater number, one cannot adopt a too rigid mathematical test while deciding the validity of a legislative measure. In the words of the Supreme Court, Art. 14 of the Constitution does not insist that legislative classification should be scientifically perfect or logically complete. Unless the classification is wholly arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden.

22. Mr. Sorabjee is right when he says that in the present case there is a clear-cut intelligible differentia which formed the basis of classification. Tenants of buildings are different from tenants of open pieces of lands. When we consider the object of the Rent Act, it is also evident that there is a rational basis for the above mentioned classification for good reasons different conditions are prescribed by the various clauses of Sec. 13 as conditions precedent for passing an order of eviction against tenants.

23. Mr. Parpia, who appears for the State, has also emphasised this very aspect. After carefully considering the criticism levelled by Mr. Singhvi against the validity of the impugned clause of Section 13, I have come to the conclusion that the same is valid. The reasonable classification is not hit by the prohibition implicit in Art. 14 of the Constitution.

24. Then Mr. Singhvi contended that the present suit filed by the respondents is barred by res judicata. The petitioners relied on this defence even in the lower courts and they urged that the decision in R. A. E. Suit No. 918/5235 of 1957 as varied by the decision of the Appellate Bench bars the present suit and some of the findings recorded by the Appellate Bench in appeals filed by the defendants are conclusive and binding on the plaintiffs in the present proceedings.

25. Before I consider the strength of this submission, it will be necessary to refer briefly to the findings recorded by the Appellate Bench in the earlier proceedings. The Appellate Bench came to the conclusion that the notice to quit dated 25-2-1957 terminating the tenant's tenancy by the end of March 1957 was served on the tenant on 1-3-1957 with the result that the tenant had not one clear month to vacate the premises. The suit filed on the basis of such a notice was liable to be dismissed. Defendant No. 7 in this suit, who was also a defend-

ant in that proceeding, who held to be a lawful sub-tenant. But the Court found that the plaintiff had failed to bring his case under S. 13 (1) (i) of the Rent Act as against this defendant on the ground that the law was subsequently amended. It was held that the structure put up by the tenant was not permanent. It was held that the land in question was let by the plaintiffs with the knowledge that defendant No. 1 would put up a structure on the said land. It was also found that the plaintiff had failed to prove that he required the premises reasonably and bona fide for erecting a new building.

26. Mr. Singhvi referred to a few rulings to show that the findings recorded in the earlier suit, whatever the result of the final order, are binding on the parties against whom those findings are recorded. Mr. Singhvi drew my attention to a Calcutta decision in *P. M. Mukerjee v. Ambika Churn*, (1897) ILR 24 Cal 900. In that case a point arose whether findings recorded in the earlier suit are binding in the subsequent suit although the earlier suit was decided against the plaintiff on the ground that the requisite notice was not given. When the ground of *res judicata* was pleaded in the subsequent suit the Court held that the matter directly and substantially in issue in the subsequent suit was directly and substantially in issue in the previous suit and it was finally heard and decided between the same parties notwithstanding the fact that the previous suit filed by reason of the decision of the Court upon some other matter as well. The subsequent suit was barred by *res judicata*. The ratio of this decision, no doubt, *prima facie* supports the contention of Mr. Singhvi. In the present case also the appellate Bench recorded a finding that the notice was not of the required duration and the suit was liable to be dismissed on that finding only. But the Court also recorded other findings mentioned above. The point will have to be decided after carefully considering the important question whether, or not the final decision was based squarely on some or on all the findings recorded in the suit. This decision was referred to by a Division Bench of this Court while considering a similar point of *res judicata* in *Laxman v. Saraswati*, 63 Bom LR 152 = (AIR 1961 Bom 218). As both the parties relied upon the decision, I will consider that authority towards the end of my discussion. Similarly both the parties relied upon another decision of this Court in *N. J. Gor v. M. G. Raval*, 53 Bom LR 174 = (AIR 1951 Bom 336). I will also refer to that decision when I conclude the discussion on the point of law raised by the parties.

27. Mr. Sorabjee also referred to certain other rulings dwelling on the point at issue. A Division Bench of the Madras High Court held in *Ramaswami Reddy v. T. Marudai Reddy & Co.*, AIR 1924 Mad 469 that an adverse finding in a decree in favour of a party is not *res judicata*. While giving this decision the Madras High Court followed an earlier decision of the Privy Council in *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy*, ILR 48 Cal 460 = (AIR 1922 PC 241). In the same volume at page 893 there is another ruling of the same High Court to the effect that a finding in the proceeding not necessary for the disposal of the suit but recorded only to avoid possible remand is not *res judicata*. It is not the basis of the judgment and, therefore, the point is not finally determined.

28. The next decision to be considered is the one in *Hiralal Murarka v. Mangtulal Bagaria*, AIR 1947 Cal 221. The Court held in that case that a finding upon an issue not necessary to be decided will not found a plea of *res judicata*. It was a case where the earlier suit was dismissed on the ground that a proper notice under Section 80 of the Civil P. C. was not given. Some findings were also recorded on other issues raised in that suit. When in the subsequent suit the decision was relied upon as constituting a bar in the nature of *res judicata*, the High Court of Calcutta held that once the Court comes to the conclusion that no notice had been given under Sec. 80, Civil P. C., it had no option but to dismiss the suit under Order 7, Rule 11 of the Code. The findings of that Court on the merits are obiter and cannot operate as *res judicata*. In this case reliance was placed on the earlier decision of that Court in (1897) ILR 24 Cal 900. It was held to be no longer good law. This matter went up to the Privy Council and the Privy Council upheld the decision of the Calcutta High Court and that judgment is to be found in *Shankarlal Patwari v. Hiralal Murarka*, AIR 1950 PC 80. I am mentioning this fact because the decision in (1897) ILR 24 Cal 900 is referred to as good law in 63 Bom LR 152 = (AIR 1961 Bom 218). It appears that the later decisions of the Calcutta High Court and also of the Privy Council were not brought to the notice of the Division Bench which decided that case. The decision in *Bhiku Appa Kura v. Dattatraya Chandrayya*, AIR 1947 Bom 392 is also an authority for the proposition that a finding which was wholly unnecessary for deciding the suit does not operate as *res judicata*.

29. Now, I must refer to a recent judgment of a Division Bench of this Court in 63 Bom LR 152 = (AIR

1961 Bom 218). This judgment is strongly relied upon by both the parties and as a decision of the Division Bench it is binding on me. After considering the various rulings of the High Court the Division Bench laid down certain broad propositions which would be helpful while resolving the point of res judicata which arises under similar circumstances. In the previous suit when a number of findings are recorded and the suit is finally decided one way or the other, it is important to find out whether the decision of the suit was based on some or all the findings recorded in the suit. The legal position summed up by the Division Bench of this Court at page 161 is to the following effect:—

"It appears from the decisions mentioned above that it cannot be laid down as a general proposition that where a previous decision is supported on two or more findings, all the findings will necessarily operate as res judicata. Where the previous suit was dismissed on a technical ground which made the suit untenable, findings recorded on the merits would normally be obiter dicta. Similarly, if the Court which decided the prior suit has itself based the decision on only some of the findings recorded by it, or if under the circumstances of the case its decision can be fairly attributed to only some of the findings so recorded, the other findings would not operate as res judicata. In other cases, where the previous decision is based upon, and is attributable to several findings, all the findings will have the force of res judicata."

Mr. Singhvi for the petitioners strongly relies upon the last part of the observation and argues that the previous decision in the present case is attributable to the several findings and not merely to the defective notice. Mr. Sorabjee, on the other hand relies upon this very authority and submits that the earlier decision can be said to be based only on the point of notice. The ultimate decision can be attributed only to that finding which was decisive for the disposal of the suit. The other findings were recorded by the Appellate Bench of the Court of Small Causes only incidentally to avoid a further remand if the higher court were to disagree with its finding on the point of notice.

30. I have gone through the judgment of the Appellate Bench and I find that Mr. Sorabjee is right in his submission. The final decision in that suit can be attributed only to the finding on the point of notice for more than one reason. It was in the nature of a technical point and the suit was, therefore, liable to be dismissed as soon as the court found that the notice of ter-

mination of tenancy was not proper. The final decision can be fairly attributed only to this one finding.

31. As for the claim under Section 13 (1) (i), the bar of res judicata does not avail the petitioners for the additional reason that the plaintiffs have based their claim on altered circumstances. I need only refer to 53 Bom LR 174 = (AIR 1951 Bom 336) wherein it is held that a fresh suit for possession on the ground of reasonable and bona fide requirement based on identical facts without pleading change of circumstances is barred by res judicata.

32. Mr. Singhvi then raised one small point which can be disposed of without much discussion. He says that Section 13 (1) (i) of the Rent Act is attracted only when the premises are land at the commencement of the tenancy and also at the time when the landlord institutes the suit for eviction on that ground. In the present case, says Mr. Singhvi, the tenant and the sub-tenants by their joint venture have erected structures on the leased land. The sub-tenants are occupying the structures which are shops. In such a case the landlord cannot ask for possession under Section 13 (1) (i) of the Rent Act. Mr. Sorabjee has raised an objection that this point was not taken in any one of the Courts below. He also submitted that the point of law is covered by a decision of the Supreme Court.

33. It is true that the point was not taken up in the Courts below, but as I find that Mr. Sorabjee's contention on the merits is well-founded, that omission on the part of the petitioners is of no consequence. I am referred by Mr. Sorabjee to a decision in K. R. Kundapur v. Krishnaji Karani, AIR 1966 SC 1024. A similar point was raised by the tenant in this case. The tenant had taken an open plot of land and built a structure thereon and he resisted the eviction on the ground that the landlord had no cause of action against him under Section 13 (1) (i) of the Bombay Rent Act. The Supreme Court examined the relevant clauses of the Rent Act including Section 5 (8) and Section 13 (1) (i) and came to the conclusion that the expression "premises" in Section 13 (1) refers to the subject-matter of letting for which rent is payable and in respect of which there is a relationship of landlord and tenant.

34. In the present case the respondents had let out an open plot of land to defendant No. 1. The rent payable by defendant No. 1 is for the land only. Defendant No. 1 is recovering rent from his tenants in respect of the structures standing on the land. Respondents

have no concern with the structures and the structures are not the subject-matter of tenancy between the respondents and defendant No. 1. As the premises are land only, the respondent's suit cannot be defeated on the ground that the tenant of the land has put up his own structure on the land.

35. The next important point of law raised by Mr. Singhvi is about the effect of Section 14 of the Rent Act on the rights and liabilities of the petitioners who claim to be lawful sub-tenants. I will consider the issue of lawful sub-tenancy later on. For the present, the point of law is considered on the basis that all the petitioners are lawful sub-tenants and they become the direct tenants of the plaintiffs as soon as the tenancy of defendant No. 1 is determined. Mr. Singhvi relied upon a decision of the Supreme Court in *Hiralal Vallabhram v. Sheth Kasturbhai Lalbhai*, AIR 1967 SC 1853 for his proposition that the sub-tenant of the contractual tenant will not be deemed to be a tenant under Sec. 14 of the Rent Act as soon as the notice determining the tenancy is given. The words "is determined for any reason" in Section 14 mean that where the interest of a tenant comes to an end completely, Mr. Singhvi says that in the present case the tenant's interest comes to an end on the passing of a decree in ejectment. It is only at that point of time that the sub-tenants become the deemed tenants of the plaintiffs. As deemed tenants they are liable to be evicted only after a proper notice to quit is given by the plaintiffs. He argues that in the present suit a decree in ejectment against the petitioners cannot be passed for the simple reason that their tenancy has not been terminated by a proper notice to quit. Mr. Singhvi relied upon a decision of this Court in *Satwant Kaur v. Abdul Kadar*, 68 Bom LR 221 = (AIR 1967 Bom 71) for the proposition that the sub-tenant is as much a tenant under the Rent Act and is entitled to a notice of termination of tenancy before a suit in ejectment can be filed against him. It was a case where on the death of a sub-tenant the right of sub-tenancy had devolved on all his heirs. The Court considered the definition of "tenant" as given in Section 5 (11) and read that with the provisions of Section 14 of the Rent Act. The landlord had given a notice terminating the tenancy of only one of the several persons in whom the sub-tenants' rights were vested. This Court held that the suit was bad for the reason that the other persons who were virtually joint tenants were not given any notice to quit. Whether or not a statutory tenant is entitled to a notice was not considered in that case.

The point of law was decided on the assumption that on the death of a sub-tenant all his heirs become the lawful sub-tenants of the premises. In fact, it is held by the Supreme Court in *Anand Nivas Pvt. Ltd. v. Anandji Kalyanji*, AIR 1965 SC 414 that by virtue of Ss. 12, 14 and 15 a person remaining in possession after determination of the contractual tenancy becomes a statutory tenant. He can remain in possession but cannot enforce terms of the original tenancy. He is a statutory tenant but has no contractual interest in the premises. He cannot create lawful sub-leases in favour of others. The ratio of this decision squarely applies to the facts of the present case. The various lawful sub-tenants, who will become the deemed tenants of the plaintiffs, will be the statutory tenants and it is not necessary to terminate their tenancies before instituting proceedings against them under any of the provisions of the Rent Act. Of course Section 12 requires a demand notice before a suit is filed for possession on the basis of rent defaults. But that is a different thing. Mr. Singhvi is not right when he says that the suit against the petitioners should fail for want of a notice to quit.

36. Both the parties strongly relied upon another decision of this Court in *Indian Coffee Workers Co-operative Stores Ltd. v. Mrs. Bachobai Cowasjee Dhanjeeshaw*, 66 Bom LR 338 = (AIR 1967 Bom 210). It was a case where the landlord had filed a suit against the tenant and the sub-tenant for possession on certain grounds under Section 13 of the Rent Act. One of the grounds of eviction was that the tenant had erected a permanent structure without the written permission of the landlord. The lower Courts had found that the tenant had in fact erected a permanent structure and the sub-tenants were actively associated with the erection of that structure. The sub-tenants challenged the decree on the ground that by virtue of the ejectment order against the tenant, they become the deemed tenants themselves under Section 14 of the Rent Act. This Court held that as the sub-tenants were jointly responsible with the tenants for the erection of the structure they are liable to be evicted along with the tenant. Mr. Singhvi relies on this part of the judgment to show that in the present case the petitioners will not be liable to be evicted on the basis of the grounds for ejectment which are found against the tenant. The tenant here is found guilty of profiteering. According to Mr. Singhvi, such a ground is not available for ejectment orders being passed against the sub-tenants who are not guilty of any such default. But Mr. Sorabjee tried

to receive support from this very judgment for his proposition of law that once the grounds mentioned in Section 13 (1) are established against the tenants, then the sub-tenants have no independent defence and a decree in ejectment can be passed against them all when all are made parties to the suit. This Court considered the effect of Section 14 and laid down two propositions of law:—

37. It was held that Section 14 cannot be read aside from the provisions of the Act, and if a sub-tenant became a lawful tenant from the inception of the sub-tenancy he was bound to act strictly according to the Act, i.e. must be ready and willing to observe the terms of the tenancy and must not do anything that is prohibited by the Act. If he contravened the Act or did not observe the terms of tenancy, Section 14 could not possibly be regarded as giving him the right to be a tenant under the landlord. As sub-tenants, in that case, had not observed the terms of the tenancy, by causing permanent alterations in the premises, they were held to be not entitled to be tenants of the landlord.

38. The other aspect which was stressed in that decision was that the right of a person to become a sub-tenant under Section 14 is not an absolute right but it is controlled by the other sections of the Act. If the other sections entitled the landlord in a given case to obtain possession, Section 14 cannot come in the way. Section 12 entitles the landlord to obtain possession for non-payment of rent and Section 13 for other reasons. If the landlord, therefore, is entitled to obtain possession under any of the provisions, Section 14 must give way.

39. I have carefully considered the ratio of this judgment and I find that this interpretation of Section 14 will render the section wholly nugatory. A landlord has no privity of contract with the sub-tenants of his tenant. Sub-tenants are answerable for performing the various conditions of sub-tenancy only to the tenant who is their landlord for the time being. It is only when the tenant's tenancy is determined either by surrender or by a decree in ejectment passed against him that the sub-tenants become the lawful tenants of the landlord by virtue of Section 14 of the Rent Act. Once they get that legal status or character, then they are to hold the premises on the same terms and conditions as they held before subject to the other provisions of the Rent Act. But the words "subject to the other provisions of the Rent Act," will have to be understood as giving them the same rights and privileges as are conferred on the statutory tenants, whose contractual tenancy for

one reason or the other has come to an end.

40. A closer look at Section 13 (1) will show that the various grounds on which the landlord can seek possession are not of the same kind and they are different in material particulars. Grounds under S. 13 (1) (a), (b), (c), (d) and (e) can be said to be personal to the tenant, who by his act, has rendered himself liable to be evicted. Grounds under Section 13 (1) (g), (h), (hh), (hhh), (i) and (ii) are mainly concerned with the premises held by the tenant. They are not in the nature of defaults which could be committed by the tenant. The landlord must establish those grounds before he can ask for a decree in ejectment against the tenant. If in a suit against the tenant other persons are joined on the allegation that they are sub-tenants and if an eviction is sought only on the grounds which are personal to the tenant then a decree in ejectment against him will result in conferring direct tenancy rights on the lawful sub-tenants. They cannot be ejected in that suit on those grounds. On the other hand, if the landlord seeks possession on the grounds which are not personal to the tenant and which concern the premises themselves, then it is open to the landlord in the same suit to plead and prove those grounds not only against the tenants but against the other persons impleaded in the suit and who are ultimately held to be lawful sub-tenants. In such a case the issues would be heard and decided between the landlord on the one side and the tenants and sub-tenants on the other. If the sub-tenants are not impleaded even in such a suit then the landlord, after obtaining a decree against the tenant, will have to file a fresh suit against the sub-tenants, who by then had become his direct deemed tenants by virtue of Section 14 of the Rent Act. In my opinion this would be the proper interpretation of Section 14 of the Rent Act when that section is read along with the other relevant provisions of the Rent Act. The construction indicated by Patel, J. will make Section 14 wholly meaningless. I will give only one illustration to indicate the fallacy which is inherent in that interpretation. The tenant may commit rent defaults for more than six months. He may not have any defence to an action founded on rent defaults. Under Section 12 (3) (a) the Court has no option but to pass a decree against him. But the sub-tenants may have regularly paid the rent to the tenant and their only fault will be that during the term of their sub-tenancy they have not forced or compelled the tenant to pass on the money received by him to the landlord. It will be wholly unreasonable

to expect the sub-tenants to perform such an onerous duty. In my opinion, it is one of those grounds which is personal to the tenant and if his tenancy comes to an end on that ground, the sub-tenants become the direct tenants by virtue of the provisions of Section 14 of the Rent Act and they will be protected under the Rent Act.

41. If this was the only point involved in this case then I could not have taken a view contrary to the decision of the Division Bench of this Court and I would have referred the matter to the Division Bench without considering the merits of the case. But as I am holding in favour of the plaintiffs on other points, I have not considered it necessary to refer this matter to a Division Bench.

42. In the present case the plaintiffs can succeed against the lawful sub-tenants only if they show that they are entitled to possession of the plot of land reasonably and bona fide under Section 13 (1) (i) of the Rent Act. If the plaintiffs succeed in establishing only the other grounds which are personal to the tenant then a decree in ejectment cannot be passed against the lawful sub-tenants on those grounds.

43. M/s. Singhvi and Dhanuka, relying on the legal effect of Section 14 of the Rent Act, tried to evolve a new defence for the lawful sub-tenants of the land in the event of a decree in ejectment against the principal tenant defendant No. 1 on any one of the grounds which involve his personal defaults. As the structures belong to defendant No. 1 after the decree the sub-tenants will continue to be tenants of defendant No. 1 in respect of his structures and will be deemed statutory tenants of the plaintiffs in respect of the land underneath subject to the provisions of the Rent Act. In Special Civil Application No. 1191 of 1967 decided on 10-3-1970 I have negated the theory that the building or structure, apart from the land on which it stands, could be the subject-matter of Sec. 105 of the Transfer of Property Act. Under that section a lease is a transfer of a right to enjoy immovable property. Under Section 3 of the Transfer of Property Act read with Section 3 (26) of the General Clauses Act (X of 1897) "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. When a tenant of a land puts up his own structure thereon then under Section 108 (B) (h) even after the determination of the lease whilst he is in possession of the property leased but not afterwards, he has a right to remove at any time, all things which he has attached to the

earth, provided he leaves the property in the state in which he received it. The structure or building without the land cannot be the subject-matter of a valid lease. The doctrine of dual ownership peculiar to India cannot be stretched to postulate a theory of dual tenancies implicit in the submissions of the learned counsel for the petitioners.

44. Realising this insurmountable difficulty Mr. Dhanuka suggested a novel solution for regularising the legal relationship between the petitioners and the defendants after this decree in ejectment brings about a total extinction of the tenancy of defendant No. 1. Despite the decree for possession of the demised land the tenant may not exercise his statutory right to demolish and remove his structure on the land. In law after the prescribed time i.e. execution of decree for possession of land against the defendant No. 1, the right to structure will vest in the plaintiffs. At that point of time the sub-tenants should be deemed to be the tenants both in respect of the land and structure under the plaintiffs. Superficially considered, the argument is attractive. I am interpreting a benevolent statute like a Rent Act enacted to safeguard the rights and interests of tenants. I would gladly adopt a construction which will advance the object of the statute. But unfortunately for Mr. Dhanuka, I find it wholly unwarranted. Rent Act protects tenants in occupation of premises against unreasonable eviction by landlords. Under Section 5 (8) of the Rent Act 'premises' means land or building let. In the present case what was let by the plaintiffs to defendant No. 1 was land and not structure. The structure was not part of the demised property and not premises within the meaning of the Rent Act. It is not possible to extend the fiction of law implicit in Section 14 of the Rent Act in the manner and to the extent suggested by Mr. Dhanuka.

45. That takes me to the final phase of this case, viz. whether the plaintiffs have established the case under Section 13 (1) (i) of the Rent Act. Before I consider the point of law, I must make it clear that in my opinion all these petitioners are the lawful sub-tenants of the land. The trial Court correctly recorded a finding to that effect. The Appellate Bench of the Court of Small Causes was not justified in reversing that finding. The facts of this case clearly show that the plot of land was let out to defendant No. 1 some time in August 1954 for a period of 3 years. Shortly after the commencement of the tenancy in or about August 1954 defendant No. 1 had erected shop structures thereon. In all

there are 15 shop structures erected on the demised plot. According to the plaintiffs only 11 shops were erected when the earlier suit was filed and the remaining 4 shops were subsequently erected. The trial Court has considered the various admissions of the plaintiffs and has come to the conclusion that very probably in August 1954 itself all the shop structures must have been erected. The plaintiffs have made halting admissions and concession in favour of some of the defendants. Plaintiffs challenge the sub-tenancy of defendants 2 to 16 only as illegal. That is again a curious position. From amongst these defendants a concession is made in favour of defendant No. 15. No good reason is given as to why from amongst these defendants a concession could be made in favour of defendant No. 15. Even the rent receipts show that the defendants were given the plot of land much earlier to the date of the Rent Act Ordinance of 1959.

46. Mr. Dhanuka has referred to the pleadings of the parties and their conduct. The trial Court has discussed all the relevant factors in greater detail. The Appellate Bench without sufficient reason has tried to explain away the admissions of the plaintiffs with reference to his belated explanation in his re-examination. Again, it is not conceivable that a tenancy could be created only in respect of the structure apart from the land on which the structure stands. I have held in Special Civil Application No. 1191 of 1967 decided on 10th March 1970 that a tenancy cannot be created in law in respect of the structure apart from the land on which it stands. In view of this decision, Mr. Sorabjee for the respondents, could not pursue the matter further but he did argue that a person could be a tenant of the structure at the same time having no interest in the land on which the structure stands. As defendant No. 1 has immediately built upon the open piece of land the several shops it is reasonable to assume that he let out the shops to the several defendants more or less at the same time long before the date of the Rent Act Ordinance of 1959. It is not shown by the plaintiffs that some other persons were in possession before the shops were occupied by the defendants Nos. 13 to 16. I therefore disagree with the finding of the Appellate Bench of the Court of Small Causes and hold that the trial Court was right in recording finding that all the defendants Nos. 2 to 16 are lawful sub-tenants in respect of the open plot of land.

47. As stated above, the plaintiffs will only succeed in getting an ejectment order if they show against all the defendants including the sub-tenants that they

require the premises reasonably and bona fide for erection of a building within the meaning of Section 13 (1) (i) of the Rent Act. That takes me to the consideration of the key words in the sub-section 'reasonably and bona fide.' Advocates on either side have made various submissions relying upon a mass of case-law and tried to put forth their own interpretation on these two words. I shall presently consider the various possible interpretations and then express my view in the matter.

48. Mr. Singhvi for the petitioners attacked the finding of the Appellate Bench on the ground that the Appellate Bench has not taken into account the relevant factors which had influenced the decision of the trial Court. He further stated that all the relevant factors considered by the trial Court are ignored and the Appellate Bench has held that mere financial capacity to build is sufficient to satisfy the Court that the plaintiffs reasonably and bona fide require the premises. As against this Mr. Sorabjee for the respondents contended that the decision of the Appellate Bench is based on findings of fact and there is no error of law apparent on the face of the record which would justify any interference under Art. 227 of the Constitution.

49. The Supreme Court in the case of Neta Ram v. Jivan Lal, AIR 1963 SC 499 was interpreting S. 13 (3) (a) of Patiala & East Punjab States Union Urban Rent Restriction Ordinance. Section 13 (3) (a) (iii) enabled the landlord to recover possession of any building if he required it for the purpose of re-erection of that building or for its replacement by another building or for the erection of other buildings. While interpreting the word "require" in the light of the various provisions of the Rent Act, the Supreme Court held that certain conditions will have to be fulfilled. It must be noted that according to Section 13 (3) (a) (iii) (b) the Controller had to be satisfied that the claim of the landlord is bona fide. In other words the landlord had to establish that he required bona fide the building for the specified purpose. At page 502 of the report the Court has observed as follows:—

"The Controller has to be satisfied about the genuineness of the claim. To reach this conclusion, obviously the Controller must be satisfied about the reality of the claim made by the landlord. This can only be established by looking at all the surrounding circumstances such as the condition of the building, its situation, the possibility of its being put to a more profitable use after construction, the means of the landlord and so on. It is not enough that the landlord comes forward and says that he entertains a

particular intention, however, strongly, said to be entertained by him. The clause speaks not of the bona fides of the landlord, but says, on the other hand that the claim of the landlord that he requires the building for reconstruction and re-erection must be bona fide, that is to say, honest in the circumstances."

What is observed by the Supreme Court shows that, there is a material difference in the scheme of Section 13 of the Bombay Rent Act and the relevant clauses of the Punjab Rent Act. Under Section 13, (1) (i) of the Bombay Rent Act the landlord's bona fides are to be considered. But under the Punjab Act, the Court must be satisfied that the claim of the landlord is bona fide. Mr. Singhvi cannot, therefore, rely upon this decision for interpreting the relevant clause of the Bombay Rent Act.

50. Then Mr. Singhvi read a passage from Halsbury's Laws of England, III Edn. Vol. 23 at page 814, para 1593:

Reasonableness:

"In determining whether it is reasonable to make an order for possession the Judge is entitled to take into account all the circumstances as they exist at the date of the hearing, in a broad commonsense way as a man of the world. Any facts which amount to hardship on landlord or tenant are relevant and so is the conduct of the parties generally. The question is not whether it is reasonable for the landlord to seek possession but whether it is reasonable to the court to grant it. The interests of the public are also relevant. The difficulty of establishing reasonableness will usually be less alternative accommodation is available than when it is not." But this statement of law is based upon the relevant clauses of the English Rent Act.

51. Mr. Sorabjee relied upon the exposition of law in the Rent Acts by R. E. Megarry, Tenth Edition, Vol. 1, page 258. Commenting on Section 2 of the English Rent Act, which deals with the reasonableness of order of ejectment, the learned author under the sub-heading (2) "Circumstances to be considered" states as follows:—

"(a) Approach of Court:— The duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a board, commonsense way as a man of the world and come to his conclusion, giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive. The court must consider not whether the landlord's desire for possession is reasonable, but whether it is

reasonable to make an order for possession; for because a wish is reasonable, it does not follow that it is reasonable in a court to gratify it."

Mr. Sorabjee, with reference to this passage and the passage quoted from Halsbury's laws of England, says that this statement of law holds good on the peculiar wording of the English Rent Act. Under Section 3 (1) of the Rent, Mortgage Interest Restrictions (Amendment) Act, 1933 no order or Judgment for recovery of possession of any dwelling house governed by the Act shall be made or given unless the Court considers it reasonable to make such order or give such Judgment. One of the conditions of that section is that the Court must have the power to pass the ejectment order under the provisions set out in the first Schedule to that Act. The preamble to the first Schedule provides, among other things, that the Court shall have power for the purpose of Section 3 of the Act to make order or give judgment for the recovery of possession of any dwelling house where the Court considers it reasonable so to do and one of the grounds mentioned in that schedule is established. Even if the landlord under one of those grounds reasonably requires the dwelling house for occupation as a residence, the Court must consider it reasonable to make an order or give judgment for the recovery of possession. Relying upon this basic difference Mr. Sorabjee argued that the general observations in Halsbury's Laws of England or in Magarry's Book will have to be considered with suitable changes while interpreting the words "reasonably and bona fide" in Section 13 (1) (i) of the Bombay Rent Act. No doubt there is considerable substance in this submission and I cannot agree with Mr. Singhvi or Mr. Dhanuka, who pressed upon me to consider the English law as useful for interpreting the key words in the Rent Act. Mr. Singhvi also relied upon a decision of this Court in *Nimbibai R. Onkar Mall v. R. P. Mali*, (1962) 64 Bom LR 798 for emphasising his point that the landlord must need the premises for himself and the need must be of a pressing nature. Chainani, C. J. was considering a case under Section 29 read with S. 43-D (1) of the Bombay Tenancy and Agricultural Lands Act, 1948. Under Section 43-D (1) of the Bombay Tenancy Act, the landlord may terminate the tenancy of a tenant if he bona fide requires the land for any non-agricultural purpose. While considering the exact connotation of these words, the learned Chief Justice referred to a number of cases under the Rent Act and came to the conclusion that before the landlord can be awarded possession of the land on the ground that he requires

it bona fide for a non-agricultural purpose, he must prove some need or necessity on account of which it is necessary for him to have the land restored to him. The need for the landlord to have more or a larger income is not the only ground on account of which he can be said to require the land. Relying on these observations, Mr. Singhvi argued that the plaintiffs must make out a case that they need the premises and there is some pressing necessity which compels them to seek possession of the land. Strictly speaking the Division Bench considered only the words "bona fide requirement" without any reference to the reasonableness of that requirement. The Tenancy Act, among other things, is intended for bringing about equitable distribution of land. When the landlord wants to dispossess the tenant he may deprive him of his means of livelihood. Then the fact that the landlord is hard pressed by circumstances may be a relevant factor while deciding the question of bona fides. The ratio of this decision will not be very useful while interpreting Section 13 (1) (i) of the Rent Act.

52. At this stage I may also refer to a number of decisions cited by Mr. Sorabjee in support of his assertion that the court must consider the bona fides of the landlord and the reasonableness of his requirement without reference to the hardships of the tenant or other general considerations, which are mentioned in the above quoted passages from Halsbury's Laws of England and the book by Magarry. In *Chandrasekhara v. Chetty's Charities*, AIR 1966 Mad 14 the Madras High Court was interpreting Section 14 (1) (b) of the Houses and Rents, Buildings Lease and Rent Control Act (No. 18) of 1960. Under that section the landlord was entitled to possession of the premises if he required them bona fide for immediate purpose of demolition. At page 18, para 16 of the report the Court stated that while considering the bona fides the Judge should take into consideration every circumstance affecting the interest of the landlord and the tenant as well as the interest of the public at the date of hearing. In para 19 of the same report the Court stated that it was not whether the landlord's desire for possession was reasonable but whether it was reasonable to make an order for possession: because it was reasonable it did not follow that it was reasonable for a Court to gratify it. Again in para 20 it was stated that the landlord should satisfy the deciding authority that his requirement was reasonable and bona fide and that he had made plans and estimates for the new building; that he had obtained the necessary sanction of the municipal authorities for the purpose of

such erection and that he had the necessary funds with him for carrying out such construction. Mr. Sorabjee relied upon only some of the ingredients which the Madras High Court considered as relevant while deciding whether the requirement of the landlord was a bona fide and reasonable one. The Madras statute used the word "bona fide." That Court noted the fact that in the English Act the word used was "reasonably required." Some of the courts felt that the two words are interchangeable and accepted the summary of the English law as affording proper guidance while recording a finding about the bona fide requirement of the landlord. But that again is not quite correct. The English Act used the word "reasonable" and made it clear that the Court must consider whether it is reasonable to pass an order in ejectment. The Madras Act used the word "bona fide." That being the position I cannot derive much assistance from the decision.

53. Mr. Dhanuka, who supplemented the arguments of Mr. Singhvi also referred to a few cases which involve the interpretation of similar words in rent legislation. (1951) 1 All ER 710 at page 713, *Cresswell v. Hodgson*, Singleton, L. J. has stated that while considering the reasonableness of the landlord's requirement, the position of the landlord and that of the tenant must be considered. At page 714, Denning, L. J. has made the following observation:—

"The Rent Restrictions Acts put a restraint on the exercise by a landlord of his common law right to possession. The restraint is not to be removed unless the county court Judge thinks it reasonable. That means, I think, reasonable having regard to the interests of the parties concerned and also reasonable having regard to the interests of the public." But I have already made it clear earlier that the scheme of the English Rent Act and the wording of the relevant provision is materially different from the wording of Section 13 (1) (i) of the Bombay Rent Act.

54. The other decision cited by Mr. Dhanuka is *Deb Kumar Mukerjee v. A. Banerjee*, AIR 1958 Cal 229. That Court was interpreting Section 12 (1) (h) Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950). That section used the expression "reasonable requirement." That sub-section in addition to the word "reasonable" contained an explanation which required the court, while determining the reasonableness of requirement for purposes of building or re-building, to consider the comparative public benefit or disadvantage by extending or diminish-

ing accommodation. The learned Judge interpreted the words "reasonable requirement" in the light of this explanation. In the Bombay Rent Act I do not find any similar provision and in fact in addition to the word "Reasonable" the word "bona fide" also is used here.

55. In *Labhu Ram v. Ram Parkash*, AIR 1959 Punj 103 the Court was considering the word "requires" in Section 13 (3) (a) (iii) of the East Punjab Urban Rent Restriction Act (3 of 1949). At p. 103 the learned Judge observed that the word "required" could not be held as synonymous of "desire". "Required" would import something more than the mere desire and would call for invocation of an outside authority who would give the verdict that in a given case for some objective standards the need was genuine and the tests had been satisfied. As the word used was the bare word "required" without any expression like "bona fide" or "reasonable", the Court struggled hard to properly interpret that word in the light of the object of that Act and thought it necessary that apart from the desire of the landlord there must be some objective standard to indicate that the landlord's need was genuine.

56. Mr. Sorabjee for the respondent, relying upon the difference in language of the English Rent Act and the relevant clauses of the Bombay Rent Act, argued that the Court must find out whether the landlord's requirement is bona fide and reasonable from his point of view without reference to other considerations including the hardship of the tenant. When a statute speaks only about the landlord's requirement being reasonable and bona fide, it is not necessary that the requirement should impress the Court as reasonable. He tried to derive some support from the observations of the House of Lords in *Viscount Tredegar v. Harwood*, 1929 AC 72. Their Lordships were considering the terms of a lease and the point argued was whether there was an implied term in the contract under which lessor's approval to certain act of the lessee was not to be unreasonably withheld. They were not called upon to consider any express terms. Reliance was placed on an implied term which would show that the lessor had no absolute right to withhold his approval. The approval was to be about the alternative Insurance office which would be approached for insuring the estate. It was suggested that there was an implied term in the contract under which the lessor's approval was not to be unreasonably withheld. The grounds of the lessor's disapproval were assailed as unreasonable. While dealing with this point *Viscount Dunedin* at p. 78 observed as follows:—

"I am not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. I should read reasonableness in the general sense, and if it was necessary — it is not so in the view already expressed — I would hold here that the appellant's reasons are eminently reasonable."

But this decision is hardly relevant here. Their Lordships were considering the construction of a contract between the parties. And it may be that whether or not the conduct of one contracting party is reasonable or not will have to be decided upon the express or implied terms of the contract. In the absence of express terms, it may be that reasonableness of the lessor's conduct was to be considered without any reference to the lessee. This decision gives no assistance to me while interpreting the terms of a statute and different considerations will be relevant while considering the words "reasonable requirement" in the statute.

57. In *Bhulan Singh v. Ganendra Kumar*, AIR 1950 Cal 74, the Court was required to consider the question whether the premises were bona fide required by the landlord, among other things, for purposes of building or re-building. At page 76 of the report, Harries, C. J. has made the following observations:—

"It appears to me that the premises are bona fide required by the landlord for the purpose of rebuilding if the landlord honestly requires them for that purpose. The equivalent of the phrase "bona fide" in "honestly." It refers to the state of the landlord's mind. The landlord, therefore, will be entitled to possession as against the tenant if he established that he honestly requires the premises for rebuilding."

At p. 249 of the same volume (*Basant Lal Shah v. Chakravarty*) there is another decision which also is given while interpreting the words "requires" and "bona fide" under the West Bengal Premises Rent Control (Temporary Provision) Act (38) of 1948. P. B. Mukharji, J. at p. 251 observes as follows:—

"Although the word 'reasonably' does not appear in the Statute, questions of reasonableness may come in for consideration in deciding the 'bona fides' of the landlord. Gross unreasonableness of the landlord may in proper circumstances lead the Court to the conclusion that the landlord's requirement is not bona fide."

58. In *Tulsi Charan Bairagi v. Debendra Nath Sil*, 1958 Cal LJ 149 at p. 150, S. N. Guha Roy, J. was considering the meaning of the expression "required" under the Calcutta Tenancy Act. The learned Judge while interpreting the

word "required" expressed the view that that expression was wider than the expression 'bona fide required' or 'reasonably required' as used in the Rent Acts of 1948 and 1960. He stated that the expression nevertheless is not equivalent to a mere wish and it refers to an objective state of things. The element of need is expressed by the use of the word "required."

59. A consideration of the various ruling and passages from Law Books cited above shows one striking feature which is common to all, viz. in all the statutes either the word "bona fide" or the expression "reasonably required" is used. Sometimes the word used is only "requires" without any qualification. Whenever one of these three words is used, the Courts have tried to interpret the word bearing in mind the objects of the relevant statutes while interpreting the word "reasonable" even "bona fides" are considered. While interpreting the word "bona fides" the Courts have considered that reasonableness of the requirement is relevant. When the bare word "required" is used the courts have expressed the view that mere wish is not sufficient and there must be something more in the nature of objective facts. Indirectly expressions like "bona fide" and "reasonable" have been considered relevant while interpreting the word "required." But in the Bombay Rent Act in some of the clauses of Section 13, the words used are "reasonably and bona fide required." These words appear in Section 13 (1) (g), (h) (hh) and (i). For good reason the Legislature has used both the expressions and full effect must be given to those expressions while interpreting the subsection. "Bona fide" means honestly and not actuated by bad faith or oblique motive. "Reasonably" means, according to the dictionary that which is rational, just, not excessive. As these two words are used to govern the word "require" all the three words must be construed in a manner which would be consistent with the object of the Rent Act in general, and Section 13 in particular. The landlord's contractual right to evict his tenant is recognised in a limited way in Section 13 so as to cause the minimum hardship to the tenant in the event of his eviction from the premises. While considering the proof of bona fides and reasonableness of the requirement, a number of factors are bound to overlap. The words "reasonably and bona fide" are not intended to be used disjunctively. In a given case facts established must prove the bona fides without reference to the reasonable requirement. If want of bona fides amounting to mala fides, is proved, courts can readily infer or hold that the requirement is unreason-

able. As observed in some of the cases quoted above, if the requirement is wholly unreasonable that will also have a bearing on the question of bona fides of the landlord. Even on that basis the court will find that the requirement is not bona fide. But at the same time it is possible to hold that the landlord has succeeded in establishing his bona fides; but that, by itself, will not give him a right to evict the tenant; he must further prove that in addition to his bona fides, his requirement also is reasonable.

60. Mr. Sorabjee wants me not to follow the English Law on the ground that the words "reasonably and bona fide" refer to the landlord without reference to the tenant. I am not prepared to agree with this submission. As I have shown above, even when one of the three words was used, i.e. 'Bona fide' or 'reasonably' or 'required' in the various Indian statutes dealing with rent legislation, the Courts have considered all the relevant factors objectively without reference to the landlord while deciding either the bona fides or the reasonableness or the bare requirement of the landlord. It is emphasised in so many words that the mere wish or the intention of the landlord is not sufficient to give him a right to evict the tenant. The Rent Act is enacted with the avowed object of protecting tenants against unreasonable eviction. While considering the relevant factors for deciding the bona fide and reasonableness of the landlord's requirement, the tenant cannot be forgotten for all the time. Various objective facts are mentioned like the public good, the hardship of the landlord, the plight of the tenant and it is said that the Courts should take a broad commonsense view of the whole matter. But at the same time while considering the reasonableness of the landlord's requirement, the mere fact that the tenant will be evicted and will suffer hardship is per se not relevant. It is the inevitable consequence of every order in ejectment which would be passed in favour of the landlord. If that is considered as decisive then the landlord, who, bona fide and reasonably requires the premises, will fail in all cases. But the tenants' hardship may be linked up with the conduct of the landlord and may give rise to some consideration of justice and equity in favour of the tenant. Such factors will have to be objectively considered while deciding the question of bona fides and reasonableness of the landlord's requirement. For instance, if the landlord lets out an open plot of land to the tenant and later on connives at or consents to the construction of some structure thereon at considerable cost by the tenant and shortly thereafter starts eviction proceedings, the

tenant's hardship attributable to the landlord's conduct is a relevant factor which will reflect not only on his bona fides but also on the reasonableness of his requirement. I have given only one illustration to indicate as to how certain factors will have to be objectively considered while deciding the bona fide and reasonable requirement of the landlord. In my view that will be the true meaning of the expression "reasonably and bona fide required" used in Sec. 13 (1) of the Rent Act. Each case will have to be decided on the facts as appearing in that case. These are the only general observations which any court can make while interpreting these two words.

61. Now, on merits Mr. Singhvi has assailed the finding of the Appellate Bench of the Court of Small Causes on the ground that the Appellate Bench has committed an error of law in ignoring the relevant factors. The trial Court had emphasised certain factors without mentioning that those factors are taken from the other clauses of Section 13 of the Rent Act which require the landlord to prove certain facts for succeeding in eviction proceedings. The Appellate Bench has referred to those clauses of Sec. 13 of the Rent Act and said that the trial Judge was in error in emphasising irrelevant considerations. Mr. Singhvi is right when he says that the various factors may be relevant in any ejection proceedings where the landlord is required to prove that his requirement is both bona fide and reasonable. It may not be a technical requirement in the nature of a condition precedent but certainly the fact that the landlord has not got the plans, has not made the estimate of expenses for building construction, has not obtained the necessary permission of the municipal authorities, are relevant factors. But after all is said and done, I am not prepared to say that the appellate Bench has not considered the relevant facts while recording a finding in favour of the landlord. The Appellate Bench has pointed out that the landlord has adduced evidence to show that he has the financial capacity to invest money in building a structure; that he has got the plans prepared and although the plans are not up-to-date in accordance with the latest municipal regulations, it is established that under the Municipal regulations it is possible for the landlord to use a portion of the plot for building purposes. One of the landlords is himself a builder and evidence is led to show the estimated cost of the proposed building. If the landlord wants to build in these circumstances, then nothing can be said against his bona fides or the reasonableness of his requirement. The finding of the Appellate Bench of the Court of Small

Causes is based on appreciation of evidence and I cannot review the findings while exercising my limited powers under Art. 227 of the Constitution.

62. Mr. Dhanuka wanted me to review the finding of the appellate Bench about the purpose of letting the land. According to him, the trial Court has found that the structure on the demised land was of permanent nature and erected, if not with the consent, at least with the connivance of the landlord. Evidence on record shows that the various sub-tenants had contributed large funds towards the cost of construction. As no written document of lease was produced, the Trial Court found that there was no breach of the terms of the tenancy and the tenants showed that letting out of the open plot was with a clear understanding that the same would be used for construction of structures.

63. Mr. Dhanuka wants me to review the adverse finding recorded by the Appellate Bench and after accepting the finding of the trial Court I should consider that as a relevant factor while deciding the question of bona fides and the reasonableness of the landlords' requirement.

64. Mr. Dhanuka has got two difficulties in his way. Firstly, I cannot review the facts and record a finding different from the one recorded by the Appellate Bench. Secondly, If Mr. Dhanuka succeeds in persuading me to adopt that course, then Mr. Dhanuka will be urging a new point of law, which was not taken up in the lower Courts. Mr. Dhanuka relied upon Regulation 2 of 1827 and argued that I have wider powers under that Regulation and I can, in the interest of justice, interfere even with findings of fact. He relied upon a decision of this Court in *Bombay Steam Navigation Co. Ltd. v. Vasudev Baburao Kamat*, 29 Bom LR 1551 = (AIR 1928 Bom 5). This Court held that the High Court at Bombay has, apart from Section 115 of the Code of Civil Procedure, 1908, the power to call for the proceedings of any subordinate Civil Court and to issue order under Bombay Regulation 2 of 1827, Cl. I, Section 5 (2), in spite of its repeal by Act 12 of 1873 by virtue of Sections 106 and 130 of the Government of India Act 1915. While recognising this power in this Court, the Court made it clear that it is only in very exceptional cases that the court would be prepared to exercise the power and normally the Court would act only, if at all, under S. 115 of the Civil P. C.

65. Mr. Sorabjee also submitted that that caution will assume greater importance today as this Court is now invested with supervisory jurisdiction

under Art. 227 of the Constitution. When the makers of our Constitution have invested all the High Courts in India with supervisory jurisdiction under Art. 227 of the Constitution, there is no good reason why this Court should resort to the archaic power contained in Regulation 2 of 1827. Apart from that I do not think that this is an exceptional case where I should exercise the power in favour of the petitioners and review the findings of fact.

66. Mr. Dhanuka also challenged the finding of the Appellate Bench of the Court of Small Causes that the tenant was guilty of profiteering and had built a permanent structure and thereby forfeited the protection of the Rent Act. These are findings of fact and I cannot disturb them in proceedings under Article 227 of the Constitution.

67. In the result I hold that the Appellate Bench of the Court of Small Causes has rightly held that the respondents have proved that they required the plot of land reasonably and bona fide for the erection of a new building within the meaning of Section 13 (1) (i) of the Rent Act. Even if I am wrong in confirming this finding, I am satisfied that this is not a fit case for interference in favour of the petitioners under Art. 227 of the Constitution. The initial tenancy was only for a period of three years. Just about the time of the expiry of the lease the landlord filed a suit in ejectment. The suit failed mainly on a technical ground. Immediately thereafter he filed the present suit and is seeking to eject the tenants of the land so that he may profitably use the plot for building purposes. The litigation is pending for over nine years. Even justice requires that the matter should end at this stage between the landlords and the tenants and in favour of the landlords. I am not bound to interfere in every case in which I find an error of law committed by the lower Courts. As I find, in this case, interference is not called for in the interest of justice. I also refuse to exercise the discretionary jurisdiction in favour of the petitioners.

68. In the result the petitioners fail and the rule in each of the petitions is discharged with costs. The decree not to be executed for a period of one month from the date of the signing of the judgment.

Petition dismissed.

AIR 1972 BOMBAY 65 (V 59 C 8)

NAIN, J.

Dharamdas Motibhai Wani, Appellant v. Shidya Jatriya Bhil and others, Respondents.

A. F. A. D. No. 122 of 1963 with C. R. A. No. 123 of 1963, D/- 21-9-1970 against order of R. P. Salve, Extra Asst. J., Dhulia in Appeal No. 310 of 1960.

Debt Laws — Bombay Money-Lenders Act (31 of 1947), S. 2 (9) — Loan — The expression "advance at interest" in the sub-section covers cases of interest payable either under an agreement or under a statutory provision — A transaction evidenced by a promote on which interest would be payable under S. 80 of the Negotiable Instruments Act would be a loan within the sub-section — A suit by a money-lender on such promotes cannot be dismissed for want of a licence under the Act unless he is given an opportunity under S. 10 (2) of the Act to produce his licence — (X-Ref:— Section 10 (2) — Negotiable Instruments Act S. 80). (Paras 9, 10)

B. R. Naik, for Appellant; V. V. Divekar, for Respondents Nos. 1 and 4.

JUDGMENT:— Both the Second Appeal and the Civil Revision Application have been filed by the original plaintiff. The Second Appeal arises from the suit he filed in the Court of the learned Civil Judge, Junior Division, Nandurbar, for recovery of Rs. 1,500/- from the four defendants in the said suit. The Civil Revision Application arises from the suit he filed for the recovery of Rs. 600/- in the same Court from the defendant in that suit. Both the claims are based on promissory notes which are executed after filling in blanks on a printed form, which is in Marathi. The printed form provides space for rate of interest both in figures and in words and in both the promissory notes these blanks were not filled in. In both the suits no interest was claimed upto the date of the suit. In both the suits, contentions were taken as to whether the transactions were governed by the Bombay Money Lenders Act, 31 of 1947, (hereinafter for the sake of brevity referred to as the "Money-Lenders Act"). The learned trial Judge thought that as no interest was claimed in the suits, the transactions were not "loans" within the meaning of that word in S. 2 sub-s. (9) of the Money-Lenders Act. Evidence was led on the point as to whether the plaintiff was a money-lender and whether he carried on the business of money-lending. But the learned trial Judge did not give any finding on that point. After disposing of the other contentions of the

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defendants as to whether the promissory notes were brought about by fraud or consideration had failed, the learned trial Judge decreed the two suits in favour of the plaintiff.

2. The defendants in both the suits appealed to the District Court at Dhulia. The only contentions taken before the learned Assistant Judge, who heard the appeals, were whether the plaintiff was a money-lender and secondly whether the transactions were "loans." On the second point, the learned Assistant Judge took the view that as the documents in the suits were promissory notes and a promissory note was not excluded from the definition of the word "loan" in the Money-Lenders Act, it was irrelevant whether the interest was mentioned in the promissory note or not. He was of the opinion that the transactions covered by the promissory notes were "loans" as defined in S. 2, sub-section (9) of the Money-Lenders Act. On the first point, he gave a finding of fact that the plaintiff was carrying on the business of money-lending and was a money-lender within the meaning of that expression in S. 2, sub-section (10) of the Money-Lenders Act.

3. Section 2, sub-s. (9) of the Act defines "loan" as meaning an advance at interest. It further provides that it does not include an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note. It is clear that if the advance is made on the basis of a promissory note, it would not be excluded from the definition of a loan if it was an advance at interest. Section 2, sub-s. (10) defines a money-lender as a person who carries on the business of money-lending in the State. Section 10 of the Act provides that no Court shall pass a decree in favour of a money-lender in any suit filed by him to which the Money-Lenders Act applied unless the Court was satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, the money-lender held a valid licence. Sub-section (2) provides that if during the trial of any such suit, the court finds that the money-lender had not held such licence, the court may, on the application of the money-lender, stay the hearing of the suit and require him to produce a licence within a period of three months.

4. The two contentions taken before me by Dr. B. R. Naik, appearing for the plaintiff, are; firstly that the transactions in the two suits are not governed by the Money-Lenders Act, and secondly that even if they are, when the learned Assistant Judge came to that

conclusion he ought to have informed the plaintiff to enable him to make an application, if he so desired, for stay of the hearing of the suit for production of a money-lender's licence. He contended that the learned Assistant Judge ought not to have dismissed the two suits.

5. Now, dealing with the first contention, it has been held as a finding of fact, that the plaintiff is carrying on the business of money-lending and he is a money-lender. The only question that remains is whether the transactions in the two suits were advances at interest. As I have mentioned above, the blanks in the printed forms of promissory notes as to interest have not been filled. Dr. Naik contended that, firstly because interest is not mentioned in the promissory notes and secondly because no interest has been claimed in the suits these were not advances at interest. In my opinion, whether interest is or is not claimed in the suits is totally irrelevant to the determination of the question whether these were or were not advances at interest. The plaintiff cannot by giving up interest in the suit take the transaction out of the provisions of the Money-Lenders Act.

6. If the documents in the two suits had not attracted the provisions of Section 80 of the Negotiable Instruments Act, there would have been no controversy on the question. The controversy is, however, introduced by Section 80 of the Negotiable Instruments Act, which provides:—

"When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties, to the instrument be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realisation of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs." (Underlining supplied).

7. The words "notwithstanding any agreement relating to interest between any parties to the instrument", were substituted for the words "except in cases provided for by the Code of Civil Procedure, Section 522". Section 522 now corresponds to Order 37 of the Civil Procedure Code, 1908. The effect of the amendment appears to be that on the one hand it enables the Court to allow interest at the rate of 6 per cent even in summary suits on negotiable instruments on the other hand it affects all collateral agreements between the parties either as to the rate of in-

interest payable or as to the liability of interest at all. Whether there is an agreement to charge interest at a rate either lower or higher than 6 per cent. or there is an agreement not to charge interest at all or the rate of interest is not specified in the promissory note interest shall be allowed at 6 per cent. per annum. The question is whether by virtue of Section 80 of the Negotiable Instruments Act, an advance becomes an advance at interest and, therefore, a loan within the meaning of Section 2 (9) of the Money-Lenders Act.

8. Dr. Naik on behalf of the plaintiff contended that "an advance at interest" could only mean an advance where interest is payable by contract and not by virtue of statute. In my opinion, this contention is not correct, because what is not included in the definition of the word "loan" is enumerated in Section 2 (9). To put the meaning suggested by Dr. Naik on the word "loan" would be to add to the list of excluded categories advances on promissory notes in which no rate of interest was specified. On the other hand, Dr. Divekar on behalf of the respondents contended that as an advance made on the basis of negotiable instrument other than a promissory note was not included, this indicated that in all cases advance made on the basis of a promissory note was included in the word "loan". This contention also does not follow naturally from the words used in Section 2 (9) of the Money-Lenders Act.

9. In my opinion, the expression "an advance at interest" would cover cases where the interest was provided by the contract as well as cases where the interest was payable under a statute. The suit transactions were, therefore, loans within the meaning of Section 2 (9) of the Money-Lenders Act. The suit transactions being loans by a money-lender were hit by Section 10 of the Money-Lenders Act.

10. The trial Court had decreed the two suits. The learned Assistant Judge held in his judgments that the transactions were hit by the Money-Lenders Act and, therefore, he dismissed the two suits. The plaintiff was not aware of the findings of the learned Assistant Judge until after the judgments. There was, therefore, no opportunity given to him to make applications for stay of the hearing of the suits to enable him to produce a money lender's licence. The learned Judge, in my opinion, ought not to have dismissed the suit, but to have followed the procedure prescribed by Section 10 of the Money Lenders Act.

11. The appeal and the Revision Application are, therefore, allowed and the judgments and decrees of the lower appellate Court are set aside. The rule in the Civil Revision Application will be made absolute. The finding that the plaintiff is a money-lender and that the suit transactions were loans within the meaning of Section 2 (9) of the Money-Lenders Act, will, however, stand. The two appeals to the District Court are remanded to the District Court at Dhulia. That Court shall give an opportunity to the plaintiff to apply for stay of the hearing of the appeals to enable him to produce a money lender's licence within the period allowed by Section 10. If he does not produce the licence within the period, the suits shall be dismissed. If, however, the plaintiff produces such licence within that period, the suits shall be decreed after taking into consideration the question of interest, costs and instalments under Sections 21 and 24 of the Money-Lenders Act. Each party shall bear his own costs throughout in both these matters.

Appeal allowed.

AIR 1972 BOMBAY 67 (V 59 C 9)
DESHPANDE, J.

Sohansingh Bharatsingh, Petitioner v. Narhar Narayan Godbole and another, Respondents.

Spl. Civil Appln. No. 1027 of 1966, D/- 25-8-1970 to set aside the order of 3rd Extra Asstt. J., Poona, D/- 12-4-1966.

(A) Transfer of Property Act (1882), Section 106 — Notice to quit — It is not invalid merely because it is addressed to a lawyer when the copy of such notice has also been forwarded to the tenant. (Para 2)

(B) Transfer of Property Act (1882), Section 106 — Notice to quit — Where the notice contemplates termination of tenancy "by the end of the month of tenancy commencing next after receipt of the notice", the notice cannot be said to be invalid on the ground that it does not give 15 days time as required by the section merely because it also states that it extinguishes the tenancy rights. (Para 2)

The wording in a notice to the effect that "the notice extinguishes the tenancy rights thereby" cannot be construed to mean that the tenancy rights were being extinguished with effect from the date of notice. (Para 2)

(C) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates

JO/JO/F48/71/SNV

Control Act (57 of 1947), Section 13 (1) (g) — Requirement of premises for personal occupation of landlord — Even where the landlord claims possession of his premises on which some structure belonging to him is standing for constructing a new bungalow for his occupation by demolishing the existing unsuitable structure the case is covered by clause (g) only. Clauses (hh) and (i) of Section 13 (1) have no application to such a case. AIR 1964 SC 1676, Followed. (Para 6)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1024 (V 53) —
1966-1 SCJ 601, Krishnappa Suba
Rao v. Dattatraya Krishnaji 9, 13
(1964) AIR 1964 SC 1676 (V 51) —
1964-8 SCR 1, Ramniklal P.
Mehta v. Indradaman Amratlal
Sheth 6

Sharad Manohar, for Petitioner;
Y. S. Chitale (for No. 1) and V. N.
Gadgil (for No. 2), for Respondents.

ORDER:— This Special Civil application arises out of the proceedings under the Bombay Rent Act instituted by respondent No. 1 plaintiff landlord against petitioner-defendant No. 1 and respondent No. 2 (defendant No. 2). The premises in dispute appear to be an open land with some structures thereon situate at City Survey No. 366, Sadashiv Peth, Poona City. Originally the premises were let out to one Sevaksingh Makhansingh on a rent of Rs. 25/- per month. The said Sevaksingh assigned his tenancy rights in favour of defendant No. 2. Defendant No. 2 then started paying rent at the rate of Rs. 30/- to plaintiff-landlord. On 12-2-1963 defendant No. 2 assigned his interest in the premises to defendant No. 1. It appears that defendant No. 2 through his lawyer Redkar informed the fact of this assignment to the landlord and asked him to accept the rent from defendant No. 1. In reply thereto the landlord gave notice on 20-3-1963 calling upon defendants Nos. 1 and 2 to vacate the premises for various reasons, including that the same were reasonably and bona fide required by him for his own occupation. Copies of this notice addressed to the lawyer Redkar were endorsed to defendants Nos. 1 and 2. After some time the present proceedings were instituted for possession against both the defendants by the landlord on various grounds, including the one that he required the premises for his own occupation, where he wanted to construct a house for himself. Defendants denied the various averments made in the plaint. By judgment and decree dated 7-8-1964 in Civil Suit No. 3396 of 1963 the trial Court decreed the suit on the ground

of the landlord requiring the premises bona fide and reasonably for his own occupation under Section 13 (1) (g) of the Bombay Rent Act. On appeal by the tenant to the District Court, the decree has been affirmed by the judgment and decree dated 12th April 1966 in Civil Appeal No. 696 of 1964. The learned Third Extra Assistant Judge, Poona, however, granted the decree for possession under Section 13 (1) (i) of the Rent Act. This decree is challenged in this Special Civil application by defendant No. 1. Defendant No. 2 naturally supports his case.

2. Mr. Sharad Manohar, the learned Advocate appearing for the petitioner, contends that the quit notice is invalid for two reasons. He firstly contends that notice addressed to a lawyer, cannot be effective for terminating tenancy where lawyer is not shown to have authority to receive the same. He secondly contends that the notice does not in terms give 15 days time as required under Section 106 of the Transfer of Property Act. There is hardly any substance in either of these contentions of the learned Advocate. Admittedly copies of the notice addressed to the lawyer were served on both the defendants indicating that the tenancy was sought to be terminated thereby. Without going into the question as to whether the lawyer to whom the notice was mainly addressed was authorised to receive this notice or not, the implications of such copies also simultaneously being received by both the defendants, are too plain. I have not been able to appreciate in the face of these admitted facts how notice ceases to be effective merely because original of the same was addressed to a lawyer, assuming that notice to defendant No. 1 was also necessary. Secondly, the said notice also calls upon the defendants to vacate the premises and deliver peaceful possession thereof to the landlord "by the end of the month of tenancy commencing after receipt of this notice". It is not suggested that, after the receipt of this notice, less than 15 days were left with the tenant before the expiry of the period of the tenancy. All that is suggested is that the notice seeks to extinguish the tenancy rights from the date when the notice itself was given on 20th March, 1963. The whole foundation for this submission is based on the wording of the notice saying that he was "giving this notice extinguishing the rights..... hereby". This wording cannot be construed to mean that tenancy was being extinguished with effect from the date of notice. These words only, notify that the tenancy rights were being

extinguished by virtue of this notice dated 20th March, 1963, and obviously the tenancy was contemplated to be terminated "by the end of the month of tenancy commencing next after receipt of this notice." There is thus no force in the first contention raised by Mr. Sharad Manohar.

3. Mr. Sharad Manohar then contends that in either case the decree for possession under Section 13 (1) (i) is not warranted by the facts of the case. Premises assumed by the Assistant Judge, says the Counsel, themselves have no foundation in facts. The learned Assistant Judge, no doubt, assumes that the structure on the land in dispute belonged to the tenant and it is on this basis that the decree for possession is passed by him under Section 13 (1) (i) of the Rent Act. This assumption, according to Mr. Sharad Manohar, is not only not borne out by any evidence, but is contrary to the case pleaded by the landlord himself in his plaint. He drew my attention to the recitals in the plaint. Paragraph 1 of the plaint describes the suit premises to mean land at C. T. S. No. 367 admeasuring about 756 sq. feet with temporary shed thereon. In paragraph 2 of the plaint, the plaintiff in terms says that the property and the premises described in paragraph 1 belong to the plaintiff as full and absolute owner. The plain implication of this averment is that the plaintiff claims the ownership not only of the land but also of the temporary shed standing thereon. Paragraph 3 recites that the premises consist only of vacant lands and temporary shed thereon. This is not denied by the tenants. Evidence also was led by the parties on the basis of these averments. It is thus clear that, even according to the plaintiff's own case, the temporary shed or the structures on the land belonged to himself. There is thus no basis for the assumption that it belonged to the tenant.

4. Mr. Chitale, the learned advocate appearing for respondent No. 1 landlord could not dispute this though he faintly suggested that the above construction of the plaint was not correct. He, however, contends that the trial proceeded on the basis that the temporary shed on the land belonged to the defendants. In support of this contention he firstly relied on the language of the decree passed by the learned trial Judge. It is true that the learned trial Judge has directed defendants Nos. 1 and 2 to "put the plaintiff in possession of the land by removing their structures standing on the suit site on or before 1-11-1964." Now, such a decree could have been passed only on

the footing that the structure on the land belonged to the defendants. But Mr. Chitale could not draw my attention to any material from which the trial Court could have made such an assumption. Mr. Chitale, secondly, drew my attention to the observations in paragraph 10 of the judgment of the Assistant Judge and contended that this position was, in fact, admitted by the tenants before the Assistant Judge. Relevant observations in paragraph 10 of his judgment are as follows:

"There was no dispute before me that the suit open plot belongs to the landlord. At present there is some structure in it, but it appears that the landlord is not claiming the ownership of the same. The landlord has said in his plaint that the premises included also this structure but it is clear from his notice Exh. 32 that this structure was built by his tenants who were in possession of the open plot. It was also an admitted proposition as argued before me that this structure never belonged to the landlord, but it was erected by the tenant. It is on the basis of this admitted fact that the lower Court has also passed a decree for vacant possession of the suit plot by removing the said structure by the person in possession. As such I have no hesitation to hold that it is an admitted fact that only the open plot was let out to Sevaksing by the present landlord."

The observations in the above para. on the face of them betray lack of precision and some misconception of the facts and presumably the argument advanced. In the first place, he says "... it appears that the landlord is not claiming the ownership of the same." But this is plainly contrary to the averments in paragraphs 2 and 3 of the plaint. He then says that in his notice Exhibit 32 the landlord has stated "that this structure was built by his tenants, who were in possession of the open plot." The contents of Exhibit 32 do not bear this out, and Mr. Chitale, could not place his finger on any portion of Exhibit 32 to support these observations. The Assistant Judge then says that it was also an admitted proposition as argued before him that this structure never belonged to the landlord and it was erected by the tenant. But the learned Judge does not indicate to whose arguments he was referring to and what precisely was the admission. Then he says that "it is on the basis of this admitted fact that the lower court has also passed a decree for vacant possession of the suit plot by removing the said structure by the person in possession." But the learned trial Judge has not in any part of his

judgment, however, referred to any such admission of the tenant to which the Assistant Judge has made reference. He says that "It is an admitted fact that only the open plot was let out to Sevaksing by the present landlord." It is not known to whose admission the Assistant Judge is referring to. It is true that defendant No. 1 has not filed any affidavit, denying having made such admissions before either of the two Courts below. But, as stated by me earlier, the observations of the Assistant Judge themselves do not attribute such admissions either to defendant No. 1 or to defendant No. 2 and none of the defendants were really called upon to refute any such assertions. I do not think it possible to rely on such vague observations of the Assistant Judge for coming to the conclusion that the structure on the land, in fact belonged to the tenant or that any of the tenants had admitted this fact before either of the Courts below.

5. On the contrary, while assigning his tenancy rights to defendant No. 1, defendant No. 2 has not claimed ownership of such structure in the assignment deed (Exhibit 40.) Had it belonged to him, he would not have failed to mention it in Exhibit 40 and claim higher price from defendant No. 1. This question assumes importance in this case because, on it depends the decision as to which of the clauses of Section 13 (1) of the Rent Act governs the claim of the landlord and whether the conditions necessary for the application of the said clause have been duly fulfilled or not. I must, therefore, conclude that there is no basis for assumption that the structure on the land belonged to the tenant. The case shall have to be decided on the footing that the land and structure both belonged to the landlord. Plaintiff's own case is that he wants to construct a house on the land for his occupation and this he shall have to do after demolition of the present structure.

6. This at once raises the question whether the case is covered by clause (g) or clause (i) of Section 13 (1) of the Rent Act. Mr. Sharad Manohar however contends that neither of the two clauses are applicable and the case clearly falls under Section 13 (1) (hh), as firstly the premises do not consist of more than two floors, and secondly plaintiff requires the same for demolition and for erecting a new building thereon. He then contends that the landlord is not entitled to possession of the suit premises, not having proved to have complied with the provisions of sub-section (3-A) read with sub-section (3-B) of Section 13 of the Rent Act.

This contention need not detain me as the point can be said to have been concluded by the Supreme Court in its judgment reported in AIR 1964 SC 1676, Ramniklal Pitambardas Mehta v. Indradaman Amratlal Sheth. There also the landlord claimed possession of the premises under Section 13 (1) (g) on which some structure belonging to him was then standing. He intended to demolish the existing structure, and build new one for his own. On behalf of the tenant it was argued that such a claim for demolition of the existing structure, and erecting a new building thereon, was covered by Section 13 (1) (hh) and not by Section 13 (1) (g) of the Bombay Rent Act. This contention was overruled by the Supreme Court holding that contemplated demolition of the existing unsuitable structure and construction of a bungalow thereon, cannot take out landlord's case from Sec. 13 (1) (g) when this process was necessitated for the purpose of his own occupation. The Supreme Court also held that clause (hh) of sub-section (1) of Section 13 was inapplicable as proposed construction was not intended for the tenants. In view of this pronouncement of the Supreme Court, I do not think it necessary to examine the contention of Mr. Sharad Manohar any further, as the said authority is conclusive of the points raised by him before me. The present case also shall have to be decided by reference to Section 13 (1) (g) of the Rent Act in view of the ratio of the above judgment of the Supreme Court.

7. But Mr. Chitale, the learned advocate appearing for the landlord, contends that even when the landlord seeks possession of land with structure thereon raised by him, his case still cannot be said to have been excluded from the purview of Section 13 (1) (i) of the Rent Act. He contends that application of Section 13 (1) (g) to the facts of such a case cannot have the necessary consequence, of its exclusion from Section 13 (1) (i) of the Rent Act. This contention is devoid of any substance. Clauses (g) to (ii) of sub-section (1) of Section 13 cover the different contingencies under which any landlord can claim possession of the premises from the tenant. These rights are available on proof of certain set of facts. These rights are then subjected to certain other overriding considerations provided in sub-sections (2) to (3) (b), and protection to the tenants is again ensured by suitable provisions of Sections 16 to 17-B against the possible abuse of these provisions by the landlords. A set of facts falling under any one clause excludes the possibility of the application of any other

clause of Section 13 (1) of the Rent Act to the same facts. This case must either fall under clause (g) or clause (i) of Section 13 (1). Contention that it can fall under both the clauses is thus misconceived.

8. Mr. Chitale then contends that clause (i) of sub-section (1) of Section 13 opens with the words "where the premises are land," and according to Mr. Chitale, there is no warrant for the narrow construction of the word "land" only to mean open land. The word "land", according to him connotes ordinarily everything attached to the land, and must be deemed to include not only open land but also the structure standing thereon. In support of his contention he relies on the dictionary meaning of the word 'land' in Stroud's Judicial Dictionary in Volume II at page 1571. I do not think it necessary to refer to the several passages to which my attention was drawn by Mr. Chitale, as this dictionary meaning is based on several English cases. Now, unlike in England, Indian law recognizes the dual ownership in the property and the dictionary meaning given by Stroud's and based on English conception of property will not be of much assistance for construing the word "land" correctly. The precise connotation of the word 'land' shall have to be ascertained by reference to the context and the setting in which the word is used in Section 13 of the Rent Act.

9. The word "premises" has been defined in Section 5 (8) of the Rent Act. Three kinds of properties appear to have been sought to be covered by this definition. It firstly covers the land not being used for agricultural purposes in clause (a). It secondly covers building or part of a building let separately as set out in Clause (b). It, thirdly, also seeks to cover the adjuncts of any such building enumerated in clauses (i) to (iii) in the latter part of the said clause (b). In the context the word 'land' in clause (a) of Sec. 5 (8) ought to be deemed to connote open land on which there is no building or a part of building or to which there are no adjuncts of any kind. If the word 'land' in Section 13 (1) (g) is read in this light, it can be construed to mean only open land. This definition on which Mr. Chitale relied rather than support him, supports the contention of Mr. Sharad Manohar. In view of the interpretation of this clause in the judgment reported in AIR 1966 SC 1024, Landlord can claim possession under this clause by removal of the structure, built by the tenant after getting the lease of the open land from the landlord, when the landlord still remains the owner of the

open plot. But he cannot avail of this provision when structure also belongs to him, though the above authority does not deal directly with this point.

10. This view gets further reinforced if one examines the provisions of Section 13 closely. In clauses (a) to (i) in sub-section (1) of Sec. 13 several contingencies are enumerated in which the landlord is enabled to exercise his right to possession of the premises from his tenant. Clauses (g) to (ii) cover the contingencies where the premises let out to the tenant are bona fide required by the landlord for some purpose or the other enumerated in the said clause. In Clauses (g) to (hhh) the word 'premises' is used to denote building or structure belonging to the landlord. This is too clear to require any detailed discussion. Requirements for, occupation, repairs, and demolition covered by these clauses can have no meaning unless existence of some structure belonging to the landlord is assumed. As against this, in clauses (i) and (ii) of this sub-section (1), the import of the word 'premises' is distinctly restricted by saying "where the premises are land" or "where the premises are land in the nature of garden or ground.....". Thus the word "land" in clauses (i) and (ii) on the face of it imports restricted connotation and is used in contradistinction to the word "premises" which in the context cover a building or a structure erected on any land. The word land in both these clauses (i) and (ii) must be construed, therefore, to mean only open land without any structure of the landlord thereon.

11. Secondly, clause (g) contemplates a case where the premises "are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held." This includes a case where demolition and reconstruction is necessary for this purpose. As against this clause (i) covers a case where the premises are reasonably and bona fide required "for the erection of a new building." The distinction between the emphasis on the two different purposes, where the premises are required for occupation and the purpose where the premises are required for erection of a new building can hardly be ignored. This distinction cannot be said to be without difference. Apart from this facts of this case attract Cl. 13 (1) (g) which deals specially with cases of landlords' requirements for their own occupation. Clause (g) generally dealing with requirements of landlords to erect a building, will not therefore apply.

12. It may be noted in this context that all open lands are not covered by Part II of the Bombay Rent Act. Only such pieces of open lands are covered by Part II of the Act which are let for residence, education, business, trade or storage within the meaning of Section 5 (1) of the Rent Act. When the purpose in clause (i) of Section 13 is shown to be "the erection of a new building", the same can have reference ordinarily to buildings capable of being used for any of these purposes. On the face of it, such purpose of erection of new buildings is different from the purpose of occupation by the landlord himself. It is true that in view of the width of the phraseology new erection for the purpose of landlord's occupation cannot be altogether excluded from Section 13 (1) (i). But then it will still be a case of possession of an open plot with structure of the tenant thereon covered by Section 13 (1) (i) and not the case of possession of land and structure of the landlord thereon which he seeks to demolish and reconstruct for his own occupation attracting the provisions of Section 13 (1) (g) of the Rent Act. Looked at from this point of view, clause (g) which enables the landlord to claim possession of premises for him when the same is reasonably and bona fide required for his own occupation, on proof of certain set of facts excludes the application of clause (i) under which a landlord can be said to have been enabled to claim possession when bona fide and reasonably required for erection of a new building.

13. Mr. Chitale strongly relied on the words "new" in the phrase "erection of a new building" in Section 13 (1) (g) of the Act and contends that the word "new" will become meaningless unless it is construed to have reference to some structure of the landlord, in the place of which new building is sought to be erected. In other words, it is urged that question of erection of "new" building cannot conceivably arise, unless the landlord makes out a case of demolition of his old one. There is not much substance in this contention. As held by the Supreme Court in AIR 1966 SC 1024, this clause also applies to the case where tenant has erected his structure on obtaining the lease of open plot. As stated earlier, this Part II of the Rent Act is applicable to the open lands only when the same is let for residence, education, business or storage. In each of these cases some sort of structure is ordinarily raised thereon by the tenant to whom the open land is let out. The word "new" presumably has reference to some such structure of the land, the

possession of which is invariably claimed by the landlord by the removal thereof. Cases may, however, arise when no structure whatsoever is raised by the tenant though such cases are likely to be few and rare. Even so, that by itself will not give the word "new" any added significance.

14. Thus looked at from any point of view, the conclusion is irresistible that the word "land" in clause (i) of Section 13 (1) of Rent Act means open land and this clause covers a case where the premises are open land and the structure constructed thereon, if any, belongs to the tenant. It is not capable of covering a case where the existing structure belongs to the landlord himself. The words in Section 13 (1) (c) "where the premises are land" ought to be construed to mean when the premises are land without any construction of the landlord thereon. In the present case the landlord seeks possession of the open land on which his own structure is standing for the purpose of his own occupation. This case can be said to have been covered only by clause (g) of Section 13 (1). Clause (hh) or (i) of Section 13 (1) can have no application to such case.

15. As the learned Assistant Judge has not considered the case from this point of view, the same shall have to be remanded to the Appellate Court for reconsideration thereof. I accordingly allow this Special Civil Application, set aside the order passed by the learned Assistant Judge and remand the case back to him for consideration afresh, on the evidence and for deciding as to whether the landlord is entitled to claim possession under Section 13 (1) (g) of the Rent Act. As the matter is pending since 1963, the learned Assistant Judge will dispose of this case as early as possible.

16. Costs will abide by the result.

Order accordingly.

AIR 1972 BOMBAY 72 (V 59 C 10)

K. K. DESAI AND NAIN, JJ.

Dattu Subrao Patil, Petitioner v. Dattatraya Pandurang Patil and another, Opponents.

Spl. Civil Appls. Nos. 861 and 1430 of 1967, 1409 and 1762 of 1965, D/- 10-8-1970, to set aside the order of Maharashtra Revenue Tribunal at Poona, D/- 11-2-1967.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act, (67 of 1948) Section 25 (2) (As came

IO/JO/E792/71/YPB

into force on 1-8-1956) — Applicability — Sub-section (2) of Section 25 applies only in cases where at the date of the institution of the application for ejectment by landlord, tenant can be held to be in arrears of payment of rent for any three years. (X-Ref:— Section 14 (as came into force on 1-8-1956). (X-Ref: T. P. Act (1882) Section 111). AIR 1962 SC 753 and AIR 1968 SC 461 held no longer good law in view of Amendments made in 1956 in the Bombay Act 67 of 1948. (Para 16)

The defaults made by a tenant at any previous dates are not relevant. Unless the landlord proves and establishes that at the date of the institution of his application for ejectment the tenant was in arrears and/or had failed to pay rent for any three years, the Mamlatdar's power under sub-section (1) of Section 25 will have to be exercised and relief will have to be granted against termination of tenancy. The tenant's voluntary payment of all arrears of rents to the landlord prior to institution of an application for ejectment would have the same effect as waiver of the termination of tenancy by the landlord by accepting rent in ordinary law. A breach which could be remedied by a tenant upon the Mamlatdar making order under sub-section (1) of Section 25 can also be remedied by the tenant himself by voluntary action of payment of all arrears of rents prior to the date of application for ejectment that might have been made by his landlord.

(Paras 10, 16)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948) Section 25 (2) (as came into force on 1-8-1956) — Expression "any three years" — Meaning — The three years for which a tenant has failed to pay rent need not be connected with each other. (Para 11)

(C) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948) Section 25 (2) — (As came into force on 1-8-1956) — Failure to pay rent for any three years involves failure to pay even any part of rent for any year. Sub-section (2) does not contemplate that the failure must be of the aggregate of rents of the three years. (Para 11)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 461 (V 55)
= 70 Bom LR 314, Vithal Vasudeo v. Maruti Rama 4, 13, 14, 25
(1962) AIR 1962 SC 753 (V 49)
= 64 Bom LR 569, Raja Ram v. Aba Maruti Mali 4, 9, 13, 14
15

C. A. 861 of 1967:
M. A. Rane, for Petitioner; Y. S. Chitale and V. N. Ganpule for K. J. Abhyankar, for Opponent No. 1.

Spl. C. A. 1409 of 1965:
B. Y. Deshmukh for R. W. Adik for Heirs of Orig. Petitioner; M. V. Paranjpe with V. V. Divekar, for Opponent No. 1.

Spl. C. A. No. 1762 of 1965:
S. C. Pratap, for Petitioners; R. S. More and H. D. Gole (for Nos. 1, 3, 4 5-A, 5-B and 6) and, H. D. Gole (for Nos. 2 (a) to 2 (f)), for Opponents.

Spl. C. A. No. 1430 of 1967:
K. J. Abhyankar and J. M. Baphana, for Petitioner; R. G. Samant, for Opponent No. 1.

K. K. DESAI, J.:— In the Special Civil Application No. 861 of 1967 instituted on behalf of the original opponent-tenant, the only contention that is made is that the Maharashtra Revenue Tribunal, the District Deputy Collector and the Tenancy Awal Karkun who had heard the application of the original applicant-landlord for ejectment of the tenant erred in holding that the provisions of Section 25 (2) of the Bombay Tenancy and Agricultural Lands Act, 1948, hereinafter referred to as the Act, were applicable to the facts of the case and for that reason the Mamlatdar had no jurisdiction under Section 25 (1) of the Act to make an order directing the tenant to pay arrears of rents within 3 months and that upon such payment to make an order directing that the tenancy had not been terminated.

2. It is stated that in the three next Special Civil Applications on our board the same question has arisen between tenants and landlords. We have, therefore, in this Special Civil Application heard Advocates of landlords and tenants in these three next following Special Civil Applications. We, however, propose to decide the question and arguments advanced by both sides in this Special Civil Application.

3. The short facts leading to the institution of the present Special Civil Application may be stated as follows:—

4. On January 20, 1964, the opponent No. 1-landlord instituted an application for ejectment of the petitioner-tenant from land bearing S. No. 225/7B situated at Shirolu on the ground that the tenant had defaulted in payment of rents from 1956-57 to 1962-63. For defaults for the last three years, i. e. 1960-61 to 1962-63 due intimations as required under the Act had been given. The tenancy had been terminated by notice dated September 12, 1963. As

the tenant had made defaults in payment of rents in respect of the last 3 years, i. e. 1960-61 to 1962-63, the landlord was entitled to an ejectment order. One of the contentions made on behalf of the tenant was that in respect of the previous defaults relied upon on behalf of the landlord, the tenant had from time to time paid off all rents and thus remitted the defaults and/or breach of law, if any. In fact, at the date of the notice dated September 12, 1963, terminating the tenancy, the tenant had paid off the arrears of rents in respect of all the years including the years 1961-62. That fact was admitted in the notice itself. The tenant had remained in arrears only for one year, i. e. 1962-63. As the default that remained outstanding and/or rent in arrears was for one year only, it was obligatory on the Mamlatdar under Section 25 (1) to make an order directing the tenant to pay outstanding arrears within three months of the date of the order and on the tenant complying with that direction, to dismiss the ejectment application and direct that the tenancy had continued in existence. This very contention is repeated before us and in that connection the main argument is that the finding of the authorities below including the Maharashtra Revenue Tribunal that to the above facts of the case provisions in sub-section (2) of Section 25 were applicable and that accordingly the Mamlatdar had no power to give relief to the tenant against forfeiture of tenancy under Section 25 (1) is incorrect. In connection with this contention, reliance is placed on the language of Section 25 (2) read with Section 14 (1) (a) and (b) and the general scheme of the Act. In connection with the reliance placed on behalf of the landlord on the decision of the Supreme Court in the case of *Raja Ram v. Aba Maruti*, 64 Bom LR 569 = (AIR 1962 SC 753), the submission is that the true effect of the observations in that case and the ratio thereof was as ascertained by the Supreme Court itself in the case of *Vithal Vasudeo v. Maruti*, 70 Bom LR 314 = (AIR 1968 SC 461). There was accordingly nothing in the decision in the case of 64 Bom LR 569 = (AIR 1962 SC 753) which was against the submissions made on behalf of the tenant. The alternative submission is that if it is held that the observations in the case of 64 Bom LR 569 = (AIR 1962 SC 753) completely supported the findings made by the lower authorities, that decision did not help the landlord. The reason for that was that since the decision in the case of 64 Bom LR 569 = (AIR 1962 SC 753) material amendments had been incorporated into the relevant Sections 14 and 25. The altera-

tions and amendments were such that the observations in the case of 64 Bom LR 569 = (AIR 1962 SC 753) entirely ceased to be applicable. In other words, the submission is that the contents of amended Sections 25 and 14 have, hitherto, not been decided by the Supreme Court and have arisen for decision by a Division Bench of this Court for the first time.

5. Before referring to the arguments advanced on behalf of the landlords, it is convenient to refer to the scheme in the amended Sections 14 and 25 of the Act that came into force on August 1, 1956, and then to notice the relevant parts of these very sections as existing prior to the amendments. The relevant parts of the amended Sections 14 and 25 run as follows:—

"14. (1) Notwithstanding any law, agreement or usage, or the decree or order of a court, the tenancy of any land shall not be terminated—

(a) unless the tenant—

(i) has failed to pay the rent for any revenue year before the 31st day of May thereof;

(ii) x x x x x

(iii) x x x x x

(iv) x x x x x

(v) x x x x x

(b) unless the landlord has given three months' notice in writing informing the tenant of his decision to terminate the tenancy and the ground for such termination, and within that period the tenant has failed to remedy the breach for which the tenancy is liable to be terminated.

(2) x x x x x

6. The marginal note against Section 25 reads: "Relief against termination of tenancy for non-payment of rent." The section provides:

"25 (1) Where any tenancy of any land held by any tenant is terminated for non-payment of rent and the landlord files any proceeding to eject the tenant, the Mamlatdar shall call upon the tenant to tender to the landlord the rent in arrears together with the cost of the proceeding, within three months from the date of order, and if the tenant complies with such order, the Mamlatdar shall, in lieu of making an order for ejectment, pass an order directing that the tenancy had not been terminated and thereupon the tenant shall hold the land as if the tenancy had not been terminated:

x x x x x x x

(2) Nothing in this section shall apply to any tenant whose tenancy is terminated for non-payment of rent if he has failed for any three years to pay rent and the landlord has given intima-

tion to the tenant to that effect within a period of three months on each default."

7. The relevant parts of the un-amended sections provided as follows:—

"14. (1) Notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated unless such tenant—

(a) (i) has failed to pay in any year, within fifteen days from the day fixed x x x x, the rent of such land for that year, or

(ii) x x x x x, or

(iii) x x x x x ; provided that no tenancy of any land held by a tenant shall be terminated on any of the grounds mentioned in this sub-section, unless the landlord gives three months' notice in writing intimating the tenant his decision to terminate the tenancy and the ground for such termination.

x x x x x x x"

8. The sub-section (1) of Section 25 was the same as now appears in the amended Section 25 (1) except that the period of three months mentioned in the sub-section (1) was previously 15 days only.

"25 (2) Nothing in this section shall apply to any tenant whose tenancy is terminated for non-payment of rent if he has failed for any three years to pay rent within the period specified in Section 14."

9. At the very outset, it requires to be emphasised that by introducing clause (b) in Section 14 (1) the Legislature afforded to the tenant himself an opportunity to remedy the breach, i. e. default in payment of rent, by making payment, and date fixed under Section 14 (1) (a) (i) in that connection, is three months from the date of the notice to be given by the landlord. Apparently, the effect of this provision is that default in payment of rent for a particular previous year on or before May, 31 would be rendered useless and cease to be any default in the event of the tenant remedying the default, by making payment within three months from the date of the notice tendered by the landlord. Thus the cause of action for ejectment based on default in payment of rent on May 31, would altogether cease to exist in cases where the tenant remedies the default. The extremely significant amendments in the sub-section (2) of Section 25 are the deletion of the last phrase "within the period specified in Section 14" and addition of the phrase "and the landlord has given intimation to the tenant to that effect within a period of three

months on each default." As we will point out whilst dealing with the observations of the Supreme Court in the case of 64 Bom LR 569 = (AIR 1962 SC 753) on which reliance has been placed for the landlord, these amendments make considerable alteration in the scheme of these sections and render the observations of the Supreme Court in that case inapplicable to cases governed by these amended sections.

10. It is convenient at this stage to discuss the true construction and effect of these two sections. Apparently, under sub-section (1) of Section 25, duty is cast on the Mamlatdar in the matter of every application for ejectment filed on the ground of defaults made in payment of rent to make an order granting relief against termination of tenancy for non-payment of rents and for that purpose to make an order as provided in the sub-section. This sub-section has the effect of providing that if the defendant-tenant pays arrears of rents within three months from the date of the order of Mamlatdar, the defaults and the cause of action for ejectment will have ceased to exist. The termination of tenancy by the landlord on the ground of such defaults will have ceased to exist. The scheme of the section is that upon the Mamlatdar making such an order, the tenant "shall hold the land as if the tenancy had not been terminated." It is also clear that a tenant who remains a defaulter and even after notices tendered by landlord pays off all arrears of rents before landlord institutes an application for ejectment will by his own conduct of payment get the same benefit which he could get by making payment in accordance with an order made by the Mamlatdar under Section 25 (1). The tenant's voluntary payment of all arrears of rents to the landlord prior to institution of an application for ejectment would have the same effect as waiver of the termination of tenancy by the landlord by accepting rent in ordinary law. There is no reason why a breach which could be remedied by a tenant upon the Mamlatdar making order under sub-section (1) of Section 25 could not be remedied by the tenant himself by voluntary action of payment of all arrears of rents prior to the date of application for ejectment that might have been made by his landlord.

11. Now, the language of sub-section (2) of Section 25 is clear. If there is any ambiguity in the language, the above true construction and effect of Section 25 (1) will assist us in arriving at correct construction of the sub-section (2). For ascertaining the true construction and effect of this sub-section

tion it is convenient to read it without the phrase "whose tenancy is terminated for non-payment of rent." The sub-section will then read as follows:—

"Nothing in this section shall apply to any tenant if he has failed for any three years to pay rent x x x x."

The word "any" is of importance and meets with the arguments advanced on behalf of some of the landlords that the failure to pay rent must be in respect of the aggregate of three years' rents. Failure to pay rent involves failure to pay even any part of rent for any year. Even if one rupee of rent for any year remains outstanding, the tenant will not be justified in submitting that he had not failed to pay rent for that year. The failure mentioned in the sub-section, therefore, has nothing to do with the aggregate of the rents of the three years referred to in the section. It is also true that the word "any" indicates that the three years may not be connected with each other in any manner whatsoever. It is more important to ascertain the point of time at which the failure mentioned in the sub-section must exist. Having regard to the scheme and language of the amended Section 14 (1) including Cl. (b) thereof, the first failure will occur on May 31 of each year. The second failure will occur on the expiry of the three months from the date of the notice tendered under clause (b). The third failure will occur when the three months' period mentioned in the order made by the Mamlatdar under Section 25 (1) expires. The fourth point of time which also is relevant is the date of the institution of the application for ejectment. The question of the failure and/or the issue that the tenant has failed to pay rent for any three years will arise in the proceedings of the application for ejectment. That question will arise only in connection with the tenant's claim that is incumbent on the Mamlatdar to make an order under sub-section (1) of Section 25 for granting relief against termination of tenancy. The question relates to the exercise of the powers invested in the Mamlatdar and the duty cast upon him under sub-section (1) of Section 25. Apparently, in relation to a tenant whose defaults were complete on each of the three points of time indicated above for any three years, but who has by making payments subsequently ceased to be in arrears of rents at the date of the institution of an application for ejectment, the landlord cannot justifiably contend that the tenant has failed to pay rents for any three years. The payment and/or the wiping off of all arrears of rents has

the effect of wiping off the cause of action for ejectment. It is difficult to appreciate how the facts which lead to the wiping off of the cause of action for ejectment have not the effect of wiping off the failure and defaults in payment of rents. Having regard to these circumstances, in our view, the point of time with reference to which the question whether a "tenant has failed for any three years to pay rent" arises for decision is the date on which an application for ejectment is instituted. The other points of time indicated above do not fit in with the scheme of the Section 25 (1) and the policy of law in favour of the tenants as can be ascertained from diverse sections of the Act. In that connection, in passing, one may notice, though it was not argued at the Bar, that a bar of limitation of two years from the date on which the right to obtain possession of land accrues to the landlord is provided in connection with all applications for ejectment. This provision has the effect of making all defaults made prior to the above period of two years ineffective.

12. It has been rightly pointed out on behalf of the tenants that the word "default" is used in this Act at several places including the sub-section (2) of Section 25. The word "failed" is used also in connection with the liability for payment of rent under Section 14 as well as in sub-section (2) of Section 25. Reliance has been rightly placed on the fact that in sub-section (2) the Legislature used the phrase "he has failed" instead of the phrase "he has defaulted" and that must also be a relevant fact in arriving at the true construction of the provisions in the sub-section. In our view, the word "failed" in sub-section (2) cannot be replaced by and has not been used to mean "defaulted". As the provision in this sub-section relates to withdrawal of powers vested in the Mamlatdar, the failure mentioned in this sub-section must exist at the date of the institution of an application for ejectment. Having regard to the plain language of the sub-section, we are not in a position to accept the contention that defaults previously made even when remedied by payments made before the institution of an application for ejectment will attract provisions in S. 25 (2). The above construction is supported by the fact that from this sub-s. (2), by the amendment made in 1956, the phrase "within the period specified in S. 14" has been deleted. That phrase could not have justified any finding as made by us this morning. The failure mentioned in the unamended section

would always be connected with the period specified in Section 14. The existence of that phrase in sub-section (2) before 1956 compelled Courts to hold that the failure mentioned in the sub-section occurred on the expiry of the period for payment specified in Section 14. This position has been altogether altered by deletion of this phrase from sub-section (2) and by addition of clause (b) in Section 14 (1). Under that clause, the default is incomplete even if rent is not paid on May 31 of the year in question. If the landlord wants to rely on that failure or default, the landlord is required to give specific notice of termination of tenancy on the basis of that default and the tenant has been afforded an opportunity to remedy the default by paying the rent due within three months from the notice given by the landlord. These alterations in these relevant sections have made significant difference and the meaning and effect of the provisions in sub-section (2) of Section 25 have not remained the same as prior to the above amendments.

13. On behalf of a landlord Mr. Paranjape contended that for application of the provisions in sub-section (2) of Section 25 defaults in payment of rents for any three years must exist at the date when notice of termination of tenancy is given by the landlord. He contended that the phrase "he has failed for any three years to pay rent" was not independent of the phrase "whose tenancy is terminated for non-payment of rent". Both these phrases are descriptive of tenant. In his submission, the construction which we have arrived at above has the fault of adding the word "and" in the sub-section after the phrase "for non-payment of rent". This submission made by Mr. Paranjape was not acceptable to Mr. Chitale who also appeared for another landlord. Mr. Chitale's submission was that the provision in sub-section (2) of Section 25 was limitation on the powers vested in the Mamlatdar under sub-section (1) of Section 25. He accordingly submitted that unless there were some arrears at the date of the institution of the ejectment application, the question under Section 25 (1) and/or 25 (2) would not arise at all. In his submission, a tenant who makes defaults in payment of rents after the period of three months from the date of the notice tendered by a landlord under clause (b) of Section 14 (1) (a) would continue to be a defaulter and in connection with the question arising under Section 25 (2) he would be a tenant who has "failed" for the year in question to pay rent. He supported this

submission by reading the judgments of the Supreme Court in the above two cases. We have already discussed the true effect of the provisions in sub-sections (1) and (2) of Section 25 and we cannot accept Mr. Paranjape's submissions. In connection with the submissions made by Mr. Chitale and other Advocates appearing for landlords, we will now refer to the decisions in the cases of 64 Bom LR 569 = (AIR 1962 SC 753) and 70 Bom LR 314 = (AIR 1968 SC 461). In the case of 64 Bom LR 569 = (AIR 1962 SC 753), the issue first decided by the Supreme Court was regarding the relief against forfeiture of tenancy granted by the authorities below and this court on principles of equity, though the relief could not be granted under any of the provisions of the Act itself. In that connection, the Supreme Court first noticed that the tenancy under the Act was not contractual but compulsory tenancy of 10 years. The Supreme Court then noticed that right of termination of tenancy and to ejectment was invested in the landlord under the scheme of Sections 14 and 29. In connection with that right, relief was liable to be granted only if the tenant's case was covered by the provisions in Section 25 (1). This relief could not be granted if the tenant's case was covered by the provisions in Section 25 (2). The Supreme Court held in the first three appeals before it that admittedly the facts were such that the tenant's case was covered by the provisions in sub-section (2) of Section 25. It was admitted that for the above reason the Mamlatdar had no power under sub-section (1) of Section 25 to give relief against forfeiture of tenancy. Having noticed that situation, the Supreme Court held that on principles of equity, relief could not be granted to the tenants in question. The main reason for the finding was that the tenancy was not contractual. The right to relief against forfeiture of tenancy was not available except as provided in the statute itself. The Supreme Court accordingly reversed the decision of this Court whereby relief against forfeiture of tenancy was granted to the tenants in spite of the provisions in sub-section (2) of Section 25. In the fourth case, relief against termination of tenancy was granted to a tenant who had, after being defaulter in compliance with order made by Mamlatdar under Section 25 (1), made payments and had obtained order that his tenancy had not terminated. The question was whether such tenant can be held to have "failed" to pay rent under Section 25 (2). The Supreme Court referred to the fact that the sub-section (2) of Section 25 provided that

"nothing in sub-section (1) of S. 25 shall apply to any tenant whose tenancy is terminated for non-payment of rent if he has failed for any three years to pay rent within the period specified in Section 14". Having regard to the last underlined phrase (underlining being ours), the Supreme Court observed:

"We are unable to appreciate the contention that when a tenant has been granted relief under Section 25 (1) in respect of any year's default, the default merged in the order granting relief and ceased to be a default".

Similar are further observations of the Supreme Court which are all based, in our view, on the now deleted phrase "within the period specified in Section 14". The observations of the Supreme Court based on this deleted phrase, therefore, are now not applicable to the facts of cases which are governed by the amended Sections 14 and 25.

14. It also requires to be noticed that the contentions made on behalf of the landlord in the case of 70 Bom LR 314 = (AIR 1968 SC 461) were almost similar to those made before us. The submission was that the scheme of Section 25 (2) was mandatory and the revenue authorities were bound to order eviction even though the tenant had paid up rent and landlord had accepted it before filing application for ejectment. This submission was based on the fact that admittedly the tenant had defaulted in paying the rents within the period specified in Section 14 of the Act. The tenant had at a very late date paid up the arrears and at the date of the application for ejectment there were no arrears. The Supreme Court negated the submissions made on behalf of the landlord by observing that sub-section (1) of Section 25 pre-supposes that there are arrears at the date of the application and sub-section (2), on the other hand, deals with a case where there is persistent default by the tenant for three years and provides that to such a case the provisions of sub-section (1) would not apply. The finding was that sub-section (2) "pre-supposes (i) that the tenant has made defaults for more than two years and (ii) that the tenant was in arrears at the date of the application x x x x".

The Court further observed:

"If this was not the correct construction of sub-section (2) and if the appellant's construction were to be accepted it would lead to a very astonishing result, viz., that even where the tenant had paid up all the arrears and the landlord has accepted them, he would still have the right to evict the

tenant, though his reason for terminating the tenancy and his cause of action for an eviction have disappeared by his acceptance of the arrears due to him. The Legislature could never have intended such a result which also would be contrary to all principles governing the relationship between landlords and tenants".

Reference was then made to the policy of law indicated in Section 20 and other sections that no provisions in the Act "shall be construed to limit or abridge the rights or privileges of any tenant x x x x". The material observation was: "The Act, therefore, does not rule out the payment by the tenant and acceptance by the landlord of arrears of rent before a suit for eviction is instituted resulting in waiver by the landlord of the termination of tenancy by him". In discussing the ratio of the case of 64 Bom LR 569 = (AIR 1962 SC 753) the Court observed:

"It will, however, be noticed that this court did not hold that even where there are no arrears at the date of the application for ejectment and the landlord has prior thereto received and accepted the arrears which entitled him to terminate the tenancy, he would still have the right to obtain eviction against such a tenant".

The Court's construction of the sub-section (2) of Section 25 as then existing was:

"x x x x Sub-section (2) took away the power of the Mamlatdar to give relief which he can give under sub-section (1) viz., to call upon the tenant to pay the arrears and on such payment to direct that the tenancy had not been terminated. It is this power which is denied to the Mamlatdar by sub-section (2), if the conditions there contemplated exist, that is, the tenant is in arrears of rent for more than two years on the date when the application for ejectment is filed".

15. Mr. Chitale has asked us to read this observation by substituting at certain places the phrase "default" for the phrase "in arrears". On behalf of the tenants, with emphasis, it is pointed out that even in connection with the provisions in sub-section (2) of Section 25 as then existing, the Supreme Court has understood the case of 64 Bom 569 = (AIR 1962 SC 753) to mean that where arrears of rent for more than two years did not exist the Mamlatdar was bound to exercise powers for giving relief against forfeiture of tenancy under sub-section (1) of Section 25. We are unable to read the judgment of the Court in the manner submitted by Mr. Chitale. As we have already observed, the amendments made in Section 14

and particularly in sub-section (2) of Section 25 have rendered the observations and construction of that sub-section in these two previous decisions inapplicable. The observations are accordingly useful in arriving at correct construction of the present sub-section (2) but not binding.

16. In our view, the sub-section (2) of Section 25 applies only in cases where at the date of the institution of the application for ejectment by landlord, tenant can be held to be in arrears of payment of rent for any three years. The defaults made by him at any previous dates are not relevant. Unless the landlord proves and establishes that at the date of the institution of his application for ejectment the tenant was in arrears and/or had failed to pay rent for any three years, the Mamlatdar's power under sub-section (1) of Section 25 will have to be exercised and relief will have to be granted against termination of tenancy.

17. In this Special Civil Application, admittedly, before the date of the notice of termination, i.e., September 12, 1963, the tenant had committed several defaults. He had paid arrears of rents after suits had been filed. Admittedly, at the date of the above notice, he had paid off all arrears of rents for the previous years including the year 1961-62. The only default which had continued was for the year 1962-63. There was thus at the date of the institution of the application for ejectment one default that was in existence. It is, therefore, clear that he was not a tenant who had failed to pay rent for any three years as required for attracting the provisions in Section 25 (2). The order for ejectment was passed against the petitioner-tenant by holding that the payments made by him for wiping off previous arrears of rents were not relevant as the defaults had been completed. This finding was contrary to law and the order for ejectment passed by the Tenancy Awal Karkun and confirmed by the District Deputy Collector and the Maharashtra Revenue Tribunal was wrong and is set aside. The matter is remanded back to the Tenancy Awal Karkun to proceed to consider the question of the order to be made under sub-section (1) of Section 25 having regard to the findings made above.

18. Rule absolute. No order as to costs.

Special Civil Application No. 1409 of 1965.

19. In this Special Civil Application, the tenant has challenged the order of remand dated February 27, 1965, made by the Maharashtra Revenue

Tribunal. The only relevant facts which need to be noticed are as follows:—

20. The opponent No. 1, landlord instituted an application for ejectment of the petitioner-tenant on the ground that he had made defaults in payments of rents for three years, i.e., 1958-59, 1960-61 and 1961-62. It is admitted that at the date when the application for ejectment was instituted, i.e., on January 8, 1963, the tenant had paid off all arrears of rents including the arrears for 1960-61. The payment of the arrears of rents for that year was made on September 18, 1962. On January 8, 1963, the rent was not paid only for the year 1961-62. After the institution of the application, the rent for that year also was paid off on March 12, 1963. In connection with the years mentioned in the application, arrears of rents are not outstanding even till this date. In the result and having regard to what we have observed above, the finding of the Prant Officer in his order dated June 25, 1964, in Tenancy Appeal No. 340/63 that the tenant was entitled to relief against forfeiture of tenancy is correct. He was, therefore, right in setting aside the order of the Tenancy Awal Karkun and directing that the possession of the suit land should be continued with the tenant. Having regard to the findings which we have now made, the order of the Maharashtra Revenue Tribunal directing that the issue whether there was any agreement between the landlord and tenant that the landlord should accept rent with interest and about the waiver of notice should be tried appears to be unnecessary. Even without any findings being made on that issue, the order made by the Prant Officer is liable to be sustained.

21. In the result, the order of the Maharashtra Revenue Tribunal remanding the matter for trial of issue is set aside. The order made by the Prant Officer is confirmed. Rule absolute as above. No order as to costs.

Special Civil Application No. 1762 of 1965.

22. The present Special Civil Application is by the landlord challenging the correctness of the order made by the Maharashtra Revenue Tribunal dated April 20, 1965, setting aside the order of the Additional Collector granting ejectment of the opponents-tenants and restoring the order of the Tenancy Mahalkari dismissing the landlord's application for ejectment.

23. On the issue whether the tenants had committed defaults in payment of rent for the years 1951-52 to

1954-55, on appreciation of oral and documentary evidence, the Mahalkari held that as regards the years 1953-54 there had been late payment but he found that at the date of the institution of the application for ejectment there were no arrears at all. He accordingly rejected the application for ejectment. The Additional Collector in his appellate order dated September 14, 1964, held that the fact that the rent was paid beyond the stipulated time could not erase the default. He, therefore, held that the sub-section (2) of Section 25 applied and the tenant was not entitled to relief against termination of tenancy and/or forfeiture of tenancy. In this connection, by the impugned order dated April 20, 1965, the Maharashtra Revenue Tribunal held that the tenant had committed defaults and not paid the rents, but at the date of the institution of the application for ejectment there were no defaults in payment of rent. In that connection, it further held: "Even it is seen from the record and admitted by the opponent-landlord that the rent for the year 1955-56 was accepted by the landlord though not as a rent but as a compensation". On the ground that there were no arrears at the date of the institution of the application for ejectment the Tribunal restored the order of the Mahalkari rejecting the application for ejectment.

24. Mr. Pratap for the landlord contends that since defaults had been made by the tenants in payment of the rent for three years and since rents due for three years had not been paid by the date fixed under Section 14 (1) (a) of the Act, the provisions in sub-section (2) of Section 25 were attracted and the tenants were not entitled to an order relieving them from forfeiture of tenancy by reason of non-payment of rent.

25. In that connection, it is sufficient to state that in the case of 70 Bom LR 314 = (AIR 1968 SC 461) the Supreme Court definitely held that the question of application of the provisions in sub-section (1) of Section 25 could not arise and the application for ejectment could not be sustained in a case where at the date of the application arrears had ceased to exist. As the finding of fact in this case is that there were no arrears of rent at the date of the application for ejectment, following the judgment of the Supreme Court in the above case, we are bound to hold that the cause of action in favour of the landlord for ejectment had altogether ceased to exist at the date of the application for ejectment. As there were no outstanding arrears of rents

in respect of any prior period at the date of the institution of the application for ejectment, the same was liable to be dismissed.

26. Under the circumstances, the rule is discharged. There will be no order as to costs.

Special Civil Application No. 1430 of 1967.

27. This is the tenants' Special Civil Application challenging the correctness of the order of the Maharashtra Revenue Tribunal dated April 13, 1967, whereby, after setting aside the order passed by the lower Courts, the tenants were directed to hand over possession of lands in suit to the opponent No. 1-landlord.

28. Mr. Abhyankar for the tenants contends that the finding of the Tribunal was that the aggregate sum of Rs. 1010-3-0 was the arrears of rents at the date of the institution of the application for ejectment. The annual rent was fixed at Rs. 685-15-0. The aggregate rent for the two years would come to Rs. 1,390/-. As the arrears of rents were for a sum which was less than the aggregate of two years' rents, the Tribunal should have held that the tenants had not failed to pay rent for any period in excess of two years and were entitled to relief against forfeiture of tenancy under sub-section (1) of Section 25. The Tribunal was accordingly wrong in granting the ejectment application of the landlord.

29. Now, in connection with this submission, it is necessary to notice that there is no dispute on the fact that the arrears of Rs. 1,010-3-0 were in respect of the rents for 1953-54 to 1955-56 in the following particulars, viz.:-

1953-54	Rs. 170-10-0.
1954-55	Rs. 685-15-0.
1955-56	Rs. 154-04-0.

This being the true position, it is quite clear that the tenants had failed to pay the total rents due for the above three years. Defaults had been committed in payment in respect of the rents which became due for each of the years. At the date when the application for ejectment was instituted, the arrears as mentioned in the above particulars for the three years mentioned above had remained outstanding and payable. As already discussed in the judgment delivered in the above first Special Civil Application, we have not been able to appreciate the argument that the phrase "failed for any three years to pay rent" contained in sub-s. (2) of S. 25 has the effect of providing that there would be no failure if the aggregate amount in arrears does not exceed the aggregate of the rent for two years. Arrears for

any year, even if it is as small as one rupee, will have to be considered as failure to pay rent in respect of that year whilst considering the application of the provisions in sub-section (2) of Section 25. As in the present case, the arrears for all the three years mentioned above existed at the date of the institution of the application for ejectment, the landlord was bound to succeed. The tenants' application is without any substance.

30. Rule discharged with costs.

31. The amount deposited in Court to be paid to the landlord towards satisfaction of the rents due.

Order accordingly.

AIR 1972 BOMBAY 81 (V 59 C 11)

(NAGPUR BENCH)

CHANDURKAR, J.

Kamālesh Dashrath Fokmare and another, Petitioners v. Sukudeo Pundlik Mahalle, Respondent.

Spl. Civil Appln. No. 683 of 1968, D/- 25-2-1970, against order of S. N. Hadole, Member, Maharashtra Revenue Tribunal, at Nagpur, D/- 4-3-1968.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Section 30 (1) — Determination of tenancy by landlord's valid notice under Section 19 — Application under Section 36 (3) for eviction of tenant and possession of land — Tenant can be ordered to pay arrears of rent or lease money falling due prior to Act but not paid by him in exercise of jurisdiction for granting relief to tenant under Section 30 (1). (X-Ref:— Sections 19 and 36 (3).)

The termination of tenancy is brought about by a notice under Section 19, but there is a bar to obtain possession by the landlord created by Section 36 (2) of the Tenancy Act and he has, therefore, to approach the Tahsildar for ejecting the tenant. It is in such a proceeding for ejectment that the Tahsildar exercises his statutory power under Section 30 with a view to grant a relief to the tenant against termination of tenancy. (Para 8)

A notice under Section 19 terminating the tenancy in case the tenant failed to pay the arrears of lease money for the three years prior to coming into force of the Tenancy Act is invalid and ineffective. Spl. Civil Appln. No. 544 of 1963, D/- 13-1-1965 (Bom). Rel. on. (Para 7)

But when the landlord issued a second notice under Section 19 on 30-11-

1959 purporting to terminate the tenancy for non-payment of rent for the year 1959-60 the notice was perfectly valid and effective notice and in a proceeding started on an application of the landlord under Section 36 (3) for eviction of the tenant and possession of the land, the tenancy authorities in exercise of their jurisdiction for granting relief to the tenant can order the tenant to pay also arrears prior to the Act along with those accruing due after the Act within the statutory period of 3 months under Section 30 of the Act. (Paras 7, 9, 11)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Section 30 (1) — Object of — Object is to give relief against termination of tenancy for non-payment of rent — Section 30 (1) embodies the same principle underlying Section 114, T. P. Act — The power under the former provision is obligatory while that under the latter is discretionary. Consistently with this object the words "rent in arrears" in Section 30 (1) and Section 2 (26) should be interpreted to include also the arrears of rent for a period prior to coming into force of Act. (X-Ref:— Section 2 (26) and Section 2 (32)). (X-Ref:— T. P. Act (1882), Section 114). (Para 11)

The definition of a 'tenant' in Section 2 (32) includes a person who is a protected lessee. Therefore, having regard to the nature of the definition of rent in Section 2 (26) of the Tenancy Act which is intended to refer to a consideration paid on account of use or occupation of the land it will also cover the concept of lease money as contemplated by the provisions of Berar Agricultural Leases Act. (Para 12)

(C) Constitution of India, Art. 227 — Order of Revenue Tribunal depriving landlord of his accrued right to possession of land from tenant on a misconception of its own earlier order — Order quashed under Article 227.

Where the tenant had failed to tender the arrears of rent within the statutory period of three months from the order of the Revenue Tribunal, no discretion is left with the tenancy authorities to grant the tenant any relief under Section 30 of the Tenancy Act and the landlord gets an accrued right to the possession of the land. If in such circumstances, the Revenue Tribunal on a misapprehension of the nature of the order passed by it on the earlier occasion dismisses the landlord's application for possession thus depriving him of the accrued right, the error must be corrected by quashing the order of dismissal passed by the Revenue Tribunal. (Paras 13, 14)

Cases Referred: Chronological Paras

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- (1965) Spl. Civil Appln. No. 544 of
1963, D/- 13-1-1965 (Bom), Shan-
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Tribunal, Nagpur 3, 5, 6
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Maharashtra Revenue Tribunal 5
- (1962) AIR 1962 SC 753 (V 49) =
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- (1936) AIR 1936 Mad 116 (V 23) =
1936 Mad WN 83, Gurpur Va-
mana Pai v. Venkatu Naika 12
- (1931) AIR 1931 Cal 457 (V 18) =
ILR 58 Cal 311, Dhurumtolla
Properties Ltd. v. Dhunbai 12

K. H. Deshpande, for Petitioners;
C. P. Kalele, for Respondent.

ORDER:— An important question which arises in this case and has been very elaborately argued is whether a Tahsildar in the exercise of the powers under Section 30 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereafter referred to as the Tenancy Act, can make an order directing the tenant to pay arrears of rent which had fallen due before the Tenancy Act came into force. The petitioners are the landlords of survey number 37/1, area 7 acres 34 gunthas, situated at Chandur, Taluq and district Akola. This field originally belonged to Bhikaji the grand-father of the petitioners and devolved on them by virtue of a will made by Bhikaji, who died on 21-8-1957. It is not disputed that the petitioners, had a right to recover lease money in respect of the years 1954-55, 1955-56 and 1956-57. They had served a notice on 30-11-1959 purporting to be one under Section 19 of the Tenancy Act terminating the tenancy of the respondent-tenant in case he failed to pay Rs. 480 as lease money. No steps for obtaining possession consequent on this termination were taken, but the petitioners later gave another notice on 6-6-1960 calling upon the respondent to pay an amount of Rs. 72 as lease money for the year 1959-60. As this amount was not paid during the statutory period of 3 months the petitioners filed a proceeding for ejectment against the respondent. The Tenancy Tahsildar held that the respondent had failed to pay lease money for the years 1958-59, 1959-60 and 1960-61 but that the petitioners

were not entitled to recover lease money for the years 1954-55 to 1956-57 which he determined at Rs. 72/- per year, because according to the Tahsildar, the right to recover this amount was barred by limitation. The Tahsildar then passed an order directing the respondent to pay the arrears of 3 years, that is, 1957-58, 1958-59 and 1959-60, within a period of one year.

2. The petitioners filed an appeal against this order. The appellate authority dismissed the appeal. The petitioners then filed a revision application before the Maharashtra Revenue Tribunal. The Maharashtra Revenue Tribunal held that the petitioners were entitled to recover the amount of lease money for the years 1954-55 to 1956-57, and therefore, made an order that an amount of Rs. 216/- on account of arrears of rent for 3 years should be paid within 3 months from the date of the order. Since the nature of this order has been a matter of controversy of the parties it is necessary to reproduce the operative part of this order, which is as follows:

"For the aforesaid reasons I allow the revision application for the arrears of rent for three years and direct that the non-applicant shall pay Rs. 216/- for the arrears of rent for the three years, i.e., 1954-55, 1955-56 and 1956-57 within three months from the date of this order failing which his tenancy shall be liable to be terminated."

This order was passed on 2-9-1963. The respondent had claimed before the Additional Tahsildar that he had sent a money order which was received by the post office at Deori on 3-12-1963, that is, after the expiry of the period of 3 months granted by the Maharashtra Revenue Tribunal and the Additional Tahsildar, therefore, held that there was no proper tender of the amount of rent on or before 2-12-1963, and consequently, the respondent was liable to be ejected from the land. An appeal against this order filed by the respondent was rejected and the Revenue Tribunal also rejected the application for revision filed by the respondent. The respondent had then filed a petition being Special Civil Application No. 906 of 1965 in this Court and it was contended in that petition that there was a proper tender of the rent as directed by the Tribunal and that the Revenue authorities had no power to terminate the tenancy in respect of the arrears of lease money due for the period prior to the coming into force of the Tenancy Act. This Court, however, without disturbing the finding that the amount as ordered by the

Tribunal by its order dated 2-9-1963 was not paid or tendered within the prescribed period of 3 months remanded the revision application to the Maharashtra Revenue Tribunal "for giving a fresh hearing to the parties with respect to what would be the proper consequential order which can be passed in accordance with law on the facts of the present case". It appears that it was contended in that petition that even though the tenant had failed to pay arrears as ordered by the Maharashtra Revenue Tribunal an order for possession could not be made in favour of the petitioners.

3. When the revision application was re-heard by the Maharashtra Revenue Tribunal, the Tribunal took the view that the order passed on 2-9-1963 was without jurisdiction and that the respondent could not be evicted for non-compliance with that order. This view was taken on the basis of a decision of this Court in *Shantabai v. Maharashtra Revenue Tribunal, Nagpur*, Spl. Civil Appln. No. 544 of 1963, D/- 13-1-1965 (Bom). The Maharashtra Revenue Tribunal, therefore, allowed the revision application filed by the respondent and rejected the application of the petitioners for possession. It is this order which the petitioners are now challenging in this petition.

4. It is contended by the learned counsel appearing on behalf of the petitioners that the Maharashtra Revenue Tribunal has misapprehended the nature of the order passed by the same Tribunal on 2nd September 1963. According to the learned counsel for the petitioners the order passed on 2nd September 1963 was not one directing termination of tenancy for non-payment of rent for the years prior to the coming into force of the Tenancy Act, but that it was in substance an order made under Section 30 of the Tenancy Act which had the effect of modifying the order made by the Tahsildar who had directed the tenant to pay arrears of rent only with respect to 3 years. The learned counsel contends that the decision of the Maharashtra Revenue Tribunal dated 2nd September 1963 does not fall within the rule laid down in *Shantabai's case*.

5. It is however, vehemently contended by the learned counsel on behalf of the respondent tenant that the order passed by the Maharashtra Revenue Tribunal on 2nd September 1963 in terms directs that the tenancy of the respondent was liable to be terminated in case he failed to pay arrears of rent for the 3 years specified therein and as such the orders squarely

fall within the rule laid down in *Shantabai's case* and the Tribunal was, therefore, justified in holding that such an order for termination of the tenancy was without jurisdiction. It is contended on behalf of the respondent that the petitioners wanted to terminate the lease of the respondent for non-payment of lease money for the years prior to the coming into force of the Tenancy Act and that they were not entitled to do so having regard to the decision in *Shantabai's case* Spl. Civil Appln. No. 544 of 1963, D/- 13-1-1965 (Bom). The learned counsel has referred to two other decisions of this Court in which *Shantabai's case* was followed. These were *Umeshchandra Sundarsa Jain v. Maharashtra Revenue Tribunal*, Spl. Civil Appln. No. 258 of 1964, D/- 23-4-1965 (Bom) and *Sitaram v. Maharashtra Revenue Tribunal*, Spl. Civil Appln. No. 1051 of 1956, D/- 19-7-1968 (Bom).

6. In order to decide the rival contentions which have been vehemently argued, before referring to the provisions of the Tenancy Act it is necessary to refer to the decision in *Shantabai's case*, Spl. Civil Appln. No. 544 of 1963, D/- 13-1-1965 (Bom). In that case the landlord had obtained a decree from the Civil Court against a tenant for arrears of lease-money for the years 1955-56 and 1956-57. The tenant was also in arrears of lease-money for the year 1957-58 for which also a decree was obtained from the Civil Court. The tenant continued to be in arrears of lease-money for the years 1958-59 and 1959-60 and a notice under Section 19 (1) (i) (a) of the Tenancy Act was issued by the landlady. This notice called upon the tenant to pay the arrears of the amount due under the decrees together with costs and also rent of the field for the year 1958-59. As the tenant did not pay the amounts demanded in spite of this notice an application for possession was filed on 6th March 1961. The Tahsildar passed an order that the tenant shall pay all the arrears of rent to the landlady failing which his tenancy will stand terminated. This order called upon the tenant to pay the amounts in respect of which the landlady had already obtained decrees. The tenant appealed against this order and the appellate authority after recalculating the amounts due in respect of the periods for the years 1955-56 to 1959-60 called upon the tenant again to make the payment within the period of 30 days. The landlady filed a revision application against this order and the Tribunal remanded the matter to the Tahsildar for a fresh decision according to law.

The Tribunal's order was then challenged by the landlady by a petition in this Court and while disposing of this petition this Court observed that the liability by way of arrears of lease-money had merged into the decrees passed by the Civil Court and that under the provisions of Section 19 of the Tenancy Act there was no right in the landlord to determine the tenancy of a tenant for nonpayment of rent in respect of the period in dispute inclusive of the year 1957-58. The decision with regard to the right of the landlord under Section 19 was stated thus in the judgment:

"It is thus clear that so far as termination of the tenancy for nonpayment of rent is concerned, the landlord is entitled to issue a notice under Section 19 of the New Tenancy Act in respect of the years 1958-59 and onwards, and not with respect to anterior period. The notice given by the petitioner in this case undoubtedly calls upon the respondent to pay arrears for the years for which she had already obtained decrees and also the arrears of the years 1958-59 and 1959-60. If the notice given is valid so far as its result of terminating the tenancy for nonpayment of rent is concerned, it was only in respect of nonpayment for the years 1958-59 and 1959-60. Thus, the question that will fall for consideration before the Naib-Tahsildar will be whether the respondent was in arrears of rent for the years 1958-59 and 1959-60, and if he is found to be in arrears to fix the time according to law for payment of those arrears. After that time is fixed, the tenant's liability for payment of the arrears for these two years will arise and the legal consequence for nonpayment within the time allowed in such an order by the Naib-Tahsildar will follow."

Thus the order of remand was not interfered with. It is true that in view of this decision which has not been departed from so far in this Court the petitioners were not entitled to terminate the lease of the respondent in respect of the arrears of lease-money for the years prior to the coming into force of the Tenancy Act.

7. The crucial question, however, which falls for determination in this case is whether the petitioners have in fact terminated the lease for nonpayment of arrears of rent for the years prior to the coming into force of the Tenancy Act or whether the order passed by the Tribunal on 2nd September, 1963 was in effect and in substance an order passed in a proceeding properly instituted after proper and legal termination of tenancy in the exercise of the

powers under Section 30 of the Tenancy Act. If what has been done by the petitioners was to terminate the tenancy for nonpayment of arrears of rent for the periods prior to coming into force of the Tenancy Act there would really be no case for interference with the order passed by the Maharashtra Revenue Tribunal. As already stated, the rival contentions of the learned counsel are really based on the manner in which the Tribunal has worded its order passed on 2nd September 1963. According to the learned counsel for the petitioners, this order has the effect of modifying the earlier order of the Tahsildar, dated 28th March 1962, by which he directed payment of the arrears of rent for the years 1957-58, 1958-59 and 1960-61, while according to the learned counsel for the respondent it is in effect an order directing the tenancy of the respondent to be terminated for nonpayment of arrears of rent for the years 1954-55 to 1956-57. I have already stated that the petitioners had taken no steps for obtaining possession consequent on termination of tenancy by their notice dated 30th November 1959. Indeed, now in view of the decision in Shantabai's case this notice would be ineffective because the notice which was given on 30th November, 1959 purported to terminate the tenancy for nonpayment of lease-money for the years 1954-55 to 1957-58. The second notice however, which was issued on 6th June 1960 terminating the tenancy of the respondent for nonpayment of rent for the year 1959-60, was perfectly legal and operative notice. It is on the basis of the termination of tenancy by this notice that the proceeding for eviction and for obtaining possession from the respondent was initiated by the landlords.

8. When this application for possession came before the Additional Tahsildar the manner in which the Tahsildar had to deal with this application was regulated by the provisions of S. 36 (3) and S. 30 of the Tenancy Act. Under Section 36 (3) he had to make an enquiry in which it was competent for him to go into the question of legality of the notice, but if no effective challenge could be made to the notice issued on 6th June 1960 and there was an effective termination of tenancy by this notice, then the Tahsildar had to exercise his statutory power under Section 30 of the Tenancy Act to give time to the tenant to pay arrears of rent within the statutory period of 3 months. No controversy seems to be now possible on the question that the termination consequent on which a claim for possession is made by the landlord is brought

about by the notice under Section 19 and that Section 30 of the Tenancy Act does not deal with any power of the Tahsildar to make any order as to termination of tenancy. If any authority for this proposition is necessary it is to be found in the decision of the Supreme Court in *Rajaram v. Aba Maruti*, 1962 Nag LJ 256 = (AIR 1962 SC 753) in which the Supreme Court was dealing with the provisions of Sections 14 (1), 25 (1) and 29 (3) of the 1948 Tenancy Act which correspond respectively to the provisions of Sections 19 (1), 30 (1) and 36 (3) of the 1958 Tenancy Act. Referring to the scheme of Sections 14 and 25 of the 1948 Tenancy Act their Lordships of the Supreme Court observed in para 7 of the judgment as under:—

"Under Section 14 on the default in payment of a year's rent occurring, the landlord may, if he so chooses, bring the tenancy to an end by giving the prescribed notice. If the tenancy is terminated, the tenant has, of course, no right to hold the land. The landlord would then be entitled to recover possession of the land from him. In view, however of Section 29 (2), the landlord cannot do so except by an application made to a Mamlatdar for the purpose. Now when such an application is made in a case where the tenant has been in default for not more than two years, Section 25 (1) would have to be applied and the Mamlatdar would have to give the tenant a chance to pay up and thereby annul the termination of the tenancy brought about under Section 14."

Same is the position under Section 19 of the 1958 Tenancy Act. The termination of tenancy is brought about by a notice under Section 19, but there is a bar to obtain possession by the landlord created by Section 36 (2) of the Tenancy Act and he has, therefore, to approach the Tahsildar for ejecting the tenant. It is in such a proceeding for ejectment that the Tahsildar exercises his statutory power under Section 30 with a view to grant a relief to the tenant against termination of tenancy. This position is also made clear by the opening words of Section 30 of the Tenancy Act which are as follows:

"30 (1) Where any tenancy of any land held by any tenant is terminated for nonpayment of rent and the landlord files any proceeding to eject the tenant, the Tahsildar shall call upon the tenant to tender to the landlord the rent in arrears....."

If this is then the true nature of the proceedings and the powers of the Tahsildar, it is difficult to accept the

contention that the order of the Maharashtra Revenue Tribunal passed on 2nd September 1963 had the effect of termination of tenancy of the respondent for nonpayment of arrears of rent for the period prior to the coming into force of the Act. The order of the Tribunal is unfortunately improperly worded, but merely because the Tribunal in its order, dated 2nd September 1963, has stated that otherwise the tenancy will be liable to be terminated it cannot have the effect of overriding the statutory right which the petitioners had already exercised by giving the notice dated 6th June, 1960.

9. If the different stages through which this application made by the landlords for possession had passed are looked at, it is clear that they have throughout made a grievance of the fact that they were entitled to possession because the tenancy of the tenant had been validly terminated by the notice, dated 6th June, 1960 and when after the order directing the tenant to pay only arrears in respect of 3 years was made by the Tahsildar they challenged that order by an appeal and by a revision application before the Tribunal they were agitating denial of their right to possession, because, according to them, the Naib-Tahsildar should have made an order directing the tenant to pay the entire arrears due up to the date of the order of the Naib-Tahsildar. It is in the light of these facts that the order of the Maharashtra Revenue Tribunal dated 2nd September 1963, must be read and the only irresistible conclusion which is possible in the instant case is that the Tribunal has modified the order passed by the Tahsildar and had called upon the tenant to pay additional arrears though no doubt those arrears related to the period prior to the coming into force of the Tenancy Act.

10. It is at this stage that it is contended by the learned counsel for the respondent that even assuming that the power which the Tribunal was exercising was the power of the Tahsildar under Section 30 it was not open to it to do so in respect of the arrears of lease-money for the period prior to the coming into force of the Tenancy Act. The argument is that the respondent was a protected lessee prior to coming into force of the Tenancy Act and that he was liable to pay lease-money and since lease-money cannot be said to be synonymous with 'rent' as the term is used not only in Section 2 (26) but also in Section 30 of the Tenancy Act, the power under Section 30 to direct the tenant to pay arrears of rent could not be exercised in respect

of lease-money due for the period prior to coming into force of the Tenancy Act. Another limb of the same argument is that where the legislature wanted to incorporate in the Tenancy Act rights of the parties under different enactments a specific reference has been made to those enactments and a reference is made to Section 5 of the Tenancy Act in which certain provisions of the Transfer of Property Act are made applicable to the leases governed by the Tenancy Act and it is, therefore, contended that in the absence of any reference to the provisions of Berar Regulation of Agricultural Leases Act in the Tenancy Act or in the absence of any specific reference to the lease-money or the right to recover lease-money in the Tenancy Act the power under Section 30 cannot be so exercised as to indirectly convert the proceeding for ejectment into a proceeding for recovery of arrears of lease-money which were due under the Leases Act, and therefore, the provisions as they are must alone be given effect to. If the order passed by the Maharashtra Revenue Tribunal on 2-9-1963 falls within the jurisdiction of the Tenancy authority under Section 30 of the Tenancy Act, then that order could not be said to be without jurisdiction and that order would fall under Section 30 (1) of the Tenancy Act, if power could be spelt out under that provision which could enable the Tahsildar or the appellate authority or the revisional authority exercising power under that section to direct payment of arrears to the landlord in respect of the period before the coming into force of the Tenancy Act. It cannot be disputed that the power under Section 30 can be so exercised as to call upon the tenant to tender the landlord the rent in arrears.

11. While it cannot be seriously disputed that the phrase "rent in arrears" includes arrears after the coming into force of the Tenancy Act, the question which is required to be decided for the purposes of the present case is whether these words take within their sweep the arrears for the period prior to the coming into force of the Tenancy Act. The words "rent in arrears" are not in any way qualified and given their natural meaning these words will obviously include rent which has not been paid by the tenant to the landlord. But what the learned Counsel for the respondent contends is that the lease-money which was not paid by the protected lessee to the landlord cannot be said to be rent within the meaning of the word as it is used in the Tenancy Act and a refer-

ence is made to the definition of rent in Section 2 (26) of the Tenancy Act, but before a reference is made to the definition it is necessary to refer to the object of Section 30 (1). The object of Section 30 (1) is to give relief against termination of tenancy for non-payment of rent and the principle embodied in that section is the same principle as is embodied in Section 114 of the Transfer of Property Act. But it cannot also be lost sight of that while under Section 114 of the Transfer of Property Act a discretionary power is vested in Court, under Section 30 of the Tenancy Act the exercise of this power is obligatory on the Tahsildar and even the period during which the tenant is called upon to pay the arrears of rent is statutorily prescribed by the provisions of Section 30 of the Tenancy Act itself. If the object of the provisions of Section 30 (1) therefore is that the tenant has to be relieved against termination of tenancy for nonpayment of rent, then in the absence of any qualifying words to the phrase "rent in arrears" I fail to see why arrears prior to the coming into force of the Tenancy Act should be excluded from the sweep of this phrase. Apart from the fact that I shall presently show that the word "rent" could also include lease money payable by the protected lessee, Section 2 which is the definition section itself starts with the words "unless the context requires otherwise" and the scheme of Section 30 (1), therefore, cannot be left out of consideration while considering the meaning of the words "rent in arrears". Consistently, a view has been taken that this phrase includes arrears after the date of the notice, that is, arrears up to the date of making of the order and it is not possible for me to find any reason why if there was a liability of the protected lessee who became tenant under the Tenancy Act which remained undischarged why the tenant who wanted to continue in possession could not be put to terms by directing him to pay arrears even in respect of the period before the coming into force of the Tenancy Act.

12. The words used in Section 114 of the Transfer of Property Act were "rent in arrears." Apart from the principle which is contained in these two provisions, namely, Section 30 of the Tenancy Act and Section 114 of the Transfer of Property Act, even the phraseology used in them is also the same. It may not be out of place to refer to the view which has been taken with regard to Section 114 of the Transfer of Property Act that the words "rent in arrears" include arrears the recovery of which has become bar-

red by limitation. In *Gurpur Vamana Pai v. Venkatu*, AIR 1936 Mad 116, it has been held that the words "arrears of rent" are wide enough to cover a rent which is even barred by limitation. This decision was later followed by a Division Bench of the same Court in *Janab Vellathi v. Smt. K. Kadervel Thayammal*, AIR 1958 Mad 232 in which the Division Bench held that when granting the extraordinary relief against forfeiture the Court has jurisdiction to decree time-barred arrears also where it is fully warranted by considerations of justice, equity and good conscience under which the relief against forfeiture is granted. A reference may also be made to a decision of the Calcutta High Court in *Dhurrumtolla Properties Ltd. v. Dhumbai*, AIR 1931 Cal 457 in which the Calcutta High Court observed:

"The argument that the words mean the rent claimed in the suit and not rent which had accrued due since the determination of the tenancy by the notice to quit, up to the date when the application for ejectment is heard is acceptable."

The word "rent" is defined in Section 2 (26) of the Tenancy Act as follows:

"2 (26) 'rent' means any consideration, in money or kind or both, paid or payable by a tenant on account of the use or occupation of the land held by him but shall not include the rendering of any personal service or labour."

The contention that this definition cannot be extended to cover lease money due under the provisions of the Leases Act cannot be accepted. It is true that the provisions of the Leases Act used the word lease money and "lease money" was defined in Section 2 (i) of the Leases Act as meaning anything that is payable to a landholder in money or kind by a lessee for the right to use land. It must be appreciated that the Leases Act was in force only in the four districts of Berar and the other four districts which are also now governed by the provisions of the Tenancy Act were then governed by the provisions of Madhya Pradesh Land Revenue Code, 1954. Chapter XIV of that enactment dealt with tenants and the provisions of that Chapter dealt with the liability of the occupancy tenants to pay rent used the word rent as is clear from the provisions of Sections 173 and 178 of that Code. With regard to other tenants also the word used was rent as will be clear from the provisions of Sections 181, 182 and 183 of that Code. Section 181 raised a presumption that if rent

was due, every payment by a tenant to the tenure-holder shall, unless the tenant otherwise agreed in writing, be presumed to be a payment on account of the rent. Section 182 had cast an obligation on the tenure-holder to "give a written receipt for the amount of rent at the time when such amount is received by him." Section 183 provided for a penalty if the tenure-holder "fails to give a receipt as required by Section 182 or receives by way of rent any amount in excess of the rent payable under the Code." The definition of rent in Section 2 (26) of the Tenancy Act defines rent as any consideration which was paid or payable by the tenant on account of use or occupation of the land held by him and it obviously has the same meaning as it had under the aforementioned provisions. The word "tenant" is defined in Section 2 (32) of the Tenancy Act and it includes a person who holds land on lease and includes a person who is a protected lessee. If a protected lessee is included in the definition of a tenant, the definition of rent with reference to the protected lessee would then read as "rent means any consideration in money or kind or both paid or payable by a protected lessee on account of use or occupation of land held by him....." Having regard to the nature of the definition of rent in Section 2 (26) of the Tenancy Act, therefore, which is intended to refer to a consideration paid on account of use or occupation of the land it will also cover the concept of lease money as contemplated by the provisions of Leases Act. Even, therefore, taking this view of the matter the arrears of lease money which is nothing else but rent payable by the protected lessee but were not paid and were, therefore, in arrears could be ordered to be paid by the tenant in the exercise of the jurisdiction under Section 30 of the Tenancy Act. I have already taken the view that the effect of the order of Tribunal was nothing more than modifying the order of the Tahsildar with a further direction that additional amount which was due on account of arrears up to date should also be paid by the tenant and if that was the nature of the order passed on 2-9-1963 it is difficult to say that that order was without jurisdiction.

13. It is then contended that this Court should not interfere with the order of the Tribunal in the exercise of its discretionary powers under Article 227 of the Constitution of India, because the tenant has bona fide made an attempt to pay off the arrears as ordered by the Maharashtra Revenue Tribunal by the order, dated 2-9-1963. It is not possi-

ble to accept this submission. Even this Court has confirmed the finding on the earlier occasion when the matter came to be placed before this Court that the amount was not tendered during the statutory period of 3 months granted by the Maharashtra Revenue Tribunal. It is difficult to appreciate how a question of bona fides really becomes material. The fact remains that it has now been decided that there has been no tender within three months of the order of the Maharashtra Revenue Tribunal and on failure of the tenant to so tender the amount he has deprived himself of the relief which he was entitled to in view of Section 30 of the Tenancy Act. There is, therefore, hardly any discretion left with the tenancy authorities and the only order that could follow would be an order for possession. If that was the nature of the right which had accrued in favour of the landlord and if the landlord has been deprived of that right by the Revenue Tribunal by the impugned order on a misapprehension of the nature of the order passed by the Tribunal on the earlier occasion that error must be corrected.

14. The result, therefore, is that the impugned order passed by the Maharashtra Revenue Tribunal on 4th March 1968 is quashed and the orders passed by the Special Deputy Collector and the Additional Tahsildar are restored. As the impugned order has now been quashed the landlords would be entitled to be restored to possession, as I am now informed that the tenant is now in possession.

15. In the circumstances of the case there will be no order as to costs. Order quashed.

AIR 1972 BOMBAY 88 (V 59C 12)

WAGLE AND MALVANKAR, JJ.

Amin Abdul Kadar Murtasa, Appellant v. Jivraj Otmal Ratnagiri Bhagidari, a firm, and others, Respondents.

A.F.O.D. No. 258 of 1970, D/- 22-2-1971, against decision of J.B. Mangsule, Civil J., Sr. Division at Ratnagiri in Spl. Darkhast No. 1 of 1969.

Civil P. C. (1908), Section 145 — A surety, who had executed a surety bond for satisfaction of a decree that might be passed by the Court, is not ipso facto discharged upon passing of a consent decree, if such a consent decree is not the result of any fraud or collusion between the plaintiff and the defendant and if no prejudice is caused to the surety. The provisions

or the principles of Sections 133 and 135, Contract Act will not apply to such a case. (X-Ref: Contract Act (1872), Sections 133, 135). AIR 1939 Bom 23, Overruled; Case law referred. (Paras 13, 14)

Cases Referred: Chronological Paras

(1961) AIR 1961 Ker 312 (V 48) =	
1960 Ker LJ 682, Chakkuny v. Viswanatha Iyer	11
(1939) AIR 1939 Bom 23 (V 26) =	
40 Bom LR 989, Parvatibai v. Vinayak	5, 14
(1935) AIR 1935 Nag 16 (V 22) =	
31 Nag LR 172, Kabiruddin v. Debisingh	10
(1933) AIR 1933 Mad 309 (V 20) =	
ILR 56 Mad 625, Annadana Jadaya v. Konammal	10
(1932) AIR 1932 Bom 168 (V 19) =	
34 Bom LR 167, Keshavlal v. Pratapsing	14
(1932) AIR 1932 Cal 858 (V 19) =	
ILR 59 Cal 1450, Jia Bai v. Joharmull Bothra	9
(1931) AIR 1931 Bom 55 (V 18) =	
32 Bom LR 1394, Haji Ahmed Karim v. Maruti Ravji	8, 9
(1930) AIR 1930 Bom 122 (V 17) =	
31 Bom LR 1442, Mahomedalli v. Lakshmbai	7, 8
(1894) 1894 Bom PJ 25, Shivappa v. Nagappa	6

C. R. Dalvi, for Appellant; K. J. Abhyankar, for Respondents 1 (a) and 1 (b).

WAGLE, J.:— Special Civil Suit No. 3 of 1967 was filed by the respondent-firm for recovery of an amount of Rupees 22,717.12 and costs with interest at 12 per cent. per annum from the date of suit till recovery. The defendant put in contentions disputing the claim of the plaintiff. After filing the suit, an application for attachment before judgment under Order 38, Rule 5 of the Civil Procedure Code was made by the plaintiff. The property was attached but the attachment was removed as the defendant furnished security in the shape of a surety bond executed by the present appellant agreeing to hold himself liable for the decree to be passed to the extent of Rs. 25,000/-.

2. Subsequently on November 14, 1968 a consent decree was made by the trial Court for Rs. 22,717.12, costs of the suit and interest at 12 per cent. per annum but subject to a condition that if payments were made as detailed in the terms of compromise, the decree was to be entered as satisfied provided the amount of Rs. 20,000/- was paid. After this decree was made, the respondent firm made an application for execution and had the pro-

party of the appellant-surety attached on September 9, 1969. On October 8, 1969 the attached property was ordered to be sold for satisfaction of the decree. Against this order for sale, the appellant-surety filed the present appeal.

3. When this matter reached hearing before Vaidya, J., one point was placed before the learned Judge, namely that there is a conflict of decisions of two Division Benches of this Court. The learned Judge having found that the conflict exists referred this matter to a Division Bench. The point in respect of which a conflict was shown to exist was whether by reason of the fact that a decree by a compromise was made, the surety who had agreed to pay the decretal amount was discharged.

4. Mr. Dalvi appearing for the appellant contended that although in strict terms a surety bond executed in favour of the Court would not be covered by Sections 133 and 135 of the Contract Act, still this Court has held that the principles embodied in Sections 133 and 135 of the Indian Contract Act would apply. It was urged by him that the surety could not be expected to anticipate that the plaintiff and the defendant would settle the claim and that the defendant would submit to a decree shifting the liability from himself to the surety. The fact that the decree was by compromise was, according to Mr. Dalvi, a variation of the original terms of the surety bond and necessarily therefore if the principles of Sections 133 and 135 of the Contract Act applied, the surety was entitled to contend that he was discharged.

5. In support of his contention that the principles embodied in Sections 133 and 135 of the Indian Contract Act applied to the surety bond executed in favour of the Court, reliance was placed by Mr. Dalvi on *Parvatibai v. Vinayak*, 40 Bom LR 989 — (AIR 1939 Bom 23). The facts of this case were as follows: The defendant in the suit offered two sureties who executed bonds to the Court for securing the payment of mesne profits for two years. Against the decree made in the suit, an appeal was filed by the defendant. A stay of execution by offering fresh security was also obtained by the defendant-appellant. After the appeal was dismissed an execution was sought by the decree-holder for mesne profits against the original sureties. A contention was taken by sureties that they were discharged. Broomfield, J., while considering this question observed that although having

regard to the definitions in Section 126 of the Indian Contract Act, Sections 133, 135 and 139 cannot apply in terms to a transaction of the type, where the bond is given to the Court, it does not follow that the principles underlying those provisions should not be applied *mutatis mutandis*. The learned Judges then held that this was a case in which the Court was itself responsible for a change in the situation which materially affected the position of the first sureties under the terms of their surety bonds and held that the sureties were discharged. Mr. Dalvi placed great reliance upon this case to urge that the two points which were decided in this case satisfactorily established, firstly that the principles of Sections 133 and 135 of the Contract Act applied to a surety bond executed in favour of the Court and secondly that if there is a variance between the terms of the surety bond and the ultimate order that is passed, there is ground to hold that the sureties are discharged. But one circumstance that has to be considered in addition to these two factors is that the learned Judges held in that case that the surety was adversely affected by the course of action taken by the Court itself and that this adverse effect was to the prejudice of the surety.

6. This point, however, whether a surety is discharged upon a compromise after a surety bond is executed by a third person for satisfaction of a decree by Court has been dealt with on several occasions by this Court and by the other High Courts. The earliest decision on this point of this Court is to be found in *Shivappa bin Gurlingappa v. Nagappa bin Shivappa Kudrimoti*, (1894) Bom PJ 25. Jardine, J., observed in this decision as follows:—

"It is argued that the bond being conditioned as to what the Court might adjudge, that verb excluded a decree passed on consent, and therefore that the decree passed is beyond its purview. We do not think, however, that we ought to limit the meaning in this manner. It is matter of notoriety that many suits are terminated by consent decrees, and we cannot hold that the creditor's taking the usual advantage of the debtor's consenting to the claim was inconsistent with the terms of the bond."

Ranade, J., while concurring with the order proposed by Jardine, J. observed as follows:

"The adjudication by the Court is only a means to an end, and in the absence of fraud there is nothing to prevent a judgment-debtor obtaining a

consent decree and saving costs, or, as in this case compromising his creditor's claim."

The observations of the learned Judges are clear enough to indicate that the words "a decree to be made by the Court" would also include a decree by consent between the plaintiff and the defendant.

7. The next judgment on the point which is the subject-matter of conflict between two Division Benches is *Mahomedalli v. Lakshmbai*, 31 Bom LR 1442 = (AIR 1930 Bom 122). The facts of this case were that in a suit to recover money, attachment before judgment was obtained by the plaintiff, and the husband of the respondent stood surety and executed a bond in form 6 to App. F, Civil Procedure Code. Subsequently the plaintiff and defendant arrived at a compromise under which the amount in dispute was agreed to be paid in monthly instalments. The question was whether in view of these terms of compromise the surety was discharged. The learned Judges of the Division Bench did not agree on the first point whether by reason of the fact that the decree was passed by consent it followed ipso facto that the surety was discharged. It was observed by Kemp, Acting, C. J. that the correct test to apply to that case was whether the compromise which was subsequently embodied in the decree was in the contemplation of the plaintiff and the surety when the latter became a surety. But in the application of the test the learned Judge did not hold that that would be a sufficient ground for holding that the surety was discharged. It was observed that it would be nine months before the surety's liability was extinguished by reason of the compromise decree and that during those nine months the position of the judgment-debtor might have altered very much for the worse. It was further observed that the surety's rights against the debtor were prejudiced by the compromise and that therefore such a compromise was not contemplated when the surety bond was given by the surety. Blackwell, J., agreed with Kemp Ag. C. J. on this point and they held that the surety was discharged. One thing to be noticed in this connection is that by the mere fact that there was a compromise, the learned Judges did not hold that the surety was discharged.

8. The third case on the point and the case on which a conflict was considered by Valdia, J., was *Haji Ahmed Karim v. Maruti Ravji*, 32 Bom LR 1394 = (AIR 1931 Bom 55). A similar point had arisen in this case

whether a surety was discharged by reason of the fact that the decree was not in invitum but it was passed by consent. Madgavkar, J., who delivered the judgment of the Bench observed as follows:

"The first question in these cases, in our opinion, is whether a compromise as such is or is not excluded under the terms of the surety-bond. That must be a question of fact in each case." The opinion of the Division Bench after considering the question was as follows:—

"It follows on this view that a compromise as such is not explicitly or implicitly outside the terms of the surety bond in this case."

The position, therefore, was that a compromise could not be excluded from the term "a decree of the Court" to be found in the surety bond. We find on going through the decisions of the two Division Benches in 31 Bom LR 1442 = (AIR 1930 Bom 122) and 32 Bom LR 1394 = (AIR 1931 Bom 55) that there is in fact no such conflict on this point. An opinion was expressed by Kemp Ag. C. J., but that opinion was personal to him and did not become the opinion of the Bench as Blackwell, J., did not concur in that opinion. From these decisions we find that it depends upon the construction of the surety bond whether the surety is discharged or continues to be liable.

9. The Calcutta High Court in *Jia Bai v. Joharmull Bothra*, ILR 59 Cal 1450 = (AIR 1932 Cal 858) concurred with the decision in 32 Bom LR 1394 = (AIR 1931 Bom 55). Rankin C. J. while considering this point observed at page 1461 (of ILR Cal) = (at page 863 of AIR) as follows:—

"In this appeal, we have been referred to the decision in 32 Bom LR 1394 = (AIR 1931 Bom 55). In that case, a Division Bench of the Bombay High Court, in a judgment with which I fully agree, as I do with the judgment of Lord-Williams, J., in the present case, examined the terms of the surety bond which said that, in case the defendant failed to pay the decree, 'I bind myself to pay any sum upto Rs. 3,000/- according to the orders of the Court'. The Bombay High Court held that the bond in that form was just as applicable to a consent decree as to any other Assuming that the consent decree is not in anywise fraudulent, it is just as much within the terms of such a bond as any other decree and indeed it strikes one as rather surprising that the ordinary form of a bond in a case under Order XIV should not be supposed to cover the case of a consent decree".

10. Similarly in *Annadana Jadaya v. Konammal*, ILR 56 Mad 625 = (AIR 1933 Mad 309) the Madras High Court held that the consent order had not the effect of releasing the surety. Of course, on facts it was held that the surety was discharged because time was given to the judgment-debtor to pay which had materially affected the rights of the surety. In *Kabiruddin v. Debisingh*, AIR 1935 Nag 16, the Nagpur High Court expressed itself as follows:

"A consent decree is not any the less a decree because it is agreed to by the parties to the suit, and though for certain limited purposes it is treated on the same footing as the agreement itself, the rules of contract do not apply in their entirety, nor do those of tort. Where therefore a surety undertakes to be bound by such decree or order as may be passed by the Court, he undertakes to be bound by a consent decree as well as by one after contest."

11. Similarly the Kerala High Court in *Chakkunnu v. Viswanathalyer*, AIR 1961 Ker 312, also held that a consent decree would be included in the expression "decree passed by Court".

12. On the point, therefore, whether a consent decree would be included within the expression "a decree to be passed by the Court", the decisions of the Calcutta High Court, Madras High Court, Nagpur High Court as it then was and the Kerala High Court are consistent and in agreement with the decisions of this Court. Obviously therefore there is no substance in the contention advanced by Mr. Dalvi that upon the passing of a decree by consent the surety is ipso facto discharged.

13. However, it has been consistently held by our High Court and also by the other High Courts that this rule is subject to three limitations, (1) that the decree is not the result of a fraud, (2) that the decree is not by collusion between the plaintiff and the defendant and (3) that the decree has not prejudiced the surety in any respect. In this case there is no argument advanced before us that either there was a fraud in the making of the decree or that there was collusion between the plaintiff and the defendant which had brought about the consent decree. The point to be considered therefore is whether the rights of the surety are in any way prejudiced by the consent decree that is made therein.

14. According to Mr. Dalvi appearing for the appellant, the very fact that the decree is made by consent is

itself sufficient to prove that it is adverse to the rights of the surety. On this point reliance was placed by Mr. Dalvi on the observations of Broomfield, J., in 40 Bom LR 989 = (AIR 1939 Bom 23). The learned Judge quoted the observations in *Keshavlal v. Pratapsing*, 34 Bom LR 167 = (AIR 1932 Bom 168) to the following effect:—

"If there is a substantial alteration in a contract by the principal, without the consent of the surety, even if there be no extra prejudice to the surety which can be shown to exist, the surety will be discharged, because the Court will not go into the question whether there has been any actual prejudice or not. The surety is to be the judge whether he will continue to remain liable on the new contract or not."

Broomfield, J. then observed as follows:

"On the same principle the respondents are not bound to prove that they have actually been prejudiced."

Reliance was placed upon these observations by Mr. Dalvi to urge that it is not necessary that prejudice in fact must be proved by the surety but that an alteration in the original terms of the bond is sufficient to prove that prejudice has been caused.

15. In order to substantiate his argument that the sureties are discharged, it was further urged by Mr. Dalvi that when there is a variance between the surety bond and the ultimate decree that is passed, there is a substantial alteration in the terms so far as the surety is concerned and that in such cases no prejudice need be proved. The term of the surety bond of which a translation was given in the lower court was as follows:—

"The said defendant will personally and voluntarily pay without fail to the plaintiff the entire amount with costs which will be declared as payable in pursuance of the decree which the Civil Judge, Senior Division, Ratnagiri will pass in the suit after a trial finally and will satisfy the amount according to the decree which will be passed for the plaintiff. But if he does not pay accordingly, I personally or after me my heirs and executors of my will bind ourselves to pay an amount not exceeding Rupees twenty five thousand out of the amount which will be due to the plaintiff according to the said decree"

Emphasis was laid by Mr. Dalvi on the expression "the decree which the Civil Judge, Senior Division, Ratnagiri will pass in the suit after a trial finally." The learned single Judge has reproduced in original Marathi the relevant term

of the bond in his judgment. The Marathi term is as follows:

“दायांत चौकशी अंती जो अखेर निर्णय दिवाणी न्यायाधीश वरिष्ठधर, रत्नागिरी, हे देतील त्या निवा-
ह्यास अनुसरून”

The word “चौकशी अंती” (after trial) was, according to Mr. Dalvi, not the same as a decree by compromise. According to Mr. Dalvi, a decree by compromise was not after trial but the same was without trial. On the construction of this term we find that Mr. Dalvi is not supported by any decided case, namely, that a decree by consent is not a decree after trial. We have referred to the various decisions which have held that a consent decree is not excluded from the term “decree” in the surety bond. Necessarily therefore it must be held that there is no substance in this contention that a consent decree materially alters the terms of a surety bond executed in this case. The other cases in which the surety was held to be discharged were either on the ground that there was fraud in the making of the decree or that there was collusion between the plaintiff and the defendant in the suit or that by grant of time to the defendant, the surety was adversely affected in his rights. In the instant case there is no argument that the surety was in any way prejudiced. In fact we find that from the terms of the decree, the amount of the decree is reduced to Rs. 20,000/- from Rs. 22,000/- and odd and costs etc. In fact, the liability of the surety is reduced by the compromise and the burden is not increased nor is the right of the surety affected in any way. We, therefore, hold that the appellant fails to prove that he is discharged.

16. In the result, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1972 BOMBAY 92 (V 59 C 13)

K. K. DESAI, J.

Durgadas Devidas Rathod, Appellant
v. Vithal Sidram Udate and others,
Respondents.

A. F. A. D. No. 301 of 1967, D/-
10-2-1971, from order of A. R. Shimpf,
Dist. J., Sholapur in Appeal No. 697 of
1965.

Debt Laws — Bombay Money Lenders Act (31 of 1947), Section 2 (9) — Loan to a trader — Not a loan within the sub-section — Purpose immaterial.

LO/LO/F890/71/MNT/SSG

A loan advanced to a trader, for whatever purpose, is excluded from the definition of loan within the sub-section except for the purpose of Sections 23 and 25 of the Act. Section 21 does not apply to such a loan and the plaintiff cannot be deprived of interest till the date of suit on the ground of breach of provisions of Sections 18 and 19 of the Act — (X-Ref: Section 21).

(Paras 3, 4)

U. R. Lalit, for Appellant.

JUDGMENT:— Issues Nos. 1 and 3 before the trial Court were:

“(1) Whether the provisions of the Bombay Money-lenders Act are applicable to the suit transactions?

(3) Whether the plaintiff proves compliance of Sections 18 and 19 of the Act?”

Though issue No. 1 was answered in the affirmative, issue No. 3 was answered in the negative. Under the provisions of the above Act, the trial Court deprived the plaintiff-mortgagee of interest that accrued due on the mortgage till the date of the institution of the suit. In that connection, before the lower appellate Court, the contention that was raised on behalf of the appellant-plaintiff was that the mortgage in suit had been executed in connection with the loan advanced to traders. The trial Court was, therefore, wrong in its affirmative finding on issue No. 1 and in depriving the plaintiff of interest due till the date of the institution of the suit. The lower appellate Court held that loan would be to a trader when it was advanced for purposes of trade. In order to succeed in his contention, it was necessary for the plaintiff to prove that the suit-loan and mortgage were made for purposes of trade of the defendants. There was no such evidence. The loan had not been advanced for purposes of trade and accordingly the learned Judge negatived the above contention.

2. Mr. Lalit has rightly contended that the above finding of the lower appellate Court is incorrect. There is clear and uncontradicted evidence of the plaintiff in this case that Sidram and his children being defendants Nos. 1 to 6, carried on joint family business and were trading in saris. Sidram, along with his children defendants Nos. 1 to 6 and his wife defendant No. 7, had taken the mortgage loan of Rs. 4,000/-. Sidram and the defendants were traders. There was no cross-examination of the evidence of the plaintiff. It is, therefore, clear that Sidram and his sons, defendants Nos. 1 to 6, were traders. They carried on a joint family business and as such were dealing in

sarls. It is true that some of the defendants Nos. 1 to 6 were at the date of the mortgage minors. It is true that defendant No. 7 was merely the wife of Sidram and was not taking part in the trading transactions. Even so, it must be held that the business in sarls that was carried on by the elder and major members of the family was joint family business and was carried on for all the defendants and Sidram. The loan must, therefore, be held to be made to traders.

3. Now, in connection with loan to traders, the relevant provisions are in Section 2 (9) of the Act and read as follows:

"2 (9) loan means an advance at interest whether of money or in kind, but does not include—

(a) x x x x x

(b) x x x x x

(c) x x x x x

(d) x x x x x

(e) x x x x x

(f) x x x x x

(g) except for the purposes of Sections 23 and 25,—

(i) a loan to a trader.

x x x x x x x"

On a reading of the above definition of loan in Section 2 (9), it is clear that the provisions of the Act, including those in Sections 18 and 19, are not applicable to loans advanced to traders. To loans advanced to traders, Sections 23 and 25 only apply. The learned appellate Judge below was not justified in his view that if loan was not shown to have been advanced to a trader for purposes of his trade, the same is not excluded from being loan under Section 2 (9). The learned Judge failed to appreciate that the provisions in clause (g) of Section 2 (9) have not the effect of providing that loans which were not advanced to traders for their trade purposes would be loans within the meaning of the Act. On the contrary, the clear and unambiguous language in the above clause (g) has the effect of providing that whenever loan was advanced to a trader, except for the purposes of Sections 23 and 25, it could not be loan within the meaning of the Act, i.e., the defining Section 2 (9). The learned Judge should have, having regard to the clear evidence of the plaintiff on record, held in the plaintiff's favour that, since the above mortgage loan had been advanced to a joint family which was carrying on business in sarls, it was covered by the provisions in the above clause (g) and was loan to traders. Merely for the reason that it was not stated in the evidence that the loan was advanced for pur-

poses of the trade of the joint family, the learned Judge was not justified in holding that the loan was not made to traders. That two of the sons of Sidram were minors at the date of the mortgage and that his wife had joined in the mortgage was, in that connection, not sufficient to make a finding that the loan was not advanced to a trader. It is quite clear that the loan was advanced to the trading family and must be held to have been made to traders.

4. The power to refuse interest to a moneylender on breach of the provisions in Sections 18 and 19 of the Act is contained in Section 21 of the Act. Section 21 was not applicable to the facts of the suit mortgage having regard to the above provisions contained in clause (g) of Section 2 (9). The two Courts below were, therefore, not justified in depriving the plaintiff of the interest that had accrued due on the mortgage till the date of the institution of the suit.

5. The appeal is accordingly allowed and the decree passed by the trial Court and confirmed by the lower appellate Court is modified to include the interest due till the date of the institution of the suit, viz. Rs. 2,915/-. The preliminary decree will be drawn accordingly.

6. No order as to costs of this appeal.

Appeal allowed.

AIR 1972 BOMBAY 93 (V 59 C 14)

WAGLE, J.

State of Mysore, Appellant v. Ramchandra Gunda and another, Respondents.

A. F. A. D. No. 565 of 1963, D/-24-11-1970, from decision of C. N. Patel, Extra Asst. J., at Kolhapur in Appeal No. 131 of 1961.

(A) Constitution of India, Article 300 — Liability of Government — When the Government builds a reservoir for facilitating the supply of water but fails to provide an over-flow channel to meet any contingency the Government is liable for damage to the adjoining lands by overflow of such reservoir due to unprecedented floods. The damage in such a case does not result from the act of God — (X-Ref:— Tort — Damages — Act of God) — 1917 AC 556, Followed. (Para 10)

(B) Constitution of India, Art. 300 — Vicarious liability of Government — The Government is not vicariously lia-

LO/LO/F894/71/MVJ/BNP

ble for the negligent acts of its servants only if such acts are committed in pursuance of the sovereign power of the State — (Tort — Damages — Vicarious liability). (Case law discussed).

(Para 13)

The construction of a reservoir by the State for facilitating the supply of drinking water is an act of welfare State for the betterment of the people of a part of the State and it is not an act in the exercise of its sovereign power. Therefore when damage is caused to the adjoining lands by the overflow of such reservoir due to negligence of its servants by not providing for such an overflow, the State Government is liable for the damage.

(Para 11)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 SC 1039 (V 52) = | |
| 1965 (2) Cri LJ 144, Kasturi Lal | |
| v. State of U. P. | 11 |
| (1962) AIR 1962 SC 933 (V 49) = | |
| 1962 Supp (2) SCR 989, State of | |
| Rajasthan v. Mst. Vidyawati | 12 |
| (1917) 1917 AC 556 = 86 LJ PC | |
| 185, Greenock Corporation v. | |
| Caledonian Rly. | 6, 10 |
| (1861) 5 Bom HCR App 1, Bourk | |
| A. O. C. 166, Peninsular and | |
| Oriental Steam Navigation Co. | |
| v. Secy. of State for India | 12 |

M. R. Kotwal Asst. Govt. Pleader, for Appellant; M. V. Paranjpe with V. V. Divekar, for Respondents.

JUDGMENT:— This is an appeal by the State of Mysore challenging the orders passed by the two lower Courts granting damages to the plaintiff for loss caused by reason of water overflowing from a reservoir constructed for the residents of Nipani.

2. In order to provide drinking water facilities to the town of Nipani, the State Government erected a reservoir adjoining Survey Nos. 92 and 93 at village Arjuni. Survey Nos. 92 and 93 belong to the plaintiffs. The construction of the reservoir was completed in 1954 by the Water Works Department. By a notification under Section 4 of the Land Acquisition Act issued on September 27, 1955, Government proposed to acquire part of the land belonging to the plaintiffs for the purpose of constructing a channel for carrying the overflow of water from the reservoir to the Nalla which is at a distance of about 1500 feet from the waste-weir of the reservoir. By private negotiation possession of the necessary land was taken by the State Government on October 21, 1956. However, the channel was not constructed except to the extent of about 250 feet on the

side of the Nalla. The construction of the channel was not attempted from the waste-weir towards the Nalla. On November 14, 1957, there was heavy rainfall of 2½" in four hours and the water from the reservoir overflowed into the waste-weir and thereafter flowed over the land belonging to the plaintiffs. Considerable damage was caused both to the land and to the crops. Plaintiffs therefore came to Court seeking damages for the loss occasioned to him by reason of the overflow of the water which had collected in the reservoir. Plaintiffs' case was that due to the negligence of the defendant in not taking proper precautions to guard against the overflow, the loss was caused to the plaintiffs.

3. The defendant-State did not dispute the following facts, namely that the reservoir was built, that there was overflow due to heavy rains in November 1957 and that the loss assessed at Rs. 3,000/- was caused. The defendant's stand, however, was that the Mysore Government through its Engineering Department had taken proper legal and timely action in this case and that adequate and proper compensation has been paid to the plaintiffs under the provisions of the Land Acquisition Act. It denied the contention of the plaintiffs that the plaintiffs had suffered loss to his land due to the negligent act of the servants of Government. Lastly it was contended that the Government was not liable for tortious acts or negligent acts of its servants. It was their further contention that it was an act of God and therefore nobody was liable.

4. Before the trial Court plaintiffs examined plaintiff No. 1 and the defendant examined Balvant Appaji Chavan, an Overseer working at Nipani at the relevant period. The issues framed by the trial Court include the issue: "Does plaintiff prove that due to gross negligence of the employees of Defendant in Public Works Department in not channelling the excess water through especially built channel, damage was caused to the crops and the lands of the plaintiff?" This issue was answered in the negative and therefore the main claim of the plaintiffs about the damage to the land and crops was not allowed. A small decree for rent and damages to the standing crop was made. Against this decision the plaintiffs went in appeal and the appellate Court holding that there was negligence on the part of the servants of the defendant-respondent decreed the claim of the plaintiffs for damages to the extent of Rs. 2,700/-. Against this deci-

sion the defendant-State has filed this second appeal.

5. Mr. Kotwal arguing for the appellant, the State of Mysore, contended that the lower appellate Court had taken an erroneous view in regard to the liability of the State. It was also urged by Mr. Kotwal that loss which was due to the act of God could not be considered as due to the act of any State Department. His argument was that during the course of several years at no time had $2\frac{1}{2}$ " rain fallen during four hours. It is not disputed that damage by overflow of water was caused because of the accumulation of water during the course of four hours heavy rain amounting to two and a half inches. Mr. Kotwal's argument therefore was that the heavy rain of $2\frac{1}{2}$ " was an act of God and therefore since the flow of water was due to the act of God, the State should not be made liable for the loss occasioned thereby. It was also urged by Mr. Kotwal that the act of the State in constructing the reservoir was an act in the capacity as a sovereign and therefore it being an act of State in its sovereign capacity, a loss occasioned to any citizen could not be made a liability on the State. The lower appellate Court considered the authorities cited before it and came to the conclusion that there was negligence on the part of the State in not constructing the channel in time and that even if it be held that the heavy rain was an act of God, still the negligence of the State is not wiped out by the said act of God.

6. The point whether heavy rainfall could be considered as Vis Major or act of God was considered by the House of Lords in *Greenock Corporation v. Caledonian Rly.*, 1917 AC 556. There the question was as to the liability for the consequences resulting from works in alveo fulminis whereby the natural alveus was filled up and the flow of water under the force of gravity thrown into a new channel at a new and higher level. Lord Wrenbury observed on this point as follows:

"In such a case the corporation is responsible, I conceive, for resultant damage howsoever arising. The responsibility to prove a substituted channel is not limited to providing a channel sufficient to meet all demands which might reasonably be anticipated, or even all demands (in excess of the ordinary) short of the act of God. The corporation must provide a substituted channel which will be equally efficient happen what will. Assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not

from the act of God, but from the act of man in that he failed to provide (as there* was before) a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God."

Relying upon these observations, the learned appellate Judge held that in spite of the heavy rain, the negligence of the State in not providing a proper channel for absorbing overflow of water was responsible for the damage caused to the land and crops of the plaintiffs.

7. Mr. Paranjape pointed out that by a letter dated May 17, 1957 (Exh. 46) this fact was brought to the notice of the State Government that there was a likelihood because of the heavy rains of overflow of water causing immediate danger to his land on the border. Even after this, according to Mr. Paranjape, sufficient precautions were not taken by the State Government to provide against a heavy overflow of water. In this connection the actions of the State Government may be considered. In 1954 the water works were completed but no provision was made for a channel for overflow of water from the Waste-weir to the Nalla which is at a distance of about 1500 feet. Such a possibility it seems was contemplated a little before September 1955 and a notification under Section 4 of the Land Acquisition Act was made for taking possession of the adjoining lands ostensibly for the purpose of creating a channel to absorb the overflow of water from the waste-weir to the Nalla.

8. It appears that as an emergent act, possession was taken by the State Government on October 21, 1956. Exh. 38 shows that this possession was taken from the owners of the land, two of whom were the plaintiffs themselves. Thereafter the evidence led by State shows that upto a distance of about 250 feet from the Nalla a channel was made adjoining the Nalla. The channel was 7 feet in depth and about 10 feet in breadth. But this channel was adjoining the Nalla and no such channel was constructed near the waste-weir so as to take the water from the waste-weir towards the Nalla. In this state of events, Exh. 46, dated May 17, 1957, was sent by the plaintiff to the State Government. The receipt of this letter is not disputed. The cause for writing this letter appears in the letter itself. It is stated therein "During rains of 1956, his land outside the acquired area was damaged by the water flowing through the waste-weir of the said Dam." It is also stated therein that he had applied to higher authorities to improve the same and to dig a chan-

nel through acquired area of Survey Nos. 92 and 93 from Arjuni but that he was sorry to note that nothing had been done. It is further mentioned in this letter that the rains were heavy and there was a chance that the flow would begin soon causing immediate danger to his land. It is not as if the danger of the likelihood of the loss was not brought to the notice of the Government. In fact, by Exh. 46 it was specifically brought to the notice of the authorities that damage was caused in 1956 rains and that such events might recur in 1957 and thereafter.

9. The point, therefore, to consider is whether the State Government was negligent in that no proper channel for the flow of overflow water from the waste-weir was constructed by it in time in order to see that loss by damage of crops is not occasioned to the adjoining lands. In the instant case it must be noted that a proposal was before Government for the construction of such channel and in 1957 in fact the proposals were taken in hand, but the proposal only went to the extent of construction of a channel about 250 feet in length but adjoining the Nalla. In these circumstances a question arises whether the damage that was caused to the land and the crops of the plaintiffs was due to an act of God or the negligence of the State. A further question that would arise is whether State would escape the liability on the ground that it was an act of God which led to the overflow if proof is given that the State was itself negligent on earlier occasion in not taking proper precaution. In the instant case, two things cannot be disputed, first, that a channel to provide for the flow of overflowing water from the waste-weir was not only contemplated but partly constructed by State Government and inference must therefore follow that the State Government must have considered that such a channel was necessary as a precautionary measure to guard the property of the adjoining land-owners. On this inference it must follow that the State Government was aware of the fact that if such a channel was not constructed, damage was likely to be caused to the adjoining owners of land. The State Government did not complete the channel. Intimation was received by it by Exh. 46 that an event which had taken place in 1956 of heavy rains might recur in 1957. The intimation was given in May 1957, that is before the rainy season started. In the rainy season it appears that no untoward incident of heavy rains occurred. But such heavy rains started on November 14, 1957 and within a period of four

hours, there was two and a half inches rainfall.

10. As has been pointed out by Lord Wrenbury in 1917 AC 556, cited above, assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God. The observations of Lord Wrenbury are most telling in regard to the liability of loss due to the negligence of an individual or a corporation. If the reservoir was not built by the State, there would have been no occasion for the accumulation of water at a high level and overflow thereafter due to heavy rains. The damage, therefore, was due, firstly, to the act of the State in having the reservoir built so that the danger always continued to exist. Whether subsequently the danger materialised by an act of God is not a matter which absolves the State from its liability for the earlier negligence in not taking proper precautions. The precautions were intended but were not fully taken. The fact that a channel about 7 feet in depth, about 10 feet wide and extending over 1500 feet was found necessary by the State is a justification for the proposition that precautions were necessary to avoid loss or damage by overflow of water. This jurisdiction (sic) itself justifies the claim made by the plaintiffs that because proper precautions were not taken as were to be taken by the State, the loss was occasioned to them.

11. Mr. Kotwal for the State, however, argued that the loss was occasioned solely by the act of God and not by any negligence of the State servants. He referred to certain authorities of the Supreme Court to point out that tortious act of servants cannot impose a vicarious liability on the State if the act of the State is done in its sovereign capacity. In *Kasturi Lal v. State of U. P.*, AIR 1965 SC 1039, a similar point was considered by their Lordships of the Supreme Court regarding the liability of the State for the tortious acts of its servants. It was observed by the Supreme Court that if the act of the State is done in its capacity as a sovereign, then there is no liability upon the State for the tortious acts of the employees in carrying out the act of State. Their Lordships, however, raised a distinction between the acts of Govt. in its capacity as sovereign and other acts of Govt. as non-sovereign acts. Sovereign acts were considered as those

which related to maintenance of law and order. In the instant case, the State Government built up a reservoir for supply of water to the citizens. This act could at best be considered as welfare act but certainly not an act of the State Government in its capacity as a sovereign. It was not an act which the State Government had to commit as it was obliged to do so. An action of the State relating to law and order would stand on a footing different from the act of the State in its capacity as for welfare of the subject. The act of the State for the purpose of welfare of the State cannot be considered as obligatory as the State Government could not be compelled to do so. Their Lordships, therefore, restricted the rule of vicarious liability of its servants upon State Government in respect of acts which were committed by State Government in pursuance of sovereign power of the State.

12. A similar proposition was laid down by their Lordships of the Supreme Court in *State of Rajasthan v. Mst. Vidhyawati*, AIR 1962 SC 933. The facts of this case were that a driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector of a District, drove it rashly and negligently while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured him. The point was whether the State Government could be made vicariously liable for the loss occasioned to the plaintiff by reason of the tortious act of employee. It was held by their Lordships that the State can be made vicariously liable for the tortious act like any other employer. While considering the proposition about the vicarious liability of the State for the tortious acts of its servants, their Lordships observed in paragraph 10 as follows:

"In this connection it has to be remembered that under the Constitution we have established a welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, the State trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. In this respect the present set up of the Government is analogous to the position of the East India Company, which functioned

not only as a Government with sovereign powers, as a delegate of the British Government, but also carried on trade and commerce, as also public transport like railways, post and telegraphs and road transport business."

"It was in the context of those facts' observed their Lordships, "that the Supreme Court of Calcutta repelled the argument advanced on behalf of the Secretary of State." Their Lordships therein refer to the judgment of Chief Justice Peacock in the case of *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India*, (1861) 5 Bom HCR App. 1. and quote with approval the following observations:

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

Their Lordships held that the act of the driver in bringing the car after repairs from the garage was not an act which he was doing in the exercise of the part of the sovereign power of the State. Therefore, as has been laid down by the Supreme Court, a distinction has to be made between acts of the State in their sovereign capacity and acts of the State in non-sovereign capacity.

13. In the instant case it has not been pointed out that the act of State in constructing the reservoir was an act in its sovereign capacity. At best it could be said to be an act of welfare State for the betterment of the people of a part of the State. By no stretch of imagination can the act of the State in constructing a reservoir for facilitating the supply of drinking water be considered as an act in exercise of sovereign power. In the instant case, therefore, the immunity for acts in the sovereign capacity cannot be made available to the defendant-State. The State therefore has no protection either because the damage was caused by the act of God or because of the immunity that was available to it if the act were in its capacity as a sovereign power. The ordinary rule of negligence will, therefore, apply and the fact that there was negligence has been accepted by the appellate Court as a finding of fact. I have also dealt with it earlier to point out that although a channel was contemplated and the danger was brought to the notice of the authorities by the plaintiffs themselves by Exhibit 46, no action was taken by the State to prevent damage

being caused by overflow of water even if excess of water was due to act of God. I, therefore, hold that the lower Court was justified in coming to the conclusion that the State was liable for the loss that was caused to the plaintiffs. So far as quantum of damage is concerned, the appellate Court has found as a fact the quantum of damage, and no further argument can lie on that point. In the result, the appeal has to be dismissed.

ORDER

The appeal is dismissed with costs.

Appeal dismissed.

AIR 1972 BOMBAY 98 (V 59 C 15)

NAIN, J.

Housabai and others, Appellants v. Jijabai Baba Powar and others, Respondents.

A. F. A. D. No. 227 of 1963, D/- 22-9-1970, against decision of N. S. Bhupati, Dist J., at Satara in Appeal No. 384 of 1961.

(A) Civil Procedure Code (1908), Sections 100, 101 — Finding of fact — Finding of fact of the first appellate court as to absence of legal necessity being binding on High Court in second appeal it is not open to challenge.

(Para 6)

(B) Hindu Adoptions and Maintenance Act (1956), Section 10 (iv) — Adoption — Custom or rule of Hindu Law in the former State of Bombay permitting adoption of males over the age of fifteen years is protected by Section 10 (iv).

(Para 7)

(C) Hindu Adoptions and Maintenance Act (1956), Section 12 proviso (c) — Effects of adoption — Alienations made by a Hindu widow prior to 1956 can be challenged by the son adopted even subsequent to alienations when the alienations were not made for legal necessity.

(Para 9)

In absence of legal necessity or benefit of the estate or the consent of the next reversioners what passed to the alienee was merely a life estate. The limitations imposed upon her estate were not imposed upon her for the benefit of reversioners. These limitations were inseparable from her estate so that even if there was no reversioner, she could not alienate the corpus of the property except for legal necessity. If she did alienate the property without legal necessity and there were no reversioners, the alienation could be set aside by the Gov-

ernment taking the property by escheat.

(Para 10)

N. S. Shrikhande, for Appellants
V. V. Albal, for Respondent No. 1.

JUDGMENT:— This is an appeal against the appellate Judgment dated 31st December, 1961 of the learned District Judge, Satara. The appeal was originally filed by the three Defendants in the suit from which the present appeal arises. Defendant No. 1 died during the pendency of this appeal and his heirs and legal representatives were joined as respondents. 2 to 7. The appeal was dismissed against the respondent No. 6 for want of prosecution. The respondents 2 to 5 and 7 have not appeared. Respondent No. 1 is the original plaintiff.

2. The dispute is about three properties. They formed a part of the estate of one Shivaba who died in or around 1920. He was succeeded by his son Baba who died leaving him surviving his widow Goja. Goja alienated three of the properties of which her late husband Baba was the full owner. One of the properties was sold on 2nd May, 1942 to Defendant No. 1, another on 4th January 1943 to defendant No. 2 and a third on 23rd March 1943 to Defendant No. 3. After these alienations she adopted the plaintiff as a son to her husband on 22nd April 1959. Thereafter she died.

3. On 19th September, 1960 the plaintiff as such adopted son filed in the court of the learned Civil Judge, Junior division, Karad, the suit from which the present appeal arises challenging the three alienations as being without legal necessity. The defendants denied the adoption and further contended that the plaintiff was in any case past the age of fifteen years on the date of his adoption and therefore by virtue of Section 10 of the Hindu Adoptions and Maintenance Act, 1956, the adoption was invalid. They further contended that as these properties had vested in them prior to the adoption by virtue of proviso (c) to Section 12, the plaintiff could not divest them. They further pleaded that there was legal necessity for the alienations by Goja.

4. The learned trial Judge held that there was a custom in the community of Goja to adopt a boy who was more than fifteen years of age at the date of adoption and therefore under Section 10 (iv) of the Hindu Adoptions and Maintenance Act, 1956, the adoption was valid. He held that fact of adoption proved. The learned trial Judge also held that the alienations by Goja were for legal necessity and were for consideration and were bona fide. He also

held that notwithstanding the proviso (c) to Section 12, the plaintiff was entitled to sue. Having come to the conclusion that the alienations were for legal necessity, the learned trial Judge dismissed the suit. Against the said decision, the plaintiff appealed to the District Court at Satara.

5. The learned District Judge held that there was a custom in the community of Gaja, whereby a boy above 15 years of age could be validly adopted. He further held that proviso (c) to Section 12 did not stand in the way of the plaintiff. He, however, reversed the finding of fact as to the legal necessity and held that the legal necessity was not proved. In the result, he allowed the appeal and set aside the alienations subject to repayment of certain small amounts of consideration to the alienees. Against the said decision, the defendants, who are the alienees, have filed the present appeal.

6. The first point taken before me by Mr. Shrikhande on behalf of the appellants is that the legal necessity for the alienations should be held to have been proved. I am afraid that the finding of fact to the contrary of the District court is binding upon me and in a second appeal it is not open to the appellants to challenge it. This contention must therefore be rejected.

7. The second contention taken on behalf of the appellants is that the custom or usage applicable to the parties which would permit persons who have completed the age of 15 years being taken in adoption has not been proved and, therefore, the adoption is void under Sec. 10 of the Hindu Adoptions and Maintenance Act. In the judgment of the learned District Judge reliance for proving the custom has been placed on two instances one of 1942 and another of 1948 and certain oral evidence. These instances may not be sufficiently ancient to establish a custom. But what Section 10 (iv) of the Hindu Adoptions and Maintenance Act, 1956, talks of is not only custom, but also usage. The instances and the evidence would be sufficient to establish a usage. However, this sufficiency of evidence for establishing a custom or usage loses all importance in territories which were formerly part of State of Bombay, such as Satara District. Even prior to the passing of the Hindu Adoptions and Maintenance Act in 1956, the Hindu Law applicable to the Bombay State was that a person may be adopted at any age even though he may be older than the adoptor and even though he may be married and had children. It is well-known that Hindu law in India is derived from various texts and commentaries some of which have by custom held

the field in various parts of India. Hindu law, therefore, is by itself customary law, except to the extent to which it has been subsequently codified. In my opinion, therefore, the prohibition contained in Section 10 (iv) against the person adopted who has completed the age of 15 years has no meaning in relation to male persons adopted in the territories which were comprised in the former State of Bombay which include the District of Satara from where this appeal comes. The custom or rule of Hindu law prevailing in these territories permitting adoption of males over the age 15 years is expressly saved by Section 10, (iv). The position with regard to the adoption of females may be different as there was no rule of Hindu law permitting adoptions of females prior to the Hindu Adoptions and Maintenance Act, 1956. This contention of Mr. Shrikhande must therefore be rejected.

8. The last contention taken on behalf of the appellants is that by various sale deeds executed in 1942 and 1943, Goja had alienated the properties which are the subject-matter of this litigation. On such alienations the properties completely vested in the respective appellants. Goja, although a Hindu widow, was full owner of the alienated properties subject to certain restrictions on her right of alienation and such alienations were valid until they were set aside at the instance of a proper person. Proviso (c) to Section 12 of the Hindu Adoptions and Maintenance Act, 1956 provides that the adopted child shall not divest any person of any estate which vested in him before the adoption. An adopted son was therefore not the proper person at whose instance the sales could be avoided.

9. This contention of the appellants does not appear to me to be correct. What had vested in the alienees as a result of the alienations by a Hindu widow was only her life estate. After her death, the adopted son as a reversioner became entitled to the reversion and was entitled to challenge an alienation in respect of which it has been established that it was not for legal necessity.

10. Mr. Shrikhande relied upon the following words in para 176 of Mulla's Hindu Law, 13th Edition:—

"A widow or other limited heir is not a tenant-for-life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death. The whole estate is for the time vested in her and she represents it completely." He also invited my attention to the commentary of Mulla on Hindu Law under paragraph 185 to the effect that a sale

by a widow is not absolutely void as regards the reversioners, but is voidable at their option. It is true that a widow was even prior to 1956 the owner of the property of her husband. But she was its limited owner and not absolute owner. In this case as she alienated the properties in 1942 and 1948 and was not in possession in 1956, when the Hindu Succession Act, 1956 came into force, she never became the absolute owner of the property. But nonetheless she was an owner in a limited sense. The estate taken by a Hindu widow in property of her husband may be described by saying that she was the owner thereof, but she could not sell the corpus of the property or otherwise alienate it unless it was for legal necessity or for the benefit of the estate or with the consent of the next reversioners. It was only when the alienation was made for legal necessity or for the benefit of the estate or with the consent of the next reversioners that it passed an absolute estate to the alienee to the same extent as an alienation made by full owner. In absence of legal necessity or benefit of the estate or the consent of the next reversioners what passed to the alienee was merely a life estate. The limitations imposed upon her estate were not imposed upon her for the benefit of reversioners. These limitations were inseparable from her estate so that even if there was no reversioner, she could not alienate the corpus of the property except for legal necessity. If she did alienate the property without legal necessity and there were no reversioners, the alienation could be set aside by the Government taking the property by escheat. It is therefore wrong to say that prior to 1956 a Hindu widow was a full owner of her property in every sense. The restrictions on her power of alienation were a part of and inseparable from her estate. In this case the finding that the alienations were not for legal necessity has become final. Therefore, it appears to me that what passed to the alienees was merely the life interest of Goja and not an absolute estate.

11. When on 22nd April 1959 the plaintiff was adopted as a son by Goja to her husband, the plaintiff succeeded to the property of his adoptive father and became a reversioner in respect of the reversion. Under Section 12 of the Hindu Adoptions and Maintenance Act, 1956, it is true that he becomes the child of his adoptive father with effect from the date of adoption. It is further true that he could not divest the appellants-alienees of any estate which vested in them before the adoption. But what vested in them was, in my opinion, only the life interest of Goja and nothing more. There was, therefore, no question of divesting

under proviso (c) to Section 12 of the Hindu Adoptions and Maintenance Act, 1956. The reversionary interest did not vest in the appellants and on his adoption the plaintiff became entitled to it and after the death of Goja when the life interest ceased, the plaintiff became entitled to claim possession of the property from the appellants. This contention also fails.

12. Mr. Shrikhande tried to take me through the reasoning of the learned District Judge in arriving at his conclusions on the two points of law argued before me. It is true that I do not agree fully with the reasoning of the learned District Judge. I have come to the same conclusions on these points of law by different processes of reasoning. But that does not affect the correctness of the conclusions arrived at by the learned District Judge.

13. The appeal therefore fails and is dismissed. There will be no order as to costs. The decree dated 31st December 1962 of the District Court is confirmed.

Appeal dismissed.

AIR 1972 BOMBAY 100 (V 59 C 16)

VAIDYA, J.

Mahadeo Keshav Lingarkar and another, Appellants v. Shamrao Balwant Kesarkar, Respondent.

A. F. A. D. No. 600 of 1963, D/- 31-7-1970, against decision of P. S. Malvankar Dist. J. at Kolhapur in Appeal No. 308 of 1961.

Transfer of Property Act (1882), Section 3, Explanation II — Notice of 'Title' — Whether includes notice of part performance.

The word 'title' in the explanation does not mean only a completed title in accordance with law but includes an equitable interest which a transferee may acquire in any property by virtue of and under a contract of transfer.

When a tenant is in possession of immoveable property, a subsequent purchaser of it will be affected with notice of the interest of such tenant who is in possession in part performance of an unregistered agreement with the lessor and consequently with the notice of such agreement and will not be protected under proviso to Section 53-A if he purchases property without enquiry. AIR 1926 Cal 204 & AIR 1965 Pat 467 & (1913) ILR 40 Cal 565 & AIR 1932 PC 228, Rel. on. (Paras 6, 8, 9)

LO/LO/F884/71/MNT/SSG

Cases Referred:	Chronological	Paras
(1965) AIR 1965 Pat 467 (V 52) =		
1965 BLJR 243, Ramkrishna v. Mahadei		6
(1932) AIR 1932 PC 228 (V 19) =		
59 Ind App 386, Mohammad Aslam Khan v. Feroze Shah		5
(1926) AIR 1926 Cal 204 (V 13) =		
29 Cal WN 953, Tiloke Chand Surana v. J. B. Beattie & Co.		5
(1913) ILR 40 Cal 565 = 18 Cal WN 341, Baburam v. Madhab Chandra		8

M. D. Hombalkar, for Appellants;
P. S. Joshi, for Respondent.

JUDGMENT:— The second appeal arises out of a suit filed by the respondent to obtain possession of western half share out of house No. 611 situated at Vadgaon in Ichalkaranji Taluka. According to the plaintiff, the house originally belonged to one Tatoba Laxman Pise. On March 14, 1958, Tatoba sold his undivided half share in the house to defendant No. 1. The defendants were, however, in possession of the entire house as tenants, since 1953. On March 8, 1960, Tatoba sold the remaining half to the plaintiff under a registered sale deed. The defendants were not willing to make an actual partition of the house. The plaintiff, therefore, prayed in the suit for an equitable partition of the house and possession of the western half of the house. The defendants resisted the suit contending that on March 8, 1960, Tatoba had no saleable interest in the suit property; hence, the plaintiff could not maintain the suit. They further alleged that on January 24, 1958, Tatoba had entered into an agreement with the defendants to sell the entire house to them and they were in possession of the house since then in pursuance of that agreement. As it transpired later that one Nivrutti Haval had half share in the entire house, they entered into an agreement with Haval on October 18, 1958 to purchase the remaining half share in the house. They had, in the meanwhile, got a registered sale deed executed by Pise in respect of his half share on March 14, 1958, as stated by the plaintiff. Thus the defendants claimed to be in possession of the half share sold by Tatoba under the sale deed dated March 14, 1958 and the remaining half share under the agreement dated January 24, 1958 entered into with Tatoba and the agreement dated October 18, 1958 entered into with Haval and claimed equity of part performance against any transferee with notice of their possession. They further stated that Haval entered into an agreement with the defendants and thereafter transferred his share to Tatoba Pise and hence Haval had lost all interest in the property and Tatoba was bound to convey

the property to the defendants under the original agreement dated January 24, 1958. They submitted that the plaintiff was not a bona fide purchaser without notice of the above transactions between the defendants and the said Tatoba and Haval and hence, the plaintiff was not entitled to recover possession of the house from the defendants. The learned Civil Judge framed the necessary issues and on considering carefully the documentary and oral evidence in the case found

(1) that the plaintiff proved the sale deed executed by Tatoba in his favour on March 8, 1960,

(2) that Tatoba had only half share in the suit property at the time of the said sale deed dated March 8, 1960,

(3) but that defendant No. 1 (though the findings in this behalf have been recorded by the learned Judge in a confused way by referring to both the defendants it appears he meant defendant No. 1) was entitled to protect his possession of the whole house under Section 53-A of the Transfer of Property Act, and

(4) that the plaintiff was estopped from bringing his suit in view of the contracts entered into by his predecessor-in-title with defendant No. 1.

He, therefore, dismissed the plaintiff's suit with costs by his judgment and decree dated July 25, 1961. Feeling aggrieved by the said decision, the plaintiff carried on appeal in the Court of the District Judge at Kolhapur and the learned District Judge reversed the decree on the ground that although the defendants were entitled to the equity of part performance under Section 53-A against Tatoba and Haval, that equity was not available against the plaintiff because the plaintiff was a bona fide purchaser for value without notice of the contracts or of the part performance thereof. In view of this finding, the learned District Judge decreed the plaintiff's suit.

2. The said decree is challenged in the above second appeal by the defendants and it is urged by Mr. Hombalkar, the learned Counsel for the defendants, that the learned District Judge erred in law in holding that the plaintiff had no notice of the equity of part performance in favour of the defendants. The finding of the learned District Judge that the defendants fulfilled all the requirements of Section 53-A of the Transfer of Property Act and were entitled to protection of their possession under the said Section 53-A is a finding which cannot be assailed by the plaintiff. The finding is recorded by the learned District Judge after carefully considering all the relevant agreements and the requirements of Section 53-A and Mr. Joshi, the learned Counsel for the plaintiff-res-

pendent, has not been able to point out any error in that finding.

3. Mr. Joshi, however, submitted that the learned District Judge was quite right in further holding that the facts of the case attracted the operation of the proviso to Section 53-A which runs as follows:—

"Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

The learned District Judge reversed the finding recorded by the learned Civil Judge on this point observing as follows:

"Here again, if we remember the facts that the Defendants were occupying the house since 1953 as tenants, the fact that they continued in possession in part performance of the contract can hardly be known to a third person. After all, it was a change in character of possession. And therefore, unless there is something more on the part of the Defendants to show this change in character or possession, it would be extremely difficult to hold that the third person could have knowledge of the fact that the Defts. were continuing in part performance of their contract with Nivrutti Haval. It is true that admittedly the Defendants have taken tap-water connection and have also constructed a bath-room. But even assuming that these improvements were made by the Defendants in part performance of the contract, the question is whether the plaintiff would be said to have had the notice of it. The notice contemplated under the proviso to Section 53-A, is not of improvements, but of the part performance of the contract. But there is nothing on the record to show that at the time the plaintiff purchased this house from Tatoba Pise he knew that the Defendants had made these improvements, much less can it be said that he had the knowledge that the Defendants had made these improvements in part performance of the contract. I am, therefore, inclined to think that the Defendants have failed to prove that the plaintiff had the notice either of the contract between them and Nivrutti Haval or of the part performance thereof."

It may also be noticed that the defendants relied on a notice published in a daily newspaper known as 'Pudhari' dated March 4, 1960 and contended that the publication must have come to the knowledge of the plaintiff. The learned District Judge rejected this contention on the ground that there was nothing on the record to show that Pudhari was in circulation in Vadgaon and there was also nothing on the record to suggest that the plaintiff had any opportunity to know about this notice.

4. However, it appears that the attention of the learned District Judge was not drawn to the definition contained in Section 3 of the Transfer of Property Act, 1882, the material portion of which runs as follows:—

"A person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I— x x x x

Explanation II— Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III— x x x x

Reliance is placed by Mr. Hombalkar for the appellant on the terms of Explanation II. He contended that the defendants being admittedly in possession of the entire suit house, in view of the said Explanation II, the plaintiff should be deemed to have notice of the contracts between defendant No. 1 and Tatoba and Haval; and in any event, it was his duty to make a proper enquiry about the rights of the defendants who were in possession of the property before purchasing the property; and he having failed to do so, he must be said to have had notice of the equities in favour of the defendants within the meaning of that definition.

5. It is not the case of the plaintiff that he made any enquiry with the defendants about the rights, if any, which they had in the property. But Mr. Joshi tried to repel this argument by contending that the constructive notice imputed to the purchaser under Explanation II is only in respect of 'title' and not in respect of any equity such as a contract to purchase the property or part performance referred to in the proviso to Section 53-A. Mr. Joshi's contention is, however, contrary to well established principles of law regarding constructive notice. The principle stated by Rankin, J. in *Tiloke Chand Surana v. J. B. Beattie & Co.*, AIR 1926 Cal 204 at p. 211 which of course, was a case decided prior to the amendment of the definition of notice in Section 3 — will apply to the facts of this case; and that principle is as follows:—

"In this case there was a tenant upon the property and his open possession is notice not only of the immediate terms of his tenancy but of collateral agreements as well, in the absence of all enquiry by the transferee."

The principle was also adopted in Illustration 3 to Section 27 (b) of the Specific

Relief Act, 1877; and the section is re-enacted in Section 19 (b) of the Specific Relief Act, 1963, though the illustration has been omitted. In *Mohammad Aslam Khan v. Feroze Shah*, AIR 1932 PC 228, while dealing with the said S. 27 (b) of the Specific Relief Act, 1877, the Privy Council laid down:

"Whether a transferee has knowledge of such facts which would put him on inquiry which if prosecuted would have disclosed a previous agreement, such transferee is not a transferee without notice of the original contract within the meaning of the exception in S. 27 (b)."

6. In my judgment, the use of the word 'title' in Explanation II does not mean that the general principles with regard to constructive notice embodied therein will not be applicable to the notice referred to in the proviso to Section 53-A. From the illustration to Section 27 (b) of the Specific Relief Act, 1877 referred to above and from the above decision of the Calcutta High Court, it is clear that the word 'title' as used in the Explanation II means not only a completed title in accordance with law but also includes an equitable interest which a transferee may acquire in any property by virtue of, and under the contract of transfer. A subsequent purchaser of an immovable property would be affected with notice of the interest of a tenant who is in possession of the property in part performance of an unregistered agreement with the lessor and consequently with notice of such agreement and would not succeed in defeating the tenant's claim to retain possession under the protection given to him by Section 53-A of the Act. Reference in this connection may be made to *Ramkrishna v. Mahadev*, AIR 1965 Pat 467.

7. In the aforesaid Calcutta decision also there was a tenant in possession. During the pendency of the lease, the tenant advanced Rs. 7800/- to the landlord on a verbal agreement that the money was to be spent on repairs and repaid by the landlord by giving credit to the tenant for monthly rents as they became due. Some time later, the mortgagee of the property obtained a decree against the landlord for sale on the mortgage, purchased the house at the court sale and gave notice to the tenant to quit. It was held by Sanderson, C. J. and Rankin, J. that the mortgagee was not entitled to evict the tenant on that notice because the possession of the tenant was constructive notice to the mortgagee not only of his tenancy but also of the agreement under which he was entitled to remain in possession until the end of August 1923 as the landlord had agreed to allow the tenant to remain in possession of the premises till that time

when he borrowed from the tenant Rs. 7800/-.

8. As stated by Sir Lawrence Jenkins in *Baburam v. Madhab Chandra*, (1913) ILR 40 Cal 565, "the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice." In view of these principles, it was the duty of the plaintiff to make an enquiry with the defendants as to what their rights were. As the plaintiff admittedly failed to make any enquiry in respect of the rights of the defendants in the said house, it must be held that he had notice of the contract or part performance thereof; and hence, in my opinion, the learned District Judge erred in law in holding that the proviso to Section 53-A was attracted in this case. In the facts and circumstances of the case, it cannot be said that the plaintiff was a transferee for consideration, who had no notice of the contract or of the part performance thereof within the meaning of that proviso, because the defendants were in possession of the house and it was incumbent on the plaintiff to make proper enquiry into their rights before getting a sale of the half share in the property in his favour.

9. For these reasons, the defendants must succeed because under Section 53-A, defendant No. 1 having contracted with Tatoba and Haval to purchase the property, must be continued in possession of the suit house in part performance of the contract; and defendant No. 1 being ready and willing to perform his part of the contract, neither Tatoba nor Haval or the plaintiff, who claims under Tatoba, can deprive the defendants of the possession of the suit house.

10. In the result, the decree passed by the learned District Judge is set aside and the decree passed by the Civil Judge is restored. Appeal allowed with costs throughout.

Appeal allowed.

AIR 1972 BOMBAY 103 (V 59 C 17)

VIMADALAL, J.

Devlakshmi Harisukh Vahalla and others, Plaintiffs v. Vishwakant P. Bhatt, Defendant.

O. S. Suit No. 291 of 1970, D/- 9-7-1970.

Trusts Act (1882), S. 9 — Acceleration of subsequent interests under trust — The English doctrine of acceleration of subsequent interests when a prior in-

LO/LO/F879/71/SNV/BNP

terest fails or comes to a premature end is applicable in India both to trusts created by will as well as to settlements inter vivos if the settlor has not shown a contrary intention in the document creating the trust and the subsequent interest is a vested interest — (Case law discussed).

(Para 6)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 844 (V 54) = 63 ITR 656, Commr. of Income-tax v. Kasturbai Walchand Trust 5
 (1967) 67 ILR 504 = (1968) 2 ITJ 167 (Bom), Commr. of Income-tax v. Lady Ratanbai Mathuradas 5
 (1967) 65 ITR 213 (Bom), Commr. of Income-tax v. Trustees of Sir Kikabhai Premchand Trust 5
 (1957) 1957-1 All ER 462 = (1957) 1 WLR 401, Flower v. Inland Revenue Commrs. 4
 (1957) 1957-3 All ER 52, Davies v. Mackintosh 3, 6
 (1943) 1943 Ch 300 = 112 LJ Ch 241, Midland Bank Executor and Trustee Co. v. Morrison 3
 (1932) AIR 1932 PC 158 (V 19) = 59 Ind App 236, Mohamed. Raza v. Mt. Abbas Bandi Bibi 6
 (1905) 7 Bom LR 207, Pestonji v. Khurshedbai 6
 (1886-87) 14 Ind App 89 = ILR 11 Bom 551 (PC), Waghele Rajsanji v. Shekh Masludin 6

J. I. Mehta with M. R. Mody, for Plaintiffs; A. H. Mehta, for Defendant.

JUDGMENT:— This is an Originating Summons taken out by the plaintiffs who, along with the defendant, are the trustees under an Indenture of Trust dated the 18th of January 1927 executed by one Pranjivan Tuljaram, for the determination of certain questions propounded therein. The facts necessary for the purpose of disposing of this Originating Summons are very few. One Pranjivan Tuljaram executed an Indenture of Trust dated 18-1-1927 and the plaintiffs and the defendant are the present trustees of that trust. The relevant clause of the said Indenture of Trust which has been quoted in para 3 of the plaint is as follows:—

"To have and to hold the said land hereditaments and premises unto the trustees.....Upon trust.....To pay all rates taxes and outgoing out of the rents and profits thereof and all expenses of keeping the said hereditaments and premises in a proper state of repair and properly insured And that the Trustees shall pay the residue of the net rents and profits thereof to the Settlor during the term of his natural life and subject thereto from and after the death of the settlor the trustees or trustee shall stand possessed of the residue of

such rents income and profits hereinafter called the trust income upon the trust to pay the same unto the said Vishwakant Pranjivan (the deft) during his natural life and it is hereby further agreed and declared that from and after the death of the said Vishwakant Pranjivan the Trustees or trustee shall stand possessed of the said trust property to sell the same and it is hereby agreed and declared that the trustees or trustee of these presents shall hold the money to arise from any such sale after payment of all expenses attending such sale upon trust to divide or distribute the same together with the balance of the unapplied income thereof as if such sale proceeds and income had absolutely belonged to the said Vishwakant Pranjivan at the time of his death and he had died intestate in respect thereof."

The settlor died on 9th June 1930. On 25th October 1962, the defendant executed an Indenture of Release under which he released unto the trustees his entire right, title and interest as a beneficiary under the said trust. The plaintiffs have taken out this Originating Summons for the purpose of determining the legal effect of the said Indenture of Release.

2. Though, in the Originating Summons, the opinion of the Court is sought on several questions, in effect, the question that arises is only one, and that is whether by reason of the release or disclaimer or surrender of his life interest under the Indenture of Trust by the defendant, by the said Indenture of Release dated 25th October 1962, the subsequent absolute interest granted by the said Deed of Trust to the heirs of the defendant as on an intestacy is accelerated, or whether there is a resulting trust in respect of the income that was payable to the defendant during his life-time under the said Indenture of Trust. That is a question which has often arisen in England and has been the subject-matter of several judicial decisions in that country, but I have not been referred to a single reported decision on this point in India which could be said to be an authority in regard to it. In view, however, of the characteristic lucidity with which the ratio of judicial decisions in England on this point has been culled in the standard English works on the subject, it is not really necessary for me to consider all those decisions in this judgment. In Lewin on Trusts (16th Edn) at p. 121, the law on the point is formulated as follows:—

"Where a life interest or some like interest income fails or comes to a premature end the question arises whether subsequent interests are accelerated or whether there is a resulting trust of the income. In the case of a will the ques-

tion is slightly different, because there, if there is no acceleration, the income falls into residue or is undisposed of. The principle is well settled in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first taker, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, so that the person entitled in remainder will take immediately on such an earlier failure or determination and will not be kept waiting until the death of the first taker. There is no reason for applying any different rule to a settlement *inter vivos*, though it may well be more difficult, in the case of a settlement, to collect the intention necessary to bring the doctrine of acceleration into play. Where it can be brought into play there is, of course, no resulting trust for the settlor."

As pointed out in Halsbury's Laws of England (3rd Edn.) Vol. 34 pp. 607-608 para 1062 where the same principle is laid down, the doctrine of acceleration does not, however, apply if the remainder is not a vested remainder but is contingent on an uncertain event. The doctrine of acceleration of subsequent interests by the premature determination of the prior interest is however, based on the express or implied intention of settlor which enables the court to construe the grant of the subsequent interest as intended to take effect on the failure or determination of the prior interest in any manner. If, therefore, the document creating the trust expressly or impliedly indicates a contrary intention, the subsequent interests are not accelerated, but there is a resulting trust of the income in favour of the settlor or his estate (Vide Halsbury's Laws of England (3rd Edn.) Vol. 39, pp. 947-948/para 1434).

3. The learned counsel for the plaintiffs cited before me the decisions in the English cases of *Midland Bank Executor & Trustee Co. v. Morrison*, (1943 Ch 300) & *Davies v. Mackintosh*, ((1957) 3 All ER 52) which were both cases in which the doctrine of acceleration was applied to testamentary dispositions. In the *Midland Bank's* case the principle of acceleration was applied to annuities given subject to a life interest in the residuary income. In doing so, Simonds J. enunciated the principle of acceleration in the following terms (at pp. 301-302):—

"I see no reason why it should not be appropriate in the case of any interest, whether partial, such as an annuity, or residuary. The principle is the same. An interest is postponed that a prior interest may be enjoyed. If that prior interest

is determined whether by the death of a prior beneficiary or for any other cause, the reason for postponement disappears and there is no reason why there should not be acceleration. Accordingly, when I find an annuity expressed to be subject to a life interest and that the tenant for life has disclaimed his life interest, I come to the conclusion that the annuity is to be accelerated, for it is just as if the direction for the payment of the annuity was 'subject to the interests of the tenant for life which may be determined either by his death or for some other reason'."

In the case of 1957-3 All ER 52 a testatrix gave the residue of her estate to be divided equally between her two sons and her step-daughter P. She further provided, "P's portion to be hers for life and then to be divided equally between her issue." The testatrix died on the 22nd March 1955, and by a deed dated 5th October 1956, P irrevocably renounced and disclaimed all the life or other interest in the residuary estate of the testatrix conferred on her by the will. P was a widow aged 58 years. She had three children, the youngest of whom was nearly 21 years' old. None of P's children had any issue. On the question as to how P's portion should be dealt with, it was held that the effect of the disclaimer was to accelerate the interest of P's children and preclude the participation of P's remoter issue, and P's portion belonged to P's three children in equal shares absolutely. It was observed in the judgment of Vaisey, J. (at p. 54) that, but for the disclaimer, the funds would, at the death of P, have been divisible in equal shares between the class of persons comprising all her descendants or whatever degree (children and remoter issue) who had been in existence at any time between the death of the testatrix and the death of P. The learned judge stated that each such person's interest would be an absolute vested interest, so that the class might include not only persons living at the death of P, but also the legal representatives of person who had predeceased her. The learned judge then pointed out that, at the time when he delivered judgment, the class however consisted only of the three children of P. In regard to the contention that the purely gratuitous act of one of the beneficiaries P. should not operate to deprive and dispossess a number of other beneficiaries, viz., P's grand-children and remoter issue, of the interest which the testatrix had given them by her will, the learned judge stated that it was clear that acceleration might and did sometimes alter the constitution of a class of beneficiaries from what it would have been if the gift had not been accelerated. He

then proceeded to apply the doctrine of acceleration and declared that the fund belonged to the three children of P in equal shares absolutely.

4. Though, in the above two cases, the principle of acceleration was applied to testamentary dispositions, the same principle has been held to be applicable to trusts inter vivos also. In the case of *Flower v. Inland Revenue Commrs.*, (1957) 1 All ER 462, the facts are that, by a settlement inter vivos, it was provided that the trustees should stand possessed of the trust funds during the lifetime of the settlor to apply the income of the trust funds in each year for such charitable and benevolent purposes as they might from time to time direct, with power to accumulate any income not so paid and to apply such accumulations for the like purpose. It was, however, provided that though the said trust was not confined to purposes charitable in law and the trustees could make payments of subscription or gifts, no payment was to be made which would benefit the settlor or any of trustees. The said settlement laid down, that after the death of the settlor, the trustees were to hold trust fund upon trust to pay the annual income to the settlor's wife for life and, on the death of the survivor of them the settlor and his wife, to hold the capital and income for the settlor's three children in equal shares. The settlor's wife died, and then the settlor himself died. It was common ground that the discretionary trust during the settlor's life was void for uncertainty. For the purpose of ascertaining whether estate duty was payable in connection with the death of the settlor in respect of the trust funds, it became necessary to decide whether the result of the invalidity of the discretionary trust was to accelerate the interests expressed to take effect after the death of the settlor, or to give rise to a resulting trust in favour of the settlor so that the trust funds passed on his death. Jenkins, L. J. who delivered the leading judgment laid down (at p. 465) that, although all the authorities in regard to the principle of acceleration which had been referred to before him were concerned with wills, there was no reason for applying any different rule to a settlement inter vivos, and that the principle must be broadly the same. He, however, went on to observe that he could not help feeling that it might "well be more difficult, in the case of a settlement, to collect the intention necessary to bring the doctrine of acceleration into play." He then went on to hold that the interests of those beneficially entitled after the death of the settlor were not accelerated, because the character of the disposition made by the settlement in that case showed that

the settlor's intention was that during his life neither he nor his wife nor his children should have any beneficial interest in the trust fund, and that, therefore, there was a resulting trust in favour of the settlor and the fund must be held to have passed on his death for the purposes of the Finance Act of 1894. The learned judge stated (at p. 468) that, having regard to the terms of the deed of settlement before him, "it would be a large and unwarrantable extension of the doctrine (of acceleration) so to apply it" in the said case. It will thus be seen that though the principle of acceleration was in fact not applied in *Flower's* case because the settlor had manifested a contrary intention, its applicability to trusts inter vivos was recognized and accepted by the Court of Appeal in England.

5. Three decisions of the courts of this country were cited before me by the learned counsel for the plaintiffs but, in my opinion, none of them can be said to be an authority in regard to the doctrine of acceleration. In the case of the *Commr. of Income-tax v. Kasturbai Walchand Trust*, (63 ITR 656) = (AIR 1967 SC 844), the facts were that, under a deed of trust inter vivos created by Seth Walchand and his wife Kasturbai, the said Kasturbai had a life interest in respect of the income of the trust funds as well as a right of free residence in some of the properties. By clause 8 of the said deed of trust it was provided that, after the death of Kasturbai, the trustees were to apply the income of the properties to the charitable purposes enumerated in the deed of trust. After the death of Seth Walchand, Kasturbai executed a deed dated 21st July 1955 whereby she surrendered and released her life interest in the income as well as her right of free residence and her entire beneficial interest under the said deed of trust "to the intent that her beneficial interest may be determined as aforesaid and the same may be immediately vested in the trustees and that the trustees may utilise the same for charitable purposes mentioned in the said indenture of settlement." The Supreme Court held that the deed executed by Kasturbai was valid in view of the provision contained in Section 58 of the Indian Trusts Act, 1882, which provided that the beneficiary, if competent to contract, could transfer his interest that by executing the said deed dated 21st July 1955 Kasturbai had surrendered all her rights, and that the income of the trust property became exempt from liability to income-tax as soon as the rights of Kasturbai ceased on execution by her of the deed of surrender dated 21st July 1955, since the same would have to be applied for charitable purposes in accordance with the other

terms of the deed of trust. The Supreme Court, however, did not decide the further question as to whether the trustees were entitled to apply the funds of the trust properties for charitable purposes immediately on the execution of the deed of surrender, or were required to accumulate the income and apply the same to charitable purposes on the death of Kasturbai under Cl. 8 thereof, as it took the view that in either case the income would be exempt from income-tax under the provisions of Section 4 (3) (i) of the Indian Income-tax Act, 1922. The decision in *Kasturbai Walchand Trust's case*, 63 ITR 656 = (AIR 1967 SC 844) is, therefore, not an authority for holding that the doctrine of acceleration applies to deeds of settlement inter vivos. That decision was followed by a Division Bench of this Court in the case of *Commr. of Income-tax v. Trustees of Sir Kikabhai Premchand Trust*, (1967-65 ITR 213 (Bom)) and the same is also, therefore, of no assistance for the purpose of deciding the question before me. The last case referred to by the learned counsel on behalf of the plaintiffs was a decision of the Division Bench of this court in the case of *Commissioner of Income-tax v. Lady Ratanbai Mathuradas*, (1967-68 ITR 504 (Bom)), but in the judgment in that case the application of the doctrine of acceleration appears to have been assumed and it was stated (at p. 510) that the sole question was whether the shares of the beneficiaries under the trust deed were indeterminate and unknown, so as to make the trustees assessable at the maximum rate under the proviso to Section 41 of the Indian Income-tax Act, 1922.

6. The Indian Trusts Act was intended to codify the law relating to private trusts and trustees. The use of the expression "define and amend" in, and the omission of the word "consolidate" from, the preamble to the said Act shows that, whilst the Act is exhaustive in respect of any matter specifically provided for in it, not exhaustive of all matters relating to private trusts. In cases covered by the Act, therefore, the provisions of the Act alone must be applied, but in any case not covered by the Act, the Court is entitled to apply rules of English law, as laid down by judicial decisions in that country, which are not inconsistent with the Act, as the rules of justice, equity and good conscience, (1886-87) 14 Ind App 89 at p. 96 (PC) and 59 Ind App 236 at p. 246 = (AIR 1932 PC 158 at pp. 160-161). Though Section 9 of the Indian Trusts Act, 1882, provides for a beneficiary renouncing his interest under a private trust by disclaimer, the said Act does not contain any provision relating to the acceleration of

subsequent interests on the failure or premature determination of a prior interest. In such a situation Courts of this country must, therefore, resort to the principles of English law on the subject as laid down by judicial decisions in that country. The English doctrine of acceleration of subsequent interests when a prior interest fails or comes to a premature end is not inconsistent with any provision of the Indian Trusts Act, 1882. I accordingly hold that the said doctrine applies in India, both to trusts created by will as well as to settlements inter vivos, provided two conditions are fulfilled, viz., (1) the settlor has not shown a contrary intention in the document creating the trust; and (2) the subsequent interest is vested interest, and not a contingent interest. Turning to the Indenture of Trust dated 18th January 1927 in the present case, it is impossible to find a contrary intention on the part of the settlor so as to negative the applicability of the doctrine of acceleration. In fact, the intention of the settlor, as disclosed by the relevant clause of the Indenture of Trust quoted above is clearly that the heirs of the defendant as on an intestacy should be the only persons who are to be beneficiaries on the failure or determination of the defendant's life interest, whatever be the manner in which the same comes to an end. The words "and he had died intestate in respect thereof" in that clause do not, in my opinion, disclose a contrary intention so as to negative the applicability of the principle of acceleration, but merely describe the class of beneficiaries amongst whom the trust property is to be distributed. There can also be no doubt that the interest which has been conferred on the said class of beneficiaries is a vested interest within the terms of Section 19 of the Transfer of Property Act, 1882, in so far as the condition upon which their interest is dependent is one which is certain to occur, and is not in the nature of an uncertain event so as to make it a contingent interest. Moreover, as observed by Vaisey, J. in the case of 1957-3 All ER 52 cited above (at p. 54) the application of the doctrine of acceleration may, and does sometimes, alter the constitution of class of beneficiaries from what it would have been if the gift had not been accelerated. The terms of the relevant clause of the Indenture of Trust in the present case are very similar to the terms of the trust created under the will in the old case of *Pestonji v. Khurshedbai*, (1905-7 Bom LR 207) in which a bequest was made to D for life and, after her death, the corpus was to be divided between her issue "according to the law or statute for the time being in force in India relating to intestate succession among Parsees." The testator died

in 1885 when D had two sons and two daughters. One daughter N died in 1885. One son F died in 1889. D herself died in 1904. It was held (at p. 211) that, on the death of the testator, the legacy became vested in the class of persons referred to and described in the will, viz., the issue of D. In the present case also, the interest granted to the defendant's heirs under the Indenture of Trust dated 18th January 1927 is therefore, a vested interest. Both the conditions necessary for the applicability of the principle of acceleration being satisfied, I have come to the conclusion that the legal effect of the execution of the Indenture of Release dated 25th October 1962 by the defendant is to accelerate the distribution of the trust funds among the class of persons answering the description of being the heirs of the defendant as on an intestacy on whom a vested interest has been conferred by the Indenture of Trust dated 18th January 1927. I, therefore, hold that the trustees must distribute the corpus of the trust funds, as well as the unapplied income thereof (if any), amongst the persons who at the date of the Indenture of Release dated 25th October 1962 answered the description of being the heirs of the defendant as on an intestacy. I answer the question propounded by the Originating Summons as follows:

1. In the affirmative.
2. In the affirmative.
3. In the affirmative.

& 4. The trustees must sell the Trust property in the manner directed by the Indenture of Trust dated 18th January 1927 and hold the money arising from any such sale, after payment of all expenses attending such sale, upon trust to divide or distribute the same, together with the balance of the unapplied income thereof, amongst the persons who would be the heirs of the defendant as on an intestacy if he had died on the 25th of October 1962.

- 5.
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 - 9.
 - 10.
 - 11.
- Do not arise.

7. I order that the plaintiffs' costs of this Originating Summons, as between attorney and client, as well as the costs of the defendant, do come out of the trust estate.

Order accordingly.

AIR 1972 BOMBAY 108 (V 59 C 18)
K. K. DESAI & V. S. DESHPANDE, JJ.
 Little Gibbs Co-op. Housing Society, Ltd. Bombay and another, Petitioners v. The State of Maharashtra and others, Respondents.

Spl. Civil Appln. No. 2127 of 1970 with Civil Appln. No. 3050 of 1970, D/- 25-2-1971.

(A) Maharashtra Co-operative Societies Act 1960 (24 of 1961), S. 78 — Supersession of Committee — Pre-requisite condition of affording opportunity to show cause before taking action — Non-observance of — Effect — (X-Ref:— Natural Justice — Principles of).

The conditions which are required to be satisfied prior to the exercise of the authority and power under Section 78 are: (1) giving an opportunity to the Committee or its member, as the case may be "of stating its or his objections" and (2) consultation with the Federal Society. These are not empty formalities. The safeguards have been provided against the misuse of the powers by the officers of the Co-operative Department. Hence, the Registrar cannot supersede the Committee unless the members of the Managing Committee are given an opportunity to explain their conduct. The scheme of the section is that action taken thereunder without affording due opportunity to show cause would be illegal and accordingly of no effect. (Paras 10, 11)

(B) Maharashtra Co-operative Societies Act, 1960 (24 of 1961). Section 78 — Supersession of Committee — Grounds — Existence of rival groups by itself, cannot furnish any basis for supersession of managing committee under S. 78 unless it interferes with the normal functioning of the Managing Committee and exercise of control by it over the affairs of the Society. (Para 12)

H. G. Adwani with B. S. Chandnani, for Petitioners; S. N. Naik i/b M/s. Little & Co. Attorneys (for Nos. 1 and 2), D. R. Dhanuka (for Nos. 3, 4, 5, 8 and 9) and P. N. Tulsian (for Nos. 6 and 7), for Respondents.

DESHPANDE, J. — The two petitioners in this Special Civil Application challenge the legality and validity of the order passed by the Government of Maharashtra on 8th November 1970 in exercise of their revisional jurisdiction under Section 154 of the Maharashtra Co-operative Societies Act, 1960, herein-after referred to as 'the Act'. Petitioner No. 1 is a Co-operative Housing Society registered under the Act in or about the year 1960. Petitioner No. 2 is one of the 13 shareholders of the said Society and also Honorary Secretary appointed

as such at the General Body meeting held on 27-10-1968. The facts, which gave rise to this special Civil Application, briefly are that on 3rd September 1964 the Assistant Registrar, Co-operative Societies, passed an order directing an inquiry in the affairs of this Society under Section 83 of the Act. On 28-5-1968 the Inquiry Officer submitted his report and referred therein to several irregularities and malpractices. The Deputy Registrar then sent extracts of the said report to the Society presumably in terms of sub-section (4) of S. 83 on 28-6-1968. On 11-9-1968 the then Managing Committee of the Society resigned en bloc. The District Deputy Registrar thereupon convened a General Body meeting of the Society on 27-10-1968. Normally the balance-sheet and statements of accounts of this Society for the year ending on 30th June 1968 should have been placed before the Annual General Body meeting before the expiry of the month of September 1968. It, however, appears that for some reasons or the other the accounts of this Society remained unaudited and such statements were not ready for placing before any such Annual General Meeting. At the said meeting on 27-10-1968 referred to as "Eighth Annual General Body meeting" an Adhoc Managing Committee consisting of five persons was appointed "till the regular Managing Committee" was elected, and petitioner No. 2 to this petition was elected as Honorary Secretary of the same. Some differences of opinion seem to have arisen between the Adhoc Managing Committee on the one hand and the District Deputy Registrar on the other hand in regard to the precise follow up actions to be taken to comply with the findings of the Inquiry Officer. It is unnecessary to make a detailed reference to all these differences. On 1-2-1969, the Honorary Secretary of the Society seems to have complained against the District Deputy Registrar to the Divisional Joint Registrar, Bombay, but he seems to have virtually refused to take any notice of the same and, on the contrary, by his letter dated 11-4-1969 asked the Secretary vaguely to proceed with the follow up action in compliance with the report of the Inquiry Officer.

2. On 26-4-1969 the District Deputy Registrar served a notice under Section 78 (1) of the Act on the Chairman and Secretary and all the Members of the Adhoc Committee of the Society calling upon them to show cause as to why the said Adhoc Committee should not be superseded "in the interest of smooth and proper functioning of the Society", as in his opinion "the Adhoc Managing Committee has not been functioning properly." By explana-

tion dated 8th May 1969 cause was shown against the said proposed action, by the Honorary Secretary. At the end of the said letter the Secretary had requested the District Deputy Registrar to give him and the members of the said Adhoc Committee a personal hearing. On 18-10-1969, however, the District Deputy Registrar without any further enquiry or hearing passed an order superseding the said Adhoc Managing Committee under sub-section (1) of S. 78 of the Act and appointed one B. S. Gokral as the Administrator to manage the affairs of the said Society. The Society thereupon preferred an appeal to the Divisional Joint Registrar and on 17-1-1970 the said appeal was allowed and the supersession order of the District Deputy Registrar dated 18-10-1969 was set aside. It appears that seven other members of this Society out of the total strength of 13 had also appeared before the Divisional Joint Registrar seeking his permission to intervene and support the supersession order and their request seems to have been granted and the appeal of the Society seems to have been allowed only after hearing them. These seven members then preferred a revision application to the State under Section 154 of the Act. This is how the impugned order dated 8th September 1970 came to be passed by the Government.

3. The principal contention of Mr. H. G. Advani, the learned advocate appearing for the petitioners, is two-fold. The findings recorded by the Government in their order dated 8th September 1970, according to Mr. Advani, are at variance with and on matters other than the charges levelled against the petitioners in the notice dated 26th April 1969. He, therefore, contends that the petitioners have been deprived of the management of the Society and their office of the Managing Committee on the basis of charges and/or causes on which they have not been afforded any opportunity to show cause. This action is, therefore, in contravention of the Scheme and provisions in Section 78 and accordingly entirely illegal. He further contends that even if the findings recorded by the State Government are accepted as correct and binding, the same still do not make out any case for action under Section 78 of the Co-operative Societies Act.

4. Now, the notice dated 26th April 1969 broadly alleges that the Adhoc Committee of the Society was not functioning properly. In support of this allegation four charges are incorporated in four clauses of the said notice. Supersession order of the State Government is based on two findings, firstly that there were two rival groups in the Society, each

questioning the actions of the other, and secondly, that the Adhoc Committee failed to hold elections implying thereby that it failed to get regular Managing Committee elected. This, according to the State Government, affected the functioning of the Society. Mr. Advani contends that the petitioners were never called upon to answer these charges, Mr. Dhanuka, Mr. Tulsiani and Mr. Naik, the learned advocates for the respondents, contended that the allegations are implicit in the charges Nos. 2 and 3 of the Show Cause notice dated 24-4-1969. The text of the charges is as follows:—

"2. There is practically no co-operative spirit in the members of the Society with the result that mere exchange of letters from the Adhoc Committee and the members making allegations against each other is going on.

3. That the Adhoc Committee did not convene the Annual General meeting of the Society for the year 1968-69 and did not get the Society's accounts for the year ending 1967-68 audited so far and that the statement of accounts etc. for that year have not been placed before the General Body for approval so far." It is unnecessary to quote the allegations in charges Nos. 1 and 4 inasmuch as no adverse findings against the petitioners are recorded, either by the District Deputy Registrar or by the State Government in their orders nor any reliance was placed on them seriously before us by the respondents' Advocates.

5. In our opinion, the two findings, on which the supersession order of the State Government is based, are at variance with and on matters other than the allegations which were the subject-matter of charges Nos. 2 and 3 in the notice dated 26th April 1969. One of the findings of the State Government is that the petitioners failed to hold elections. The finding is vague but the learned advocates on both sides agreed on the implications thereof. The implication is that the Adhoc Committee was appointed only by way of a stop-gap arrangement and the said Committee failed to convene a General Body meeting of the Society and get the regular Managing Committee elected from 27-10-1968 till 26-4-1969. There is no doubt, from minutes, that the said Adhoc Managing Committee was appointed "till the regular Managing Committee" was elected. It is possible to contend that the petitioners should have taken steps to get regular Committee elected. This omission or failure, however, is not specifically mentioned in any one of these charges. The learned Advocate appearing for the respondents tried to argue that this allegation is implicit in charge No. 3. We have therefore,

deliberately quoted charge No. 3. It consists of two parts. The first part refers to the failure of the Adhoc Committee to convene Annual General meeting of the Society for the year 1968-69. This charge is absurd and frivolous. It could not have been levelled at all inasmuch as the accounting year 1968-69 itself had not expired by 26th April 1969, when the notice was given and it was open for the Society to convene Annual General meeting for the said year ending on 30-6-1969 before the expiry of September 1969. The second part of this charge pertains to the failure of the Adhoc Committee in not getting the Society's accounts for the year ending 1967-68 audited and placed before the General Body meeting for approval. This, however, has nothing to do with the failure to get the regular committee elected. Thus neither part of charge No. 3 pertains to the failure of the Adhoc Committee to get regular Managing Committee elected. It is thus clear that the petitioners were never called upon to explain as to why regular Managing Committee was not got elected and it was not open for the Government to base its order on such a charge and finding.

6. Second finding is that "the membership is small and each rival group will continue to question the action of the other." Mr. Dhanuka contends that allegations in Charge No. 2 are sufficient to warrant such a finding. All that is alleged under this charge is that there was "practically no co-operative spirit in the members of the Society", and secondly that the same resulted in "mere exchange of letters from the Adhoc Committee and the members making allegations against each other." It is not known as to what precisely is meant by the allegation that co-operative spirit was not in existence in the members of the Society. To us the allegation appears to be too vague, wide and general for any one to meet and reply. There is indication which precise correspondence the District Deputy Registrar had in his mind. It is pertinent in this context to note that in spite of the petitioners' objections and insistence in their reply dated 8th May 1969, no details were furnished nor particulars were supplied to them nor personal hearing was given before the order dated 18-10-1969 was passed by the District Deputy Registrar. In fact, such charges really could not have been answered in the absence of any specific details and specific references to such particular letters.

7. Assuming, however, that there was absence of co-operative spirit among the members of the Society, and that they went on indulging in making merely allegations against each other, the

same cannot necessarily lead to the proof of the existence of two rival groups, and even such existence of two rival groups in a Society or in any institution does not necessarily lead to the further conclusion that each group is determined to question the action of the other. Existence of rival groups as also the extent of the depth of their rivalry, are after all questions of facts. The necessary facts and allegations not having been mentioned in the Show Cause notice dated 26th April 1969, the finding recorded by the State Government, in this behalf, is liable to be quashed for want of charge and notice to show cause. Both the findings of the State Government on which the supersession order is founded thus are arrived at by non-observance of principles of natural justice.

8. Mr. Dhanuka urged that no inference is called for in exercise of jurisdiction under Arts. 226 and 227 of the Constitution on such technical grounds, when facts are incapable of being disputed. It is true, as contended by Mr. Dhanuka, that admittedly the petitioners have failed to get the regular Managing Committee elected till this day. But Mr. Advani contends that this was because of the stay order obtained and obstructions created by the respondents and he could have proved this to the hilt had he been called upon to explain his failure.

9. In connection with the contention, as to the scope of Section 78 made by Mr. Advani it is necessary to ascertain the true meaning and effect of the provision in Section 78, the relevant parts whereof read as follows:—

"78 (1) If, in the opinion of the Registrar, the Committee of any Society or any member of such Committee persistently makes default, or is negligent, in the performance of the duties imposed on it or him by this Act or the rules or the bye-laws or commits any act which is prejudicial to the interests of the Society or its members or wilfully disobeys directions issued by the Registrar for the purposes of securing proper implementation of co-operative production and other development programmes approved or undertaken by Government, or is otherwise not discharging its or his functions properly, or where a situation has arisen in which the committee or any member thereof ceases or refuses to discharge its or his functions and the business of the society has or is likely to come to a standstill, the Registrar may, after giving the Committee or the member, as the case may be, an opportunity of stating its or his objections (if any) within fifteen days from the date of issue of notice, and after consulting the federal society to which the society is affiliated, by order

(a) remove the committee, and

(i) xx xx xx

(ii) appoint one or more administrators, who need not be members of the society, to manage the affairs of the Society for a period (not exceeding two years) specified in the order, x x x x xx xx xx"

Apparently the legislature has, by the language of the section indicated that in its view the authority and power to remove the Committee enacted by the section was extraordinary and abnormal and that this authority and power must not be used except in abnormal situations mentioned in the section and only upon satisfaction of the conditions mentioned in the section. These abnormal situations are:—

(a) the committee of any Society or any member of such committee persistently makes default; or

(b) the said committee or any member thereof is negligent in the performance of the duties imposed on it or him by the Act or the Rules or the Bye-laws; or

(c) the committee or any Society or any member of such committee commits any act which is prejudicial to the interests of the Society or its members; or

(d) the committee or its member wilfully disobeys directions issued by the Registrar for the purposes of securing proper implementation of co-operative production and other development programmes approved or undertaken by Government; or

(e) committee or its members is otherwise not discharging its or his functions properly; or

(f) where a situation has arisen in which the committee or any member thereof ceases or refuses to discharge its or his functions and the business of the Society has or is likely to come to a standstill.

10. It is only when the Registrar forms an opinion as to the existence of such situation that he can proceed to take action for the removal of the Committee. The conditions which are required to be satisfied prior to the exercise of the authority and power are: (1) there is an opportunity to the Committee or its member, as the case may be "of stating its or his objections" and (2) consultation with the Federal Society. These, in our opinion, are not empty formalities. The safeguards appear to have been provided against the misuse of the powers by the officers of the Co-operative Department.

11. Apparently the co-operative Societies under the Act are autonomous bodies. Final authority of each such

Society vests in the General Body of members. The management, however, of such Society vests in a Committee which is otherwise known as Managing Committee. The provisions of the Act, Rules and the Bye-laws regulate proceedings at the General Body meeting as also the manner of election of the Managing Committee and the exercise of control over it by members of the Society. These also provide for the removal thereof, in case of loss of their confidence. Members and shareholders are prima facie the masters of their own Society and the property or the business owned by it, and it is really for them to decide as to how they should function, subject to their obligation to comply with the provisions of the Act as also other laws of the land. Powers are also vested in the Registrar under Section 79 to enforce the performances of such obligations which a Society or its Committee owe under the law. It is only when such normal checks are found to be unenforceable and lawful functioning of the Society becomes impossible, that recourse to the extreme step contemplated under Section 78 is intended to be taken. In the event of any action under Section 78, the shareholders are deprived, at any rate, temporarily of their rights to manage their own affairs through the Committee of their choice. Such action also, on the other hand, constitutes a slur on the persons who happen to occupy seats in the Managing Committee. The management then consequently stands vested in the hands of one who is not of their own choice, but is the choice of the Registrar. This apart, the remuneration of the Administrator is also required to be borne by the shareholders or is otherwise defrayed from the assets of the Society. This drastic action, therefore, cannot be resorted to lightly and without regard to the legal rights of the shareholders as also the members of the Managing Committee. Such action has to be taken only to protect the interest of the Society, or the community at large. That is why the Registrar cannot have recourse to such an extreme step unless the members of the Managing Committee are given an opportunity to explain their conduct. The scheme of the section is that action taken thereunder without affording due opportunity to show cause would be illegal and accordingly of no effect.

12. Now, the order of the State Government itself does not show which of the several contingencies contemplated under Section 78 of the Act had, in its opinion, warranted such supersession in this case. All that the learned Advocates for the respondents could do in defence of the order, was to harp on

the admitted existence of rival groups in the Society and rely on Cl. (e) of Section 78, as analysed above. In our opinion, existence of rival groups by itself, cannot furnish any basis for such action unless it is shown further that it interferes with the normal functioning of the Managing Committee and exercise of control by it over the affairs of the Society. We have already shown that this aspect of the matter, as discussed earlier, was not even the subject-matter of any one of the charges incorporated in the show-cause notice dated 26th April 1969.

13. Mr. Dhanuka contends that findings of the Inquiry Officer as also the conduct of the parties during the present litigation do warrant some action to put the house of the Society in order. All this undoubtedly presents a very sorry picture. It will be open for the Registrar to have a fresh look and take such action as is warranted in his opinion. It is for the Registrar to examine and take appropriate action.

14. We cannot but observe that the timing at which the show cause notice is given against the background of the controversy between the Co-operative Department and the Committee, and the casual manner in which the charges are levelled and the way in which the supersession order is passed on 18-10-1969, does not inspire much confidence in the judgment of the District Deputy Registrar, as to the necessity and urgency of the action. Complaint of the petitioners to the Joint Registrar dated 1-2-1969 against the District Deputy Registrar was almost ignored on 11-4-1969 and show cause notice follows on its heels on 26-4-1969. Charge No. 2 is too vague, wide and uncertain to admit of any precise reply. Charge No. 3 is absurd and frivolous as the petitioners were charged with the omission of holding a meeting for the year 1968-69 on 26-4-1969 when the year itself had not expired and last date in the month of September was still five months ahead. Charge No. 4 could have hardly any relevance for action under Section 78 and complaints under three other charges could have been got removed by recourse to other milder provisions. While under charge No. 1 the petitioners are accused of not recovering dues of Rs. 56,000/-, it was admitted by the respondents' advocates that implication of charge No. 2 was the grievance as to why Rs. 24,000/- and odd, included in the above sum of Rs. 56,000/-, was being recovered from respondent No. 3. Laconic order dated 18-10-1969 beyond repeating some phrase from the Section 78 does not even refer to any findings on the four charges. While officers must act fearlessly where

action is necessary, they must also not fail to acquit the delinquents of the charges, when charges are not found to have been justified. This silence is unfair not only to the persons charged but to the department itself as the fog of suspicion will continue to cloud and obscure their visions while examining any subsequent allegations, when an occasion arises. Order of the Deputy Registrar is based ultimately on the petitioners, (a) failure to get the regular Managing Committee elected and (b) existence of factions, with which allegations they were not charged. This can hardly be said to be fair manner of exercising statutory powers pregnant with far-reaching consequences.

15. Mr. Dhanuka also made a grievance that the conduct of petitioner No. 2 in not complying with the order of the State Government, even when stay was refused, amounts to an offence under Section 146 (f) and (g) of the Act. Mr. Advani has tendered unconditional apology on behalf of petitioner No. 2 and we do not propose to take any notice thereof, in view of this apology.

16. The appointment of the present Ad hoc Committee at the General Body meeting dated 27-10-1968 was contemplated, no doubt, to be a stop-gap arrangement. The present litigation has unwarrantedly prolonged the life of the said Ad hoc Committee. Mr. Advani, the learned advocate appearing for the petitioners, has made a statement before us that his clients, the petitioners, are willing to write to the Registrar, Co-operative Societies, immediately requesting him to convene a General Body meeting of the Society as early as possible, with a view to get the new Managing Committee elected. If he fails to do, it will be open for the Registrar, to convene such meeting and get the regular Managing Committee elected. He is also free to proceed afresh in accordance with law, if the situation so warrants.

17. We accordingly allow this petition and make the rule absolute. The order of the State Government dated 8-9-1970 is set aside and that of the Divisional Joint Registrar dated 17-1-1970 is restored.

18. In the circumstances of the case there will be no order as to costs.

19. No order on Civil Application No. 3050 of 1970.

Petition allowed.

AIR 1972 BOMBAY 113 (V 59 C 19)

BHASME, J.

Miss Gool Rustomji Lala, Petitioner v. Jal Rustomji Lala and others, Opponents.

Spl. Civil Appln. No. 1739 of 1967, D/- 29-1-1971 to set aside order of Appellate Bench, Sm. C. C. Bombay, D/- 8-3-1965.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947). S. 5 (11) (c) — Member of family who can inherit right of tenancy can only be one person. (Para 10)

Considering the subject and context of the Rent Act and its object, it is clear that the Court must declare only one person as the tenant under Section 5 (11) (c) after considering the claims of all those persons who say that they are members of the tenant's family and were residing with him at the time of his death. (Para 10)

Cases Referred: Chronological Paras

(1966) 1966-1 QB 542 (CA), Dealex Properties Ltd. v. Brooks	10
(1965) AIR 1965 SC 414 (V 52) = 1964-4 SCR 892, Anand Niwas Pvt. Ltd. v. Anandji Kalyanji Pedhi	6
(1965) C. R. A. No. 1511 of 1962, D/- 17-9-1965 (Bom)	10
(1957) 1957-1 All ER 423 = 1957-1 WLR 351, Tray Foot v. Lock	8
(1952) 1952 AC 61 = 1951-2 All ER 582, Moodie v. Hosegood	9

K. J. Abhyankar, for Petitioner; R. B. Andhyarajina I/b Vachha & Co., Attorney, for Opponent No. 1.

ORDER:— This is a dispute between the sister and her brother. The petitioner and Respondent No. 1 are respectively the daughter and son of late Rustomji Lala, who was the tenant of a flat on the fifth floor of the building known as 'Joshi House,' Cumballa Hill, Bombay 26. Rustomji Lala was the contractual tenant. He was residing in the flat with his wife and three children. His wife died in 1942. His one son Sohrab left India and went abroad in 1948. Since that time Rustomji stayed in the flat with petitioner and Respondent No. 1. It appears that in 1947 Rustomji gifted away his another building "Jor Mahal" to the petitioner. In 1952 he transferred his business to his son the Respondent No. 1. On 19-2-54 Rustomji made a Will. Under that Will he gave away all his moveables and the tenancy right in the suit flat to the petitioner. Rustomji died on 12-3-1958. The petitioner obtained the probate of the Will on 17-9-1964. The landlord had given a notice terminating the tenancy of the

AP/AP/A369/72/BNP

petitioner and also of Respondent No. 1. It appears that the petitioner had made an application No. RAE, 1650 of 1959 against the landlord for a declaration that she alone was the tenant. An ex parte declaration in her favour was made on 9-8-1962. On 18-11-1960 Respondent No. 1 had made an application and the order passed in that application is the subject-matter of the proceedings before me. That application was given against the petitioner and also the landlord, rather the landlady, alleging that he was residing with the deceased tenant at the time of the death of the tenant. As a member of the tenant's family he was entitled to a declaration under Section 5 (11) (c) of the Rent Act that he was the tenant in respect of the suit flat.

2. The petitioner objected to this application on various grounds. She strongly relied on the Will and submitted that the deceased tenant had bequeathed the contractual tenancy in her favour. She alone had the right to be declared as a tenant in respect of the suit flat. In that application the petitioner also mentioned the fact that the Respondent No. 1 was not residing with the deceased tenant as a member of the family. He was occupying a room separately and was paying monthly charges because he was allowed to reside as a paying guest. The landlady did not file any written statement. She did engage a lawyer but the lawyer made a statement that his client was not interested in the dispute. But it appears that the landlady was examined as a witness on behalf of Respondent No. 1.

3. The learned trial Judge considered all the facts and circumstances of the case. He came to the conclusion that Respondent No. 1 was residing with the deceased tenant in the same flat as a member of his family. It is true that the deceased-tenant had made a Will and bequeathed the contractual tenancy right to the petitioner. But, according to the learned trial Judge, that was not a decisive factor. Both the petitioner and Respondent No. 1 were qualified to become tenants under Section 5 (11) (c) of the Rent Act. Accordingly he made a declaration that the petitioner and Respondent No. 1 are the tenants within the meaning of that sub-section. Respondent No. 1 appears to have accepted the finality of this adjudication. But the petitioner aggrieved by that decision approached the Division Bench of the Court of Small Causes by filing a revisional application. The Bench of the Court of Small Causes summarily rejected the revisional application on 2-3-1965.

4. The petitioner had first filed a Civil Revision Application in this Court.

On 28-6-1966 she was allowed by this Court to convert that Civil Revisional Application into a Special Civil Application. The Special Civil Application has thus come before me for final disposal.

5. Mr. Abhyankar, who appears for the petitioner, contends that the learned Judge was not justified in holding that both the persons are entitled to be declared as tenants. The petitioner, in addition to her being a legatee under the Will in respect of the tenancy rights, was the only member residing with the deceased-tenant and she alone has a right to become the tenant of the suit flat. As the petitioner got the tenancy right under the Will, she alone will have to be considered as the person entitled to a declaration under Section 5 (11) (c) of the Rent Act. Lastly Mr. Abhyankar submitted that the learned Judge has committed an error of law in declaring both the persons tenants. Under the relevant part of the sub-section only one person can be declared to be the tenant.

6. Mr. Abhyankar first relies upon the Will under which the petitioner gets the tenancy rights. He says that under the first part of Section 5 (11) (c) of the Rent Act the petitioner is the person who can be considered to be the tenant. Once it is held that the petitioner has become the tenant under the first part of the section, then it is not necessary to consider the various other clauses. Those clauses will have to be considered only when the statutory tenant dies and the question arises as to who should succeed to his interest in the property. This will not be a correct reading of that sub-section. It is true that S. 5 (11) (c) begins with the following definition of the tenant:

"5 (11) 'tenant' means any person by whom or on whose account rent is payable for any premises and includes"

If the expression "tenant" means only a person who acquires the tenancy rights of the deceased-tenant, either as a heir or under the Will, then the other clauses will become redundant. It is true that as a person who gets the contractual tenancy rights under the Will the petitioner may claim to be the tenant within the meaning of the first part of Section 5 (11). But that by itself will not take away the rights which can be claimed by the various other persons under the clauses which follow. Mr. Abhyankar strongly relied on an unreported judgment of this Court for the proposition that under Section 5 (11) (c) of the Rent Act the legal heir of a deceased tenant has the right to exclude other claimants who may claim tenancy rights by relying upon the other clauses of Section 5 (11). Mr. Abhyankar referred to

the unreported decision of K. K. Desai, J. in Civil Revision Application No. 1556 of 1963 decided on 9th February 1966. Although the learned judge was deciding a different point, he did make certain observations which suggest that under Section 5 (11) (c) the rights of the heirs of a deceased tenant must be preferred to the rights of mere members of the tenant's family as referred to in Section 5 (11) (c). The learned Judge also made certain observations that the question of tenancy as under Section 5 (11) (c) in favour of mere members of a tenant's family can arise only when the contractual tenancy is found to have been terminated before the death of a tenant and the heirs entitled to continue in occupation are unable to settle their disputes regarding their claim to be held tenants. K. K. Desai, J., who made the aforesaid observations, had not quoted any authority in support of this proposition. The wording of the section does not warrant any such restrictive interpretation. It is now well settled that the expression 'tenant' appearing in Section 5 (11) (c) leaving behind the members of his family, at any rate, includes both statutory and contractual tenants. It may be that the opening words of Section 5 (11) (c) are used to denote only a contractual tenant. The decision of the Supreme Court in *Anand Niwas Private Ltd. v. Anandji Kalyanji Pedhi*, AIR 1965 SC 414 cited by Mr. Abhyankar contains certain observations about the scheme of Sec. 5 (11) (c) and the Rent Act. Justice Shah (as he then was) has explained at page 424 the expression 'tenant' as appearing in the different clauses of Section 5 (11) of the Act. According to the learned Judge in the principal definition the expression 'tenant' means only a person who is a contractual tenant because rent is payable by a contractual tenant and not by a statutory tenant. On that view of the matter, Mr. Abhyankar is right when he says that according to the opening words of Section 5 (11) (c) the petitioner will become the contractual tenant in respect of the suit flat by virtue of her title under the Will.

7. It appears that on 28-6-1960 the respondent-landlady addressed a notice to the petitioner and also the Respondent No. 1 terminating their tenancy on certain grounds. As the notice was addressed to the petitioner, who had acquired the contractual tenancy right under the Will it is clear that after the expiry of the month of tenancy the petitioner became the statutory tenant for all purposes.

8. Then Mr. Abhyankar relies upon the wording of Section 5 (11) (c) and submits that at any rate at the death of the deceased tenant the petitioner was

having the contractual tenancy rights. She was also residing as a member of the tenant's family with him at the time of his death. As against the respondent No. 1 she had a better title and the Court should have named as the sole statutory tenant under Section 5 (11) (c). Mr. Abhyankar relies upon a decision in *Trayfoot v. Lock*, (1957) 1 All ER 423. In that case a similar point arose under identical provisions of the English Rent Act. The son and the step-daughter were both members of the tenant's family when the tenant died. The tenant had, before his death, by a writing expressed his wish that the tenancy rights should devolve on the step-daughter. The learned Judge while considering the claim of the step-daughter based on the writing and also the other circumstances of the case, expressed that the crucial factor would be the deceased-tenant's wishes. He also made it clear that such wishes may not always have an overriding consideration but they may in some cases have decisive effect. Mr. Abhyankar says that in the present case the deceased-tenant before his death had disposed of his entire property according to his wishes. He had transferred his business to his son in his lifetime. He had also given away another building to the petitioner, and in the Will he had expressed a wish that the tenancy rights in respect of the flat should devolve on the petitioner. It is true, as stated by the learned Judge in the above case, the wish of the deceased-tenant will be considered as relevant and having regard to the other circumstances, at times that may be accepted as decisive. But I am of the opinion that it will not affect the unfettered discretion vested in the court to select one of the several contestants in exercise of its powers under S. 5 (11) (c) of the Rent Act.

9. While this matter was argued before me there was some interesting discussion about the rights of the contractual tenant as against the tenant who would be declared as a statutory tenant by the Court under Section 5 (11) (c) of the Act. Mr. Andhyarjina referred to a decision in *Moodle v. Hosegood*, 1952 AC 61. It was held in that case that under the relevant provisions of the English Rent Act the widow of a deceased tenant, (whether the tenant is contractual or statutory), who was residing with her husband at the date of his death is entitled to the protection given by the Act. It was also held that if a contractual tenancy is still subsisting at her husband's death and devolves upon some one other than the widow, it is not destroyed but the rights and obligations which ordinarily devolve upon the successor-in-title of the contractual tenant are sus-

pended so long as the widow retains the possession of the dwelling house. It was further made clear in that decision that the contractual tenancy is determinable by notice. The landlord or the contractual tenant can determine it by giving the appropriate notice but the determination will not affect the widow's rights and obligations. If no notice is given the contractual tenancy will come into full operation when the widow gives up possession. In the present case admittedly a quit notice was given terminating the contractual tenancy which vested in petitioner No. 1 after the death of the tenant. It is for this reason that the question about the position of the contractual tenant pending the statutory tenancy vesting in someone else either under the Rent Act or as a result of the declaration made by the Court under S. 5 (11) (c) of the Rent Act need not be debated further in this case. Similarly there was some discussion about the extent of the transmission of the tenancy rights after the death of the statutory tenant who derives his rights under a declaration made by the Court under S. 5 (11) (c). That presents a vexed problem and will have to be resolved in a proper case.

10. Mr. Abhyankar lastly submitted that the learned Judge was in clear error when he declared both the petitioner and Respondent No. 1 tenants under Section 5 (11) (c) of the Rent Act. Mr. Abhyankar argues that the wording of the section clearly postulates that the court can declare only one person as the tenant in respect of the deceased tenant's premises. When more than one person claim such a right and there is no agreement between them inter se, then the Court must make a choice and declare that only one person is the tenant of the premises. For appreciating the point raised by Mr. Abhyankar, it will be desirable to reproduce the relevant part of the sub-section.

5(11). "tenant" means any person by whom or on whose account rent is payable for any premises and includes—

- | | | |
|--------|---|---|
| (a) x | x | x |
| (aa) x | x | x |
| (b) x | x | x |

(c) any member of the tenant's family residing with him at the time of his death as may be decided in default of agreement by the Court."

Mr. Abhyankar emphasises the words "any member of the tenant's family" and submits that the Court must pick up one of the several claimants as the fit person to be tenant and make the declaration accordingly. Mr. Andhyarujina, on the other hand, submits that the singular used in the section includes the plural. He strongly relies upon Section 13 (b) of

the Bombay General Clauses Act. That section reads thus:—

13. "In all Bombay Acts (or Maharashtra Acts), unless there is anything repugnant in the subject or context

(a)

(b) words in the singular shall include the plural, and vice-versa."

Mr. Andhyarujina also brought it to my notice that at one time while interpreting a similar provision of the English Act it was held that the singular under that Act included the plural Mr. Andhyarujina was fair enough to refer to a recent contrary ruling in *Dealex Properties Ltd. v. Brooks*, (1966) 1 QB 542 (CA). The Court of Appeal was considering a similar provision of the English Rent Act, i.e. Section 12 (1) (g) of the Act of 1920. The relevant part of that section was to the following effect:—

12(1)(g). "..... and the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or where a tenant dying intestate leaves no (such) widow or is a woman, such member of the tenant's family so residing as aforesaid, as may be decided in default of agreement by the county court....." The expression "such member" was construed to be not plural but singular. It was argued that the court should construe the word "member" as "members" because under the Interpretation Act a singular includes a plural. But the learned Judge brushed aside that suggestion by saying that that was to be done only when the statute did not evince a contrary intention. Any other interpretation would have undesirable consequences. The learned Judge admirably sums up some of the consequences in these words:—

"To my mind a fearful confusion ensues once it is supposed that there can be a plurality of 'members' who may agree together, and so have a sort of tontine which will last for so long as the survivor of them is in existence. I think that under the Rent Acts a tenant must be a single person because it is a status of irremovability which belongs to him, and I do not think to anyone but him." So, according to the learned Judge, the member of the family of the tenant who can inherit the right could be only one person. This position appears to be accepted even by the learned author, R. E. Megarry, in his recent book, the Rent Acts, 10th Edn. at page 217 para (d). The relevant portion from that paragraph may be reproduced here:—

"(d) No Joint tenancy.— It has been held that two or more claimants cannot take the transmitted tenancy as joint tenants, thus avoiding 'fearful confusion' and 'absurd consequences'."

So Mr. Andhyarjina cannot rely too much on Section 13 (b) of the General Clauses Act. Under that clause of the General Clauses Act singular shall include the plural when there is nothing repugnant in the subject or context. Considering the subject and context of the Rent Act and its object, I am of the view that the Court must declare only one person as the tenant under Section 5 (11) (c) after considering the claims of all those persons who say that they are members of the tenant's family and were residing with him at the time of his death. This interpretation found favour with Patel, J. in C. R. A. No. 1511 of 1962, D/- 17-9-1965 (Bom).

11. Whenever persons who are members of the tenant's family start a scramble for the tenancy rights, in a sense the war of succession begins. Succession to the property of the deceased is generally decided by applying the rules of Succession forming part of the personal law of the parties. But the law of Succession is substantially modified while resolving the disputes which arise after the death of the tenant, whether statutory or contractual. If the several members, who are residing as members of the tenant's family, fail to come to an agreement, then the Court has to make the choice and declare that one amongst them will be the tenant for claiming the protection of the Rent Act. The Court will have to take into account several relevant factors including the wishes of the deceased-tenant. In all such cases the Court should have regard to the paramount collective interest of the family of the deceased-tenant. The court should make the choice in such a way that the person selected to be the tenant is likely to act in the interest of the family, like the Karta of a Hindu Joint Family or the paterfamilias. If the Court has in mind such considerations, then it is likely that the Court will select the right person for looking after the collective interest of the tenant's family after his death. In any event the court cannot declare more than one person as the tenant under Section 5 (11) (c) of the Rent Act. The learned trial Judge was clearly in error when he made a declaration that both the petitioner and Respondent No. 1 are tenants under Section 5 (11) (c) of the Rent Act.

12. Despite this finding in favour of the petitioner I do not propose to interfere with the order of the learned trial Judge for certain good reasons. The petitioner is a younger sister of Respondent No. 1. They were residing together under the same roof for several years. During the life time of the father and even after his death Respondent No. 1 is paying a substantial amount by way

of contribution towards the family expenses. After the death of the deceased-tenant the landlady treated both as tenants and served them with quit notices. Even when the dispute started between the brother and sister, the landlady had not shown any interest in the proceedings. After the learned trial Judge made the declaration the landlady accepted that as final and binding. In view of these circumstances, I am of the view that no interference is called for in exercise of my powers under Art. 227 of the Constitution of India.

13. In the result the application fails and the rule is accordingly discharged. There will be no order as to costs.

14. The rule issued on the Civil Application is discharged with no order as to costs.

Rule discharged.

AIR 1972 BOMBAY 117 (V 59 C 20)

V. S. DESHPANDE, J.

Caitan D'Souza and others, Petitioners v. Miss Jerbai S. C. Dinshaw and others, Opponents.

Spl. Civil Appln. No. 1166 of 1966, D/- 9-9-1970 to set aside order of Appellate Bench, Sm. C. C. Bombay, D/- 27-6-1966.

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13 (1) (c), second sub-clause — Under the provision the tenant is held liable not only for his own acts but also for the acts of those who reside with him. (Para 3)

(B) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13 (1) (c) second sub-clause — Mere proof of conviction of an offence alleged to have been committed on the premises alone will not satisfy the requirement of the provision. (Para 8)

The second sub-clause of S. 13 (1) (c) is intended to cover cases where a tenant or any person residing with him is convicted of an offence committed on the premises with deliberate and conscious use of the premises pursuant to some illegal and immoral purpose or where the tenant has allowed somebody consciously to commit such an offence pursuant to some such illegal or immoral purpose. The user of the premises pursuant to an illegal or immoral purpose shall have to be proved to have played a dominant and main part in the incident, if not the ingredient of the said offence itself. Even if the single act is found to be sufficient

to bring home the guilt to the accused, the said single act alone without the proof of the same having been committed pursuant to some illegal or unlawful purpose, will not furnish any cause of action to the landlord for eviction of the tenant. AIR 1955 Bom 111 Explained.

(Para 9)

Cases Referred: Chronological Paras

(1955) AIR 1955 SC 566 (V 42) =
1955-2 SCR 270, Anil Behari
Ghosh v. Latika Bala Dassi 2

(1955) AIR 1955 Bom 111 (V 42) =
56 Bom LR 836, Jayantilal Moti-
lal Pathak v. Dayaram Ranchhod-
das Soni 2, 4, 5,
7, 8

(1925) 1925-1 KB 301 = 94 LJKB
408, S. Schneiders and Sons Ltd.
v. Abrahams 4

(1921) 1921-1 KB 541 = 90 LJKB
656, Waller and Sons v. Thomas 5

D Y. Lovekar for R. M. Tipnis, for
Petitioners; M. N. Kenia (for Nos. 1 to 3)
and U. R. Lalit, for (No. 2), for Oppon-
ents.

ORDER:— This petition under Article 227 of the Constitution arises out of the Rent Act (Bombay Act No. 57 of 1947) proceedings instituted by the landlord-respondents Nos. 1 to 3 against the original petitioner-tenant, since deceased. Possession of the premises from the tenant was sought to be obtained on the ground that the tenant's wife was convicted for using the premises for immoral and illegal purposes as contemplated in Section 13 (1) (c) of the Rent Act. This suit was decreed by the trial Judge on 4-2-1966 in RAE Suit No. 4770 of 1962 and the appeal by the tenant was dismissed by the Appellate Bench of the Court of Small Causes at Bombay on 27-6-1966.

2. It appears that the tenant has been occupying the premises in dispute for about 35 years before the institution of the proceedings. The tenant's wife was admittedly convicted for offence under Section 66 (1) (b) of the Bombay Prohibition Act on 19-7-1962. Details of the circumstances under which she was tried and convicted are not directly proved, as the plaintiff remained content with examining one bill collector as his witness and the defendant led his own evidence saying that he did not know anything about the criminal case, though admitted that his wife was convicted. However, the judgment passed by the Presidency Magistrate, 14th Court, Bombay (Exhibit 'A') has gone on record without objection, though this judgment could not have been strictly admissible in evidence for proving the facts constituting the offence, as held in AIR 1955 SC 566, particularly when the tenant was

not even party to the case. It appears from the judgment that the premises were raided by the police on 22nd July 1961. Four persons in addition to the wife of the tenant were found inside the room at the time of the search. In the kitchen under the table one pint bottle bearing the label of Black and White Whisky, containing .09 litres of illicit liquor was found. Near the 'mori' was found an aluminium pot containing 1.52 liters of lukewarm water smelling of alcohol. One red coloured hot-water bag smelling of alcohol and a glass smelling of alcohol from the said premises were also seized. It is on these facts that five accused were tried for an offence under Section 66 (1) (b) read with Sec. 81 of the Bombay Prohibition Act. The contents of the vessel were not sent for Chemical Analysis. However, another bottle containing .09 litres of illicit liquor was sent to the Chemical Analyser and was found to contain ethyl alcohol. The learned Magistrate acquitted other four accused but convicted the wife of the tenant only for an offence under Section 66 (1) (b) for possession of .09 litres of illicit liquor and sentenced her to one day's simple imprisonment and to pay a fine of Rs. 250/-. The trial Court relied on 56 Bom LR 836 = (AIR 1955 Bom 111) (Jayantilal Motilal Pathak v. Dayaram Ranchhoddas Soni) and on the strength of this judgment in Criminal case alone held that these facts attracted the provisions of Section 13 (1) (c) of the Rent Act and the tenant was liable to be evicted. The same finding has been confirmed by the Appellate Bench.

3. Mr. Lovekar, the learned advocate appearing for the petitioner-tenant, contends that conviction of the wife for offence under Section 66 (1) (b) cannot render the tenant liable to eviction and Section 13 (1) (c) cannot be said to have been intended to hold the tenant vicariously liable for the act of his wife or any person residing with him. Answer to this argument much naturally depends upon the true construction of the section. Clause (c) can be divided into three sub-clauses. So divided, Cl. (c) of Section 13 (1) reads as follows:—

"13(1) Notwithstanding anything contained in this Act a landlord shall be entitled to recover possession of any premises if the court is satisfied.
.....

(a)

(b)

(c)

(i) that the tenant or any person residing with the tenant has been guilty of conduct which is a nuisance or annoyance to the adjoining or neighbouring occupiers, or

(ii) (that the tenant or any person residing with the tenant) has been convicted of using the premises or allowing the premises to be used for immoral or illegal purposes; or

(iii) that the tenant has in respect of the premises been convicted of an offence of contravention of any provisions of Cl. (a) of sub-section (1) of S. 394 or S. 394-A of the Bombay Municipal Corporation Act."

This contention of Mr. Lovekar cannot be accepted unless the words "has been convicted" are held to control only the words "the tenant" and not the words "or any other person residing with the tenant" in the opening of the first sub-clause. Mr. Lalit, the learned advocate appearing for the respondents, seems to me to be right when he contends that such reading militates against the plain dictates of grammar. Even the setting and context of this sub-clause does not admit of such construction. This apart, when the conduct of any person residing with the tenant amounting to nuisance and annoyance also renders the tenant liable to eviction, there is no reason why similar acts on the part of such person residing with the tenant resulting in his conviction as envisaged in the second sub-clause could not have been intended to furnish a cause of action for eviction against the said tenant. This entire Cl. (c) deals with the objectionable user of the leased premises involving some sort of nuisance or annoyance or discomfort to neighbours. This object aimed at is likely to be frustrated, if the tenant is not held liable, not only for his own acts, but also vicariously liable for the acts of those who reside with him. It is true that in the third clause, no reference is made to the act of "any person residing with the tenant." But then, this clause was introduced in this section long after the main statute was enacted in 1947 by Maharashtra Amendment Act No. 38 of 1962. This apart, Ss. 394 (a) (i) and 394-A also contemplate, of vicarious liability of the occupant for suffering or allowing any body to commit like offences on the premises, though its extent and measure is slightly different. Considered as whole, it shall have to be held that the words "has been convicted" in second clause has not only reference to the word "the tenant" but also to "or any person residing with the tenant." This interpretation will be in accordance with the plain wording of the clause as also with the governing legislative intent. The first submission of Mr. Lovekar, therefore, fails.

4. Mr. Lovekar then contends that mere proof of commission of some offence on the premises in the absence of proof of something more cannot

amount to "using the premises or allowing the premises to be used for immoral or illegal purpose." It is true that both the courts below have merely relied on conviction and have not further considered how tenant's wife, i.e. the person residing with the tenant, can be said to have used the premises for immoral or illegal purposes, merely by possession of .09 litres of illicit liquor. Mr. Lovekar contends, firstly, that there is no evidence that it was so possessed with any unlawful and immoral purpose and, secondly, that finding of lukewarm water and the hotwater bag in addition to the quantity of the liquor and the fact that these were not found actually inside the room where the five persons including the wife of the tenant were sitting at the time of the raid militates against the said liquor having been possessed for any unlawful purposes. I find some substance in this contention of Mr. Lovekar. This contention has nothing to do with the legality or the validity of the conviction itself, but has a bearing on the application of the second part of Cl. (c). The trial Court relied on the judgment of this Court reported in 56 Bom LR 836 = (AIR 1955 Bom 111). This Court followed the judgment of an English case reported in (1925) 1 KB 301, in which corresponding analogous provisions of Section 5 (1) (b) of the Rent and Mortgage Interest Restriction Act of 1923 was interpreted. This court held that the facts found in the case were covered by the ratio decided by the English case, without adding anything of its own, this Court quoted the observations of Atkin, L. J. at page 311 with approval. I wanted to check up the detailed facts of the said case. Unfortunately, however, I could not get the paper book of Civil Revision Application No. 162 of 1954 decision of which is reported in 56 Bom LR 836 = (AIR 1955 Bom 111) as I am told that the papers have been sent to Gujarat High Court on the bifurcation of the erstwhile Bombay State. However, from the facts given in the report, the tenant seems to have been convicted in that case for offences under Sections 65 (e) and 66 (b), though it is not possible to find out what exact quantity of liquor was found in possession of the tenant and precisely under which circumstances. Section 65 (e) deals with offences of selling and purchasing liquor at the premises. The observations of the learned Judge, therefore, have got to be understood in the context of the facts found in that case. The facts of the present case, as stated earlier, are clearly distinguishable. Not only that a very small quantity of liquor was found in possession of the wife of the tenant, but the same was found inside the kitchen along with the hot-

water bag as also a vessel of lukewarm water. These facts do prove the conviction for possession of liquor. These do not further prove that user of the premises was for or pursuant to any unlawful or immoral purpose. One cannot definitely say that liquor was possessed for any prohibited use or that such user was contemplated pursuant to any purpose planned in advance. Casual, accidental, incidental and unintended possession and user without any such prohibited purpose cannot be ruled out on the facts established. Presumably it could not be so on the facts in 56 Bom LR 836 = (AIR 1955 Bom 111).

5. This apart, the judgment of the English case relied upon by Dixit, J. itself makes a clear distinction between the cases where offences like these are committed incidentally on the premises in dispute and premises being used for the purposes of commission of the offences pursuant to some immoral or illegal purposes. Thus Banker, L. J. at page 307 observes:—

"It may be that the mere fact of a crime being committed on the premises would not constitute a user of the premises by the tenant for an illegal purpose."

A little further the learned L. J. agreeing with the observations of Lush, J. in *Waller & Son v. Thomas*, (1921) 1 KB 541 says:—

"I agree with Lush, J. that the object of this clause is to deal with cases in which the improper user of the premises is in furtherance of an unlawful purpose, and not with an isolated instance of illegality in carrying out a lawful purpose."

Similarly, Scrutton, L. J. observes at page 310 of the report saying:—

"..... it is enough if there is a conviction of a crime which has been committed on the premises and for the purpose of committing which the premises have been used; but that it is not enough that the tenant has been convicted of a crime with which the premises have nothing to do beyond merely being the scene of its commission."

Third Judge Atkin, L. J. after making the observations quoted at page 838 of the Bom. L. R. says a little further:

"On the other hand if the premises are once used for an immoral or illegal purpose, it does not necessarily follow that they have been used for such a purpose within the section."

It is thus clear that the three learned L. Js. who decided the English case relied upon by Dixit, J. in 56 Bom LR 836 = (AIR 1955 Bom 111) were conscious of the distinction between the cases where the offence happens to be committed incidentally and casually on the premises

without any conscious intention or purpose of using it for any illegal or immoral purpose and the cases where offence is committed on the premises pursuant to some unlawful purpose. The present case clearly falls within the purview of the former category of cases. The present case thus is clearly distinguishable from the case in 56 Bom LR 836 = (AIR 1955 Bom 111) and as such the ratio of the said judgment has been on the face of it wrongly applied to the facts of this case.

6. There are, however, stronger grounds why I think the provisions of Cl. (c) of Section 13 (1) can have no application to the facts found in this case. Now, Section 12 (1) of the Bombay Rent Act affords protection to the tenants as long as they are ready and willing to pay the amount of standard rent and permitted increases and to observe and perform other conditions of tenancy, in so far as they are consistent with the provisions of the Rent Act. It is only under certain contingencies enumerated in Cls. (a) to (l) that the landlord had been enabled to recover possession of the said premises from the tenant in violation of the above protection. Clauses (a) to (e) and (j) to (l) deal with certain acts or omissions of the tenant having some bearing or the other on his obligation to the landlord as his tenant or the demised premises, or to the neighbours. These provisions seek to put an end to the tenant, where the tenant has been guilty of some act injuriously affecting the leased property or adversely affecting the landlord directly or indirectly. Cl. (a) deals with acts of the tenant contrary to the provisions of Cl. (o) of Section 108 of the Transfer of Property Act. Clause (b) deals with the effect of the tenant having erected any permanent structure on the premises by affecting the use of the property. Clause (c) essentially deals with the user of the property in a manner which is likely to constitute some sort of discomfort to the adjoining and neighbouring occupiers. Clause (d) deals with the conduct of the tenant which estops him from refusing to vacate. Clause (e) deals with the effect of sub-letting and assignment. It is unnecessary to go into details of Cls. (j) to (l). Suffice it to observe that each one of these clauses deals with the act or omission of the tenant, which either affects the landlord adversely or the leased premises injuriously. Clause (c) cannot have been intended to be a moral code for the conduct of the tenants for ensuring compliance by them of all the existing laws independently of such obligation. Any infraction on the premises, therefore, cannot be intended to have been covered by the provisions of Cl. (e), unless such

infraction directly or indirectly affects the landlords or affects the premises or affects the adjoining or neighbouring occupiers. Considered from this point of view, it is impossible to hold that, mere possession of .09 liters of illicit liquor without more alone can have any bearing on his obligation arising out of the tenancy.

7. Mr. Lalit contends that such construction runs counter to the plain words of this sub-clause, and also to dicta laid down in 56 Bom LR 836 = (AIR 1955 Bom 111) and the English case according to which even solitary user of premises resulting in conviction, as against continuous or frequent user, is sufficient to warrant eviction of the tenant. I have already stated how facts in 56 Bom LR 836 = (AIR 1955 Bom 111) and legal position there is distinguishable. This contention, however, will lose its force if distinction between stray and casual act of user and solitary act of user with or pursuant to some purpose and design is borne in mind. This sub-clause itself speaks of conviction and not of convictions. Conviction for an offence covered by this sub-clause may be very often than not based on solitary or single act, though instances of a single conviction for more than one act cannot be ruled out. Such one act of the tenant covered by the conviction may be casual, incidental, intentional and without any specific prohibited purpose or it may also be of the nature covered by this sub-clause. The question that Mr. Lalit's submission raises really is: how and where to draw a dividing line? Does this sub-clause require proof of something more than the act covering the conviction itself to warrant eviction?

8. Now, shorn of all the unnecessary verbiage the relevant part of Cl. (c) will read as follows:—

"that the tenant has been convicted of using the premises or allowing the premises to be used for immoral or illegal purposes."

Any literal and too technical a construction may render this entire sub-clause meaningless. As observed by Atkin, L. J. in the above case, there is no offence known to law of "using the premises for any immoral purposes." This was the position when Atkin, L. J. was called upon to construe practically analogous provisions of Section 5 (1) of Rent and Mortgage Interest Restrictions Act, 1923, and the position is in no way changed when this court is called upon to consider the above sub-clause (c) of S. 13 (1) of the Rent Act. Similarly there are very few offences, which can answer the description of "using the premises for illegal purposes." Then there is also no law making any act of "allowing the pre-

mises to be used either for immoral or illegal purposes" an offence, unless it is construed to have reference to an abetment of an offence in which user of the premises for unlawful purposes is an ingredient. This is why Atkin, L. J. was constrained to say that corresponding clause of English Act should be construed less technically. The phraseology, therefore, requires to be interpreted after making an attempt to find out the precise legislative intent, as to the remedy that was sought to be advanced and the mischief that was sought to be suppressed. Looked from this point of view, this sub-clause seems to have been intended to cover cases where a tenant or any person residing with him is convicted of an offence committed on the premises with deliberate and conscious use of the premises pursuant to some illegal and immoral purpose or where the tenant has allowed somebody consciously to commit such an offence pursuant to some such illegal or immoral purpose. This view gets support also from the context, particularly from the acts covered by the immediately preceding and following sub-clauses. The entire Cl. (c) appears to have been intended to cover acts of tenants etc. Which tend to make life of the neighbours miserable, rendering thereby premises a source of some discomfort. Emphasis appears to be more on the nature of user of the premises and its purpose than on the conviction itself. The user of the premises pursuant to an illegal or immoral purpose shall have to be proved to have played a dominant and main part in the incident, if not the ingredient of the said offence itself. The words "convicted for using the premises for immoral or illegal purposes" or allowing it to do so cannot be given full meaning and effect in any way otherwise. One plain implication of this construction is that user of the premises for illegal or immoral purposes not being necessarily the ingredient of the offence, circumstances to that effect shall have to be proved in addition to the facts constituting the offence to attract this sub-clause of Cl. (c) of Section 13. Mere proof of conviction of an offence alleged to have been committed on the premises alone will not satisfy the requirements of this clause. Even otherwise, the judgment regarding the conviction passed by the criminal court is not admissible in civil proceedings excepting to prove the fact of conviction or acquittal. The facts constituting the offence and the conviction have got to be proved independently. But as stated above, the tenant may not entail the forfeiture of the tenancy merely by proof of the facts constituting the offence unless it is further shown that the user of the premises for the said

offence was a deliberate act and also was in pursuance of some illegal and immoral purpose. All that is held in 56 Bom.LR 836=(AIR 1955 Bom 111) and the English case is that landlord need not prove the continuous user or even a frequent user. That does not mean that offence casually an incidentally committed on the premises without there being any intention of user pursuant to the purposes mentioned there were intended to be covered by the above clause. Even if the single act is found to be sufficient to bring home the guilt to the accused, the said single act alone without the proof of the same having been committed pursuant to some illegal or unlawful purpose, will not furnish any cause of action to the landlord for eviction of the tenant.

9. Result is that the application is allowed and the orders passed by the two Courts are quashed.

10. There will be no order as to costs, in the circumstances of the case.

Application allowed.

AIR 1972 BOMBAY 122 (V 59 C 21)

VIMADALAL, J.

Vithoba Rama Randive, Applicant v. Dhairyasinharao Bhayasaheb Ghatge and another, Opponents.

Civil Revn. Appln. No. 883 of 1969, D/- 30-1-1971; from order of N. B. Dharurkar Civil J., Jr. Division at Kagal, D/- 31-7-1969.

(A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 86 (c) — Scope.

Under the section the Tenancy Authorities are to decide not only whether the land is less than economic holding and the total income thereof is less than Rs. 1500/- but has also to decide whether the land in question is an agricultural land within Section 2 (8) of the Act so as to attract the section. (X-Ref.— Section 2 (8)). (Para 3)

(B) Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 85-A (1) and (2) — Reference under the section — When necessary.

Sub-section (1) has to be read subject to sub-section (2). Sub-section (2) does not contemplate a reference to Tenancy Authorities in a case where the issues have already been decided by competent authorities under the Act in earlier proceedings between the same parties in respect of the same land. (Para 4)

M. V. Sali, for Applicant; V. D. Govilkar, for Opponents Nos. 1 and 2.

ORDER:— This is a Revision Application from the order of the Civil Judge,

AP/BP/A371/72/MNT

Junior Division, Kagal, declining to make a Reference to the authorities under the Bombay Tenancy Act, 1948, under Section 85-A thereof, of the issue as to whether the present petitioner is a tenant within the meaning of that Act. The plaintiff-landlord had filed the suit in that Court for possession of his half share in land bearing S. No. 84/1 and for mesne profit. By his written statement, the first defendant-tenant had, inter alia, contended that the court had no jurisdiction to decide whether he was a tenant under the Bombay Tenancy Act and hence an issue in that behalf should be referred to the competent authorities under that Act for decision. The trial court declined to make the Reference on the ground that that issue had already been decided against the present petitioner on 18-10-1960 by the authorities under the said Act in proceedings under Section 88-C between the same parties in respect of the same land initiated by the plaintiff-landlord, and directed that the hearing of the suit be proceeded with. It is against that order that the first defendant-tenant has approached this Court in Revision.

2. Various elaborate arguments have been advanced by Mr. Sali on the Petitioner's behalf, but it is not necessary to deal with all of them. Only two narrow questions arise: (1) Did the question in regard to the applicability of the Bombay Tenancy Act fall to be decided in proceedings under Section 88-C thereof; and (2) Does Section 85-A require that the question as to whether a person is a tenant under that Act must be referred to the authorities under it in every case, even though it may have already been decided by those authorities in previous proceedings between the same parties in respect of the same land.

3. As far as the first question is concerned, in my opinion, the question had to be decided in proceedings under Section 88-C. I do not agree with Mr. Sali that in those proceedings the tenancy authority had only to consider two things viz. (a) whether the land was less than the economic holding of 16 acres; and (b) whether the total annual income thereof was less than Rs. 1500/-. The authority concerned had first to decide whether the land in question was agricultural land within Section 2 (8) of the Act. In the proceedings under Section 88-C between the parties in respect of this very land the tenancy authority has, in terms, held by his Order dated 18-10-1960 that the major portion being grass land, the Bombay Tenancy Act was not applicable to it. From that decision it necessarily follows that the first defendant was not a "tenant" within the meaning of Section 2 (18) of the Act, as

he sought to contend in the present suit. I am not concerned with the merits of that decision. Moreover, there was an appeal filed by the present petitioner against that decision which was dismissed by the Deputy Collector on 30th June 1969. I do not accept the petitioner's contention that the Mamlatdar's order dated 25-11-1965 in proceedings which were initiated in the ordinary course under Section 32-G holding that, in view of the minority of the plaintiff-landlord, the Tillers' Day was postponed necessarily implied a decision to the contrary viz. that the land was agricultural land. In view of the finding that the landlord was a minor, no other question arose in those proceedings and the short order dated 25-11-1965 shows that the question as to whether the said land was agricultural land was, in fact, not decided or even considered by the tenancy officer.

4. As far as the second question formulated by me above is concerned, on first impression, Section 85-A does seem to suggest that a Reference must be made to the tenancy authorities each time a question under the Act arises, but on a close scrutiny of the language used in that section I have come to the conclusion that I am not driven to a construction which would lead to such an oppressive and unreasonable result. If a defence under the Tenancy Act is raised, the suit, no doubt "involves" an issue under that Act. That issue would be "required" by that Act to be decided by the authorities under it. The use of the mandatory words "shall stay", by themselves, would suggest that in every such case the suit must be stayed by the trial Court and a Reference made to the appropriate authority under the Act. Those words must, however, be read and understood in the context of the language used in sub-section (2) of S. 85-A itself. Sub-section (2) deals with the proceedings and the decision that must inevitably follow upon a Reference made by the Civil Court under sub-section (1). If, therefore, there is anything in the language employed in sub-section (2) which shows that the legislature could not have contemplated a Reference in a certain case, sub-section (1) must necessarily be construed as limited to that extent. In my opinion, the words "and decide such issues" in sub-section (2) clearly negative a Reference in cases in which those issues have already been decided by the competent authority under the Act in earlier proceedings between same parties in respect of the same land, for it could never have been contemplated by the legislature that the same issue or issues should be decided again and again by the authorities under the Act

resulting in multiplicity of proceedings, and perhaps, even in conflict of decisions.

5. In the result, I hold that the decision of the lower Court was right and this Revision Petition must be dismissed with costs.

Revision dismissed.

AIR 1972 BOMBAY 123 (V 59 C 22)

(AT NAGPUR)

PADHYE, J.

Pandhari Ramji Timade and others, Petitioners v. Jagdamba Devi Deosthan, Nagpur and another, Respondents.

Special Civil Appln. No. 719 of 1970, D/- 12-10-1971, from order of S. N. Hadole, Member Maharashtra Revenue Tribunal Nagpur, D/- 17-6-1970.

Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 107 (1) (a-1) (as inserted by Maharashtra Act 17 of 1966) — Appeal — Decision on contractual tenancies under S. 100 (2) is also appealable under S. 107 (1) (a-1) — (X-Ref:— Section 100 (2)).

The right of appeal which has been granted by virtue of insertion of Cl. (a-1) in Section 107 (1) is not confined only to the orders arising out of proceedings where only questions of deemed tenancies are raised but it also covers all orders where the question of a person being a tenant or not, including a deemed tenant, is involved. (Para 8)

Previously no order of the Tahsildar under Section 100 (2) was made appealable. This omission was sought to be supplied by the amendment. The Legislature could not have intended that the right of appeal should be given only in cases where the question is about a person being a deemed tenant or a protected lessee or an occupancy tenant and no right should be given where the question is raised about a person being a contractual tenant or not. The Legislature must have intended to give a right of appeal against all orders passed by the Tahsildar under Section 100 (2) which should also cover cases of contractual tenancies. (Para 8)

Cases Referred: Chronological Paras
(1969) Special Civil Appeal No.

1096 of 1968, D/- 19-12-1969 =
1970 Mah LJ (Note No. 30),
Narayan v. M. R. T. 4

(1963) AIR 1963 SC 1241 (V 50) =
(1964) 1 SCR 371, State of West
Bengal v. Union of India 8

(1963) AIR 1963 SC 1356 (V 50) =
(1964) 1 SCR 29, S. C. Prashar
v. Vasantsen 8

KO/LO/F817/71/GKC/BNP.

(1960) AIR 1960 SC 655 (V 47) =
 (1960) 2 SCR 896, Motiram v. Surajbhan 4
 (1956) AIR 1956 SC 77 (V 43) =
 (1955) 2 SCR 1117, Indira Sohanlal v. Custodian of Evacuee Property Delhi 4

S. N. Kherdekar, for Petitioners;
 K. G. Chendke, for Respondent No. 1.

ORDER:— This petition challenges the order dated 17-6-1970 passed by the Maharashtra Revenue Tribunal in Revenue revision No. Ten-A-478 of 1969. The facts leading to this petition are briefly these: The respondent No. 1 Jagdamba Devi Deosthan is the landholder of field Survey No. 6, area 7.17 acres, assessment Rs. 14/- and Survey No. 1/3, area 1.17 acres, assessment Rs. 3-31, both situated at mouza Kurla, tahsil Hingan-ghat, district Wardha. The petitioners claim to be the tenants of the aforesaid fields. According to the petitioner, the fields were leased out to the petitioners or their predecessors-in-title in the year 1955-56 and they continued to be in possession of those fields in the years 1956-57 and 1957-58. The respondent No. 1 however, challenged the claim of the petitioners of their being tenants of the said fields. The petitioners, therefore, filed, on 3-4-1961 an application purporting to be under Section 100 (2) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereinafter called the Tenancy Act, before the Tahsildar for a declaration that they are the tenants of the aforesaid fields and the name of the respondent No. 2 be deleted from the Khasras. By order dated 16-10-1961 this application was dismissed by the Naib Tahsildar. The Special Deputy Collector, however, set aside that order and allowed the appeal by his order dated 16-7-1962. The matter was further taken to the Revenue Tribunal and by order dated 20-6-1963, the Maharashtra Revenue Tribunal set aside both these orders and remanded the case to the Naib Tahsildar.

2. While the proceedings were pending before the Naib Tahsildar after remand, Section 107 of the Tenancy Act was amended by inserting Cl. (a-1) at the top in Section 107 (1) of the Tenancy Act by which in the list of appellate orders, an order under Section 6 was inserted by Maharashtra Act No. 17 of 1966. This amendment came into effect from 2-6-1966.

3. The Naib Tahsildar who inquired into the application after remand rejected the application by his order dated 24-1-1967 holding that the petitioners were not the tenants of the fields in question. On appeal by the petitioners, the order of the Naib Tahsildar was set

aside by the Special Deputy Collector by his order dated 18-2-1969 holding that the petitioners were the tenants. This order was then challenged by the respondent No. 1 before the Maharashtra Revenue Tribunal who by his order dated 17-6-1970 set aside the order of the Deputy Collector holding that the appeal before him was not competent and remanded the case to him with the observation that the order of the Naib Tahsildar could be revised under Section 110 of the Tenancy Act and left it to the Special Deputy Collector to consider whether the appeal memorandum could be treated as a revision application and if he should decide to treat the appeal memorandum as a revision petition, then to decide that revision on merits. In the view it took the Revenue Tribunal did not enter into the merits of the case. This order has been challenged by the petitioners who claim to be the tenants of the fields in question. It is their contention that in view of the amendment to S. 107 (1) of the Tenancy Act, an appeal against the order of the Naib Tahsildar to the Special Deputy Collector was competent since the cause of action for the appeal arose on 24-1-1967 and, therefore, the Revenue Tribunal should have decided the revision application in their favour on merits and ought not to have remanded the same to the Deputy Collector for considering whether the appeal memorandum should be treated as a revision application.

4. The Revenue Tribunal took the view that when the original application under Section 100 (2) was filed on 3-4-1961, an order under Section 100 (2) was not made appealable under Section 107 of the Tenancy Act. The Tribunal took the view that the right of appeal was a substantive right and came into existence on the date the litigation was introduced and since at that time no right of appeal was conferred, the appeal against the original order of the Naib Tahsildar before remand and the subsequent order of the Naib Tahsildar after remand, was not maintainable. It is contended by Mr. Kherdekar on behalf of the petitioners that a right of appeal would be available to a party against any order which has been passed after the date the right of appeal has been conferred by the Act. It is contended that the right of appeal was conferred with effect from 2-6-1966 whereas the order of the Naib Tahsildar was passed on 24-1-1967, i.e. after this amendment and, therefore, the order of the Naib Tahsildar dated 24-1-1967 was appealable before the Special Deputy Collector under Section 107 (1) (a-1) of the Tenancy Act. This Court in Special Civil Appln. No. 1096 of 1968 decided on 19-12-1969, Narayan v. M. R. T. (reported in 1970

Mah LJ Note No. 30) took the view that an appeal against an order under Section 100 of the Tenancy Act passed after 2-6-1966 on which the Cl. (a-1) in Section 107 was introduced by the amendment was maintainable. The Supreme Court in *Motiram v. Surajbhan*, (AIR 1960 SC 655) relying on its earlier decision in *Indira Sohanlal v. Custodian of Evacuee Property Delhi*, (AIR 1956 SC 77), held that where an amendment affects vested rights, the amendment would operate prospectively unless it is expressly made retrospective or its retrospective operation follows as a matter of necessary implication. Under the East Punjab Urban Rent Registration Act (3 of 1949), by S. 15 (4) finality was given to the appellate decision. By Act No. 29 of 1956, Section 15 was further amended by introducing Section 15 (5) giving a further right of revision against the order of the appellate authority thereby taking away the finality of the appellate decision under Section 15 (4). It was held that where the amending section had come into force at the time when the appellate authority decided the matter and when the appellate order was actually passed, the appellant could not claim the finality under the earlier provision and the revision petition against the order under the amended S. 15(5) was maintainable. It is, therefore, clear that the order dated 24-1-67 which was after the amendment came into effect was an appealable order. We are not in fact concerned with the order dt. 16-7-62 before remand in this case because, rightly or wrongly, the matter was still before the Naib Tahsildar on remand when the amendment to Section 107 was effected. Mr. Chendke the learned counsel for respondent No. 1 also did not contest this position for the purposes of this petition and an order passed after the date of the amendment could be appealable if otherwise an appeal is provided against such order.

5. The learned counsel for the respondent, however, contended that even under Cl. (a-1) of Section 107 (1) of the Tenancy Act, an order of the kind which has been passed in the present case by the Naib Tahsildar was not made appealable and, therefore, the decision of the Maharashtra Revenue Tribunal ought to be upheld. It is contended that what is made appealable by the aforesaid amendment is an order which is made under Section 6 of the Tenancy Act which deals with cases of deemed tenants only. It is urged that an order under S. 100 (2) is not made appealable and, therefore, the appeal is restricted only to a particular class of cases. According to him, this was a case not of a deemed tenant but of a contractual tenancy and against an order based on a case of contractual

tenancy no appeal has been provided in Section 107 (1) of the Tenancy Act even by way of an amendment. He then contends that it was the plea of the petitioners themselves that the petitioner No. 1 Pandhari, and earlier his father Ramji who is now dead, had cultivated the fields since 1955-56 continuously on the basis of the lease and further in the year 1959 also a lease deed was executed by the landlord in favour of the petitioner No. 1 for the joint family and the petitioner No. 1 had cultivated the suit fields on lease basis for the year 1959-60. He again reiterated in his statement dated 21-4-1966 before the Naib Tahsildar that he and his father Ramji were cultivating the suit fields since 1955 to 1960 continuously on lease basis and they were thus occupancy tenants of the suit fields and as such they were entitled to purchase the rights of the fields on this basis (pages 79 to 81 of the original record). Mr. Chendke contended that a right of appeal is a creature of statute, and, therefore, the provision granting a right of appeal which is a substantive right has to be construed strictly. In the first place, it is alleged that there is no order passed under Section 6 of the Tenancy Act which only states who would be deemed tenants. An order whether a person is a tenant or not is passed only under Section 100 (2) of the Tenancy Act by the Tahsildar whose duty it is to deal with that question and decide the dispute raised before him. It may be said that, strictly speaking, the order is not passed under Section 6 of the Tenancy Act, but the order is under Section 100 (2) which has to consider the ingredients of Sec. 6 for finding out whether a person is a tenant or not or whether a person should be deemed to be a tenant or not. Such an order, therefore, is one under S. 100 (2) read with Section 6 of the Tenancy Act and an order on the question whether a person shall be deemed to be a tenant or not could be said substantially falling within the provisions of Section 6 of the Tenancy Act and it is in this sense that it has been stated in Cl. (a-1) of S. 107 (1) that it is an order under Section 6. By mentioning Section 6 what is intended is to make an order which declares a person to be a tenant or not a tenant, appealable. It is, however, argued that even though it may be accepted that an order declaring a person to be a tenant or not a tenant could be said to fall under Section 6 of the Tenancy Act; still it is restricted only to those categories who can get a declaration of their being deemed tenants by virtue of their lawfully cultivating a land belonging to another person and could not cover cases where a person does not claim to be a deemed tenant but claims to be a contractual

tenant. "Tenant" is defined in S. 2 (32) of the Tenancy Act. "Tenant" means a person who holds land on lease and includes a person who is deemed to be a tenant under Sections 6, 7 and 8. In the first part, a person holding a land on a contract of lease is a tenant in fact and is a contractual lessee and to such a person the fiction in Section 6 (1) of the Tenancy Act is not applicable. Besides the contractual lessee, a person who is deemed to be a tenant under Sections 6, 7 or 8 is also included in the definition of the term "tenant." Besides, a person who is a protected lessee or an occupancy tenant is also included in the term "tenant." Thus, there are three categories of tenants under Section 2 (32) of the Tenancy Act: (1) a contractual lessee, (2) a deemed tenant and (3) a protected lessee or occupancy tenant. It is contended that when a specific reference is made to Section 6 only, a right of appeal is conferred only in cases where the dispute is whether a person is or is not deemed to be a tenant and an order in such a dispute is alone appealable. But where the dispute is whether a person is a tenant by virtue of a contract of lease an order arising out of such question is not made appealable by the aforesaid amendment.

6. This Act has been enacted after the Reorganisation of States making it applicable for the Vidarbha Region and bringing it on par with the Tenancy Act which was prevalent in the Western Maharashtra, viz., the Bombay Tenancy and Agricultural Lands Act, 1948. The definition of the word "tenant" in this Act has been taken from the Bombay Tenancy Act of 1948. Similarly, Section 6 of the Tenancy Act is also a replica of Section 4 of the Bombay Tenancy Act, 1948. In the Bombay Tenancy Act, 1948, an order under Section 4 thereof was made appealable by Section 74 of that Act. Unfortunately, such a provision was not made in the Tenancy Act (1958) — may be through some inadvertent omission — though all other similar orders have been made appealable, with the result that all orders which are passed under Section 70 of the Bombay Tenancy Act, 1948, including the order deciding whether a person is a tenant or not, were made appealable in the Western Maharashtra, whereas a similar order in the Vidarbha Region was not made appealable. This omission came to be noticed by the Legislature and was keenly felt and with a view to bring the Vidarbha Act on par with the Act prevailing in Western Maharashtra, so far as the rights of appeal are concerned, an amendment to Section 107 (1) of the Tenancy Act was proposed and was subsequently made by Maharashtra Act No. 17 of 1966

by adding Cl. (a-i) to Section 107 (1) and bringing it into effect from 2-6-1966. The reason for making this amendment has been stated in the statement of objects and reasons in these words:—

"It has been brought to the notice of Government that as Section 107 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 does not provide any appeal against an order of the Tahsildar deciding whether a person is a tenant or not, the affected party is left with no further remedy under the Act. The Bill is intended to provide an appeal to the Collector against such orders." The question that falls for consideration is whether this right of appeal which has been granted by virtue of this amendment is confined only to the orders arising out of proceedings where only questions of deemed tenancies are raised or it also covers all orders where the question of a person being a tenant or not, including a deemed tenant, is involved.

7. The provision of Cl. (a-i) of Section 107 (1) has to be read not only along with Section 6 but also S. 100 (2) of the Tenancy Act. Whether it is a dispute about the person being a contractual tenant or being a deemed tenant under Sections 6, 7 or 8 or his being a tenant on account of his being a protected lessee or occupancy tenant, such a question is required to be decided by the Tahsildar and Tahsildar alone under Section 100 (2) of the Tenancy Act.

8. Section 100 (2) of the Tenancy Act does not exclude the decisions on contractual tenancies. Previously no order of the Tahsildar under S. 100 (2) was made appealable. This omission was sought to be supplied by the amendment. The Legislature could not have intended that the right of appeal should be given only in cases where the question is about a person being a deemed tenant or a protected lessee or an occupancy tenant and no right should be given where the question is raised about a person being a contractual tenant or not. The Legislature must have intended to give a right of appeal against all orders passed by the Tahsildar under Section 100 (2) which should also cover cases of contractual tenancies. It may be noted that under the tenancy Act whenever a question is raised in a civil suit, which is required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues, then such issues have to be referred by the civil court to the competent authority for determination. In a civil suit a question might be raised that a person is either a tenant or not a tenant. Such question may relate not only to deemed tenants but also contractual tenants and all those questions are required to be referred for

the determination by the Tahsildar which it is the duty of the Tahsildar to decide under Section 100. If on such a reference a decision is given by the Tahsildar, whether it be in respect of a contractual tenancy or a deemed tenancy, an appeal has been provided against that order under Cl. (zb) of Section 107 (1) of the Tenancy Act. It seems inconceivable that an appeal could be provided in cases arising out of references decided by the same authority involving a question whether a person is a contractual tenant or not but there should be no appeal against an order under Section 100 (2) where a declaration is sought that a person is a tenant or not a tenant. In fact, even on a reference under Section 125 the Tahsildar acts under his powers under S. 100 (2). Both these kinds of order therefore are orders under Section 100 (2) and it could not be contemplated that these orders of a similar nature, though coming through different channels, should be treated differently by providing an appeal in one case and not providing in the other. The provisions should be construed reasonably and due effect to the intent of the Legislature should be given. The background in making the amendment has also to be taken into consideration. An appeal was already provided against an order of the Tahsildar in a proceeding which came to him on a reference from civil court under Section 126; but where proceedings were initiated directly before the Tahsildar under Section 100 (2), no appeal was provided, even though same matters were to be decided by him. A reference under Section 125 comprehended even the case of a contractual tenancy which could also be decided under Section 100 (2). It is but natural that orders under S. 100 (2) on direct application to the Tahsildar should also be made appealable and while making those orders appealable a further distinction could not be between matters arising on a reference under Section 125 and matters directly arising under Section 100. The Legislature could not have intended to make any such distinction for which there was no rhyme or reason. Construed in this light, it would be apparent that by providing an appeal by the newly introduced clause (a-i) appeals against the orders declaring a person to be a tenant or not a tenant, on whatever basis, were made appealable. If any guide is required to ascertain the reasons or the background which induced the Legislature to make this amendment, that could be found in the Statement of Objects and Reasons in the Bill which shows the reason for introducing this amendment. No distinction is made in introducing this amendment between a contractual tenant or a deemed tenant or any other kind of tenant and the right of appeal

was given in every case where the question of a person being a tenant or not a tenant was involved. Though it may not be permissible to use Statement of Objects and Reasons accompanying the Bill for determining the true meaning and effect of the substantive provisions of the statute, yet they can be used for the limited purpose of understanding the background and antecedent state of affairs leading up to the legislation. It has been so laid down in State of West Bengal v. Union of India, (AIR 1963 SC 1241), S. C. Prashar v. Vasantsen, (AIR 1963 SC 1356) and several other cases of the Supreme Court. In interpreting a statute the court cannot ignore its aim and object. It appears to me, therefore, that though the amendment is not very happily worded, it also embraces the right of appeal in a case where the question relates to a person being or not being a contractual tenant also as contemplated by the principal part of S. 2 (32).

9. In my view, even on the interpretation of the new Cl. (a-i) of Section 107 (1) an appeal against the order of the Naib Tahsildar in this case was competent and the Special Deputy Collector rightly entertained and decided the appeal. It was, therefore, not necessary for the Maharashtra Revenue Tribunal to set aside the order of the Special Deputy Collector on the ground that the appeal was not competent and to remand the matter to him for considering whether the appeal could be treated as a revision application under Section 110. Since the appeal before the Special Deputy Collector was competent, the Revenue Tribunal had to decide the revision application before it on merits which it refrained from doing in the view it took. Since I hold that the appeal before the Special Deputy Collector was competent, the revision application before the Maharashtra Revenue Tribunal has to be heard and decided on merits. The order of the Maharashtra Revenue Tribunal remanding the case to the Special Deputy Collector is, therefore, set aside and the case is remanded to the Maharashtra Revenue Tribunal who shall now hear the parties and decide the revision application in accordance with law.

10. The petition, therefore, succeeds and is allowed, but in the circumstances, I make no order as to costs.

Petition allowed.

AIR 1972 BOMBAY 128 (V 59 C 23)

(AT NAGPUR)

CHANDURKAR, J.

Shrikant Pundlikrao Ganorkar, Petitioner v. The Assistant Collector, Achalpur Tahsil Achalpur and District Amravati and another, Respondents.

Special Civil Application No. 331 of 1970, D/- 12-8-1971.

Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 98 (b) — Duties of Tribunal — The proper authority to decide the question whether in fact there is any surrender as contemplated by Section 49-A (5) and how the land so surrendered is to be dealt with is the Agricultural Lands Tribunal and not the Tahsildar — (X-Ref:— Section 20) — (X-Ref:— Section 21) — (X-Ref:— Section 49-A (5)) — (X-Ref:— Section 100).

(Para 4)

S. N. Kherdekar, for Petitioner; C. S. Dharmadhikari, Addl. Govt. Pleader, for Respondent No. 1.

ORDER:— This petition by the landlord arises out of an application purported to have been filed under Section 36 (2) read with Ss. 43 (14-A) and S. 49-A (5) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereinafter referred to as the Tenancy Act. This application came to be filed before the Tenancy Tahsildar, Achalpur. In this application the petitioner had alleged that he was the owner of Survey No. 3, area 35 acres 21 gunthas of Mouza Jamapatki, of taluq Achalpur, which was cultivated by respondent No. 2 Bankatsingh as a tenant. According to the petitioner, Bankatsingh had in his personal cultivation land more than three family holdings and the purchase of the land had thus become ineffective by the statutory provisions. He, therefore, prayed that the land in the possession of the tenant should be put in his possession. The tenant filed a reply admitting that besides field S. N. 3, he had his own cultivation to the extent of three family holdings. The Naib Tahsildar treated the application as one under Section 21 of the Tenancy Act and passed an order purporting to be one under Section 36 (3) of the Tenancy Act that the landlord should be put in possession of the whole field.

2. The Assistant Collector, Achalpur, exercised his revisional jurisdiction *quo motu* and came to the conclusion that the application which was filed on 26-12-1967 was barred having regard to the provisions of Section 36 (2) of the Tenancy Act as it was not made within two years from 1-4-1963 which was the date for statutory transfer of ownership under

Section 49-A of the Tenancy Act. He also held that since in respect of the holding of the tenant proceedings under the Ceiling Act were already pending, the Naib Tahsildar should have stayed the proceedings before him. He, therefore, set aside the order of the Naib Tahsildar. A revision application filed against this order before the Maharashtra Revenue Tribunal was rejected. The Tribunal took the view that the proper authority to deal with the question, whether the land was deemed to have been surrendered under Section 49-A (5) of the Tenancy Act, was the Agricultural Lands Tribunal and the Naib Tahsildar had no jurisdiction in entertaining an application under Section 36. An additional finding which the Tribunal gave was that assuming that the Naib Tahsildar had jurisdiction, the application was patently barred by limitation. The revision application thus came to be dismissed. These orders are challenged by the petitioner in this petition.

3. The learned counsel appearing on behalf of the petitioner contends that the application was in substance an application for enforcing the right which had accrued to the landlord by virtue of the statutory surrender which had come into effect by virtue of Section 49-A (5) of the Tenancy Act. But, according to him, since such a surrender as contemplated by Section 49-A (5) was to be treated as if it was a surrender under Section 20 and the provisions of sub-sections (1) and (2) of S. 21 applied to such a statutory surrender also, the jurisdiction to deal with a matter under Sections 20 and 21 of the Tenancy Act being with the Tahsildar, the application was rightly made to the Tahsildar and the Tahsildar had jurisdiction to pass an order for possession.

4. It is difficult to accept the argument that the Tahsildar had any jurisdiction to deal with the claim made by the landlord on the footing that there has been a statutory surrender under Section 49-A (5) of the Tenancy Act. Section 49-A (5) of the Tenancy Act provides that the land the ownership of which is not transferred under Section 49-A (1), shall be deemed to have been surrendered to the landlord, and thereupon the provisions of sub-ss. (1) and (2) of Section 21 and Chapter VII of the Act shall apply in relation to such land as if the land was surrendered by the tenant under Sec. 20. The scheme of Section 49-A indicates that it has to be determined as to in respect of which land held by the tenant ownership is transferred on 1st of April 1963 and then the question whether there is any land of which ownership is not transferred and is deemed to have been surrendered to

the landlord is to be determined. The question whether the landlord is entitled to retain the entire land so surrendered is also to be determined. The proceeding contemplated by Section 49-A with regard to the transfer of ownership and the consequent coming into being of the statutory surrender is a composite proceeding. No doubt, sub-section (5) provides that for the limited purpose of dealing with the land which will be statutorily surrendered, the provisions made in sub-sections (1) and (2) of S. 21 will apply, but merely because the manner in which the land with regard to which there is a statutory surrender has to be dealt with is indicated by sub-section (5) of S. 49-A with reference to the provisions of Sections 20 and 21, that does not ipso facto make the surrender as one under Section 20, but it is only deemed to be as if one under Section 20. The nature of the proceedings under Section 49-A (5) in which the land which the tenant is entitled to keep as an owner and the land which he must be deemed to have surrendered is not altered merely because the proceedings have to be determined with reference to the provisions of sub-sections (1) and (2) of S. 21. Section 100 which deals with the powers and duties of the Tahsildar does not make any reference to the matter under Section 49-A of the Tenancy Act. Under Cl. (b) of S. 98, it is the duty of the Agricultural Lands Tribunal to decide any dispute as to the particular area of land to be purchased under Sections 41, and 46 and 49-A. The statutory surrender is a consequence of certain land not being transferred to the tenant as a statutory purchaser and since this statutory surrender follows by way of a consequence, it is not possible to hold that separate proceedings should be initiated by the landlord for having an enquiry with regard to such a surrender to be made. The proper authority, therefore, to decide the question whether in fact there is any surrender as contemplated by Section 49-A (5) and how the land so surrendered is to be dealt with would be the Agricultural Lands Tribunal. There is thus no question in a proceeding under Section 49-A of a landlord being required to apply under Section 36 of the Tenancy Act and the application under Section 36 was wholly misconceived and made to an authority which had no jurisdiction to deal with the matter under Section 49-A. In this view of the matter, it is not necessary to decide the other contentions raised by the learned counsel for the petitioner. The finding given by the Tribunal that the proper authority to deal with the question of the statutory surrender was the Agricul-

tural Lands Tribunal thus cannot be interfered with.

5. The petition must, therefore, fail and is rejected, but in the circumstances, there will be no order as to costs.

Petition dismissed.

AIR 1972 BOMBAY 129 (V 59 C 24)

CHITALE AND NATHWANI, JJ.

Madhukar Ganpatrao Somvanshi, Petitioner v. Sheshrao Narayanrao Biradar and others, Opponents.

Special Civil Appln. No. 1879 of 1968, D/- 24-6-1970.

Maharashtra Co-operative Societies Act (24 of 1961), S. 91 — Scope of.

Elections cannot be held up by entertaining grievances arising prior to the declaration of the result of election; otherwise, it will put the public to inconvenience. AIR 1957 SC 694 & AIR 1952 SC 64 & Spl. Civ. Appln. No. 1069 of 1968, D/- 16-10-1968 (Bom), Rel. on.

(Para 8)

Hence wrong acceptance or rejection of a nomination paper can be challenged only after the result of election is declared. A bye-law is an agreement amongst the members of a society and if it defeats the principles of law relating to elections it is invalid and cannot give jurisdiction to Registrar to entertain such a dispute.

(Para 8)

Cases Referred: Chronological Paras

(1968) Spl. Civil Appln. No. 1069 of 1968, D/- 16-10-1968 (Bom)

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(1957) AIR 1957 SC 694 (V 44) = 13 Ele LR 112, Dr. Narayan Bhaskar Khare v. Election Commission of India

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(1952) AIR 1952 SC 64 (V 39) = 1952-3 SCR 218, N. P. Ponnuswamy v. Returning Officer, Namakkal Constituency

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P. B. Sawant, for Petitioner; B. R. Naik, Vikram Hipparkar and R. S. More, for Opponent No. 1.

CHITALE, J. :— The facts leading to this petition, briefly stated, are as follows: Nilanga Taluqa Co-operative Supervising Union, Nilanga, District Osmanabad, Opponent No. 6, is a Federal Co-operative Society, (hereinafter referred to as the "Federal Society"), deemed to have been registered under the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the Act). 124 Co-operative Societies are affiliated as members to the said Federal Society. The Managing Committee of the Federal Society consists of 8 members (including the Chairman), one of whom is nominat-

AP/BP/A372/72/HGP

ed by the Government, one is nominated by Osmanabad District Central Co-operative Bank and the other six are elected. The election to the Managing Committee of the Federal Society was scheduled to be held on 16th September 1967, nominations were to be submitted on or before 2-9-1967, scrutiny of the nomination papers was to be held on 4-9-1967, and after scrutiny the list of the candidates contesting the election was published on 8-9-1967. On 14-9-1967 i.e. two days prior to the date of the election, respondent No. 1 Sheshrao Narayanrao Biradar submitted an application to the District Deputy Registrar, Co-operative Department, Maharashtra State, contending that the procedure preceding the election was not properly followed. One of the grievances raised at the hearing was that although some of the member societies were disqualified, they were allowed to contest the election. This application was heard by the Registrar's nominee and by his order dated 15th April 1968 he granted respondent No. 1's application and rejected the nomination papers of the present petitioner Madhukar Ganpatrao Somvanshi and respondents Nos. 2 to 5. Against this decision, the present petitioner preferred appeal to Maharashtra State Co-operative Tribunal, Bombay. The Tribunal by its decision dated 11th September 1968 held that the dispute in question was not one contemplated by Section 91 of the Act, hence no appeal lay to the Tribunal. The Tribunal recorded no findings on merits. In view of the finding that no appeal lay, the appeal was dismissed. The present petition is preferred against this decision of the Tribunal.

2. Mr. Sawant, who appears for the petitioner, relies on the Supreme Court decision in *Dr. Narayan Bhaskar Khare v. Election Commission of India*, 13 Ele LR 112 = (AIR 1957 SC 694). Relying on this decision, it is urged that wrong rejection or acceptance of nomination papers cannot form the subject-matter of a dispute contemplated by Section 91 of the Act, if such a dispute is raised before the declaration of result of the election. The Supreme Court in that case observed that although Art. 71 (1) of the Constitution undoubtedly confers jurisdiction on the Supreme Court to inquire into and decide all doubts and disputes arising out of or in connection with the election of the President or Vice-President, the question for consideration before the Court was whether there was anything in the Constitution indicating the time or stage at which and the manner in which such doubts and disputes are to be inquired into and decided. The Supreme Court referred to Articles 327, 329 (b) and Section 80 of the

Representation of the People Act, 1951, and held: (P. 120).

"It is quite clear from the language of the section that any improper reception or refusal of a vote, or any non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under the Act or the improper acceptance or rejection of a nomination paper may be made a ground for challenging the election. This means that all doubts and disputes relating to any stage of the entire election process is to be canvassed by an election petition presented to this Court after the election in its wide sense is concluded.

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..... The well-recognised principle of election law, Indian and English, is that elections should not be held up and that the person aggrieved should not be permitted to ventilate his individual interest in derogation of the general interest of the people, which requires that elections should be gone through according to the time schedule. It is, therefore, in consonance both with the provisions of Art. 62 and with good sense to hold that the word "election" used in Art. 71 means the entire process of election."

3. It is obvious that the above Supreme Court decision clearly lays down that wrong acceptance or rejection of a nomination paper can be made a ground of attack only after the result of the election is declared, and not at any stage prior to that.

4. We may also refer to the decision of the Supreme Court in *N. P. Ponnuswamy v. Returning Officer, Namakkal Constituency*, (1952) 3 SCR 218 = (AIR 1952 SC 64). In that case the appellant's nomination paper was rejected by the Returning Officer. He applied to Madras High Court under Art. 226 of the Constitution. The Supreme Court confirmed the decision of Madras High Court that it had no jurisdiction to interfere at that stage in view of the provisions of Article 329 (b) of the Constitution and S. 80 of the Representation of the People Act. In this case, the Supreme Court rejected the contention that the remedy which merely allows a candidate to have an election set aside only after the election is held is not as efficacious as the one which would enable him to stop holding the election. The Supreme Court pointed out that there was another side of the question to be considered, viz. inconvenience to the public administration on account of elections and the administrative business being required to be held up while individuals prosecute their grievances. By this decision the Supreme Court held that questioning the rejection of a nomination paper is questioning the elec-

Hon. hence it could not be done prior to the declaration of results of an election in view of Art. 329 (b) of the Constitution and Section 80 of the Representation of the People Act.

5. In view of the above two decisions of the Supreme Court, it is clear that respondent No. 1's application in effect contending that the nomination papers of the petitioner and respondents Nos. 2 to 5 were wrongly accepted could not be entertained before the declaration of the results of the election. If so, it is urged by Mr. Sawant for the petitioner, the decision of the Registrar's nominee dated 15-4-1968 is without jurisdiction.

6. Dr. Naik, who appears on behalf of respondent No. 1, relies on bye-law 23(8) of the Federal Society and contends that even though the dispute in question may not be a dispute under Section 91, bye-law 23(8) is binding on all the members of the Federal Society, it provides an internal arrangement enabling the member aggrieved to challenge wrong rejection of nomination papers and such arrangement is binding on the members of the Federal Society, hence the decision of the Registrar's nominee is legal and valid. Strictly speaking, bye-law 23(8) does not apply to the facts of the present case, inasmuch as the grievance of respondent No. 1 was not that a nomination paper was wrongly rejected, but his grievance was just the converse of it viz. the nomination papers of some members were wrongly accepted. Thus on the wording of bye-law 23(8) itself, it is clear that the said bye-law does not empower the Registrar's nominee to decide the dispute raised by respondent No. 1. In the alternative, it is urged by Dr. Naik that if the dispute does not come within the scope of bye-law 23(8), it should be treated as a dispute falling under Section 91 of the Act and if so, the Registrar's nominee would have jurisdiction to decide the dispute. In view of the abovementioned Supreme Court decisions, we are unable to accept this contention of Dr. Naik.

7. We may also refer to an unreported decision of this Court in Special Civil Appln. No. 1069 of 1968 decided on 16-10-1968 (Bom). Patel, J., who delivered the judgment, points out that in view of the clear wording of Section 92 which provides a period of limitation for filing election disputes, an election dispute as contemplated by Section 91 could not be filed, nor entertained prior to the declaration of the result of the election. We agree with this view expressed in the said decision. Dr. Naik, however, relies on some of the observations in the said decision. The observations relied upon are:—

".....The Tribunal has rightly held that an appeal provided under the Election Rules of this Bank is as a matter of internal management of the Bank and by a rule it cannot call upon the Registrar or the Deputy Registrar either to treat an appeal as a dispute to which only the Returning Officer apparently is made a party."

8. We are unable to hold that these observations support Dr. Naik's contention. The other observations that follow clearly indicate that this Court held that a rule cannot be regarded as valid, if it elevates a matter which does not strictly fall within the scope of Section 91 of the Act to a dispute under that section. Dr. Naik contends that bye-law 23(8) provides an internal arrangement, the members of the Federal Society agreed to abide by that bye-law, thus that bye-law would be binding on the members, if so, the decision of the Registrar's nominee would be valid and binding on the members of the Federal Society, irrespective of the question whether the dispute falls under Section 91 of the Act or not, and whether an appeal lies to the Tribunal or not. In view of the principle laid down by the Supreme Court, which is mentioned above, we are unable to accept this contention. A bye-law like bye-law 23(8) in this case cannot be said to be a valid bye-law, inasmuch as if such a bye-law is allowed to work, it would give rise to conflict of decisions. Dr. Naik does not dispute that a candidate defeated at the election would be entitled to challenge the election after the declaration thereof on the ground of wrong acceptance or wrong rejection of nomination papers. Thus if the above contention of Dr. Naik is accepted as correct, the same question may be inquired into on two or more occasions by different authorities or tribunals and this may obviously give rise to conflicting decisions. Thus it is in our opinion clear that a bye-law that provides for a challenge to the procedure adopted regarding an election even before the declaration of the result of that election cannot be held to be a valid bye-law in view of the above decisions of the Supreme Court. In effect such a bye-law constitutes an agreement amongst the members of the Society which may defeat relevant provisions or principles of law relating to elections. As pointed out by the Supreme Court, it is very vital for the public administration that elections are held in time according to the schedule notified and they are not delayed on account of individual grievances of a candidate. We, therefore, hold that respondent No. 1's application dated 14-9-1967 was untenable and it was wrongly entertained by the Registrar's nominee.

9. We must mention here that Dr. Naik raised the objection that the only relief claimed in this petition is to have the decision of the Tribunal set aside, there is no prayer seeking the relief that the order passed by the Registrar's nominee on 15-4-1968 is without jurisdiction and respondent No. 1's application dated 14-9-1967 should be rejected holding the same to be untenable. This objection is technically correct although the necessary relief can be said to be implied in the prayer that the Tribunal's decision should be set aside. In order to obviate the technical difficulty, however, we allow the petitioner to amend the petition by adding the necessary prayer.

10. For reasons indicated above, we make the rule absolute and reject respondent No. 1's application dated 14-9-1967 challenging the acceptance of the nomination papers of the petitioner and respondents Nos. 2 to 5. Respondent No. 1 shall pay the petitioner's costs.

Rule made absolute.

AIR 1972 BOMBAY 132 (V 59 C 25)

MALVANKAR, J.

Raghunath Gopal Daftardar, Appellant v. Sau, Vijaya Raghunath Daftardar, Respondent.

A. F. A. D. No. 1088 of 1969, D/- 15-3-1971 against order of R. K. Joshi, Dist. J., Poona in Appeal No. 646 of 1967.

(A) Hindu Marriage Act (1955), Section 12 (1) (c) — Section 17 of Contract Act does not apply to a case of fraud under S. 12 (1) (c) — (X-Ref:— Contract Act (1872), S. 17).

The Contract Act does not apply to a marriage under the Hindu Marriage Act. Section 12 (1) (c) of the latter Act does not speak of fraud in any general way or of every misrepresentation or concealment which may be fraudulent. A person who freely consents to a solemnization of the marriage under the Hindu Marriage Act with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of fraudulent representation or concealment. Mere non-disclosure prior to marriage or concealment of curable epilepsy disease of girl and false representation that she was healthy does not amount to fraud within the meaning of that word used in Section 12 (1) (c). AIR 1959 Madh Pra 8, Dissented from. Case law discussed. (Paras 11 to 15)

(B) Hindu Marriage Act (1955), S. 12 (2) (a) (ii) — Bar to entertain petition for

annulment of marriage — When attracted.

The expression "the petitioner has, with his full consent, lived with the other party to the marriage as husband" in Section 12 (2) (a) (ii) emphasizes living as husband with full consent for whatever period it may be, provided the alleged fraud is condoned. The condition laid down in Section 12 (2) (a) (ii) does not depend upon the lapse of any time after the discovery of the alleged fraud. If the husband or the wife, as the case may be, after the fraud was discovered, lived together for whatever period as wife and husband with full consent, it would be sufficient for not entertaining the petition for annulling the marriage. AIR 1958 Bom 264, Distinguished. (Para 18)

Cases Referred: Chronological Paras

(1967) AIR 1967 Punj 172 (V 54) =

ILR (1966) 2 Punj 370, Surjit

Kumar v. Smt. Raj Kumari 13

(1964) AIR 1964 Punj 359 (V 51) =

66 Pun LR 204, Harbhajan Singh

v. Smt. Brij Balab Kaur 11, 13

(1959) AIR 1959 Cal 778 (V 46),

Anath Nath De v. Lajjabati

Devi 11, 13

(1959) AIR 1959 Madh Pra 8

(V 46) = 1958 Jab LJ 472, Bimla

Bai v. Shankerlal 14

(1958) AIR 1958 Bom 264 (V 45) =

59 Bom LR 1169, Rajani Prabhakar

Lokur v. Prabhakar Lokur 18

(1952) AIR 1952 Bom 486 (V 39) =

54 Bom LR 725, A. v. B. 11

(1937) AIR 1937 Mad 332 (V 24) =

1937-1 Mad LJ 192, Boodapatl

Ankamma v. Boodapatl Baman-

appa 11

(1936) AIR 1936 Bom 138 (V 23) =

38 Bom LR 77, Bai Appibai v.

v. Khimji Cooverjee 13

(1934) AIR 1934 Pat 670(1) (V 21)

= 16 Pat LT 162 (FB), Emmanuel

Singh v. Kamal Saraswati 13

M. V. Paranjape with Prakash S. Shah, for Appellant; R. W. Adik, for Respondent.

JUDGMENT:— This is a second appeal against the Judgment and decree passed by the learned District Judge, Poona, in Civil Appeal No. 646 of 1967 on his file from the decree in Marriage Petition No. 18 of 1963 of the Court of the Civil Judge (Senior Division), Poona. It arises this way.

2. The appellant-petitioner was married to the respondent at Poona on 30th March 1962 according to Hindu religious rites. The petitioner alleged that during the negotiations as well as at the time of the solemnization of the marriage the respondent and her parents not only concealed the fact that she was suffering from epilepsy since childhood but also

misrepresented to him and his father that she was quite healthy. Within a fortnight after the marriage which was consummated in the first week of April 1962, the respondent started getting epileptic fits. These fits recurred in the months of April, May and June at an interval of about a fortnight. The petitioner further alleged that in the first week of July 1962, he, for the first time, realised that the respondent was suffering from epilepsy which was an incurable disease and, therefore, he took her to the place of her elder sister Mrs. Deshpande in Poona and left her there on 6th July 1962. He also alleged that since after the discovery of this fraud on 2nd July 1962 till he took her to the house of her elder sister Mrs. Deshpande on 6th July 1962, he did not live with her as her husband. From 6th July 1962 the respondent never returned to his house. Alternatively, the petitioner alleged that within a short time after the marriage was consummated, the respondent started behaving in a queer way and also used to insult the petitioner and other members of his family. He, therefore, contended that having regard to the nature of the disease and the strange and unbecoming behaviour of the respondent, he reasonably apprehended that it would be harmful and injurious for him to live with her. He, therefore, prayed for a decree of nullity of the marriage on the ground of fraud, and in the alternative, a decree for judicial separation on the ground of cruelty.

3. The respondent contested the petitioner's claim vehemently. She denied the allegation of fraud and alleged that the fact that the respondent was suffering from epilepsy was brought to the notice of the petitioner's father and the petitioner during the negotiations. She denied that any fraud was practised on the petitioner and contended that he married her with free consent. She also alleged that soon after the marriage, the mother of her mother-in-law discovered a small white spot on her waist while giving her bath, whereupon the members of the family suspected that she was suffering from leucoderma, when in fact it was scar left of an insect-bite. The rest of the contentions in the written-statement are not material for our purpose.

4. On these pleadings, the learned trial Judge framed the necessary issues and on consideration of the evidence adduced by the parties, came to the conclusion that the petitioner had failed to prove that his consent was obtained by fraud or that the respondent was suffering from an incurable disease, and that, therefore, the petitioner was not entitled to a decree of nullity. As regards the alternative plea of the petitioner, the learned trial Judge found that the peti-

tioner had failed to prove the alleged cruelty and, therefore, dismissed his claim on that ground also. The petitioner then filed an appeal in the District Court, Poona. The learned District Judge found that the petitioner or his father was never told at any stage of the marriage either during the course of the negotiations or at the time of the solemnization that the respondent was suffering from epilepsy, that generally there might have been statements made by the parents and the relations of the respondent that she was healthy, that the respondent herself never told either the petitioner or any of his relations that she was healthy, that the type of epilepsy from which the respondent was suffering was not an incurable disease, that the alleged fraud was discovered by the petitioner on 26th June 1962 or at the most on 2nd July 1962, that thereafter till the respondent was taken by the petitioner to the house of the former's sister on 6th July 1962, both of them were living together as husband and wife with free consent of the petitioner, and that the non-disclosure of the disease of epilepsy either during the course of the negotiations or at the time of the solemnization and the alleged misrepresentation that the respondent was healthy did not amount to fraud in law, and that the petitioner had also failed to prove the alleged cruelty. The learned District Judge, therefore, confirmed the decree of the trial Court and dismissed the appeal with costs. Being aggrieved by this judgment and decree, the petitioner has come to this Court in second appeal.

5. On the arguments advanced before me, the first point that arises for consideration is whether the petitioner has been able to prove in this case that the type of epilepsy, from which the respondent is suffering, is an incurable epilepsy. The learned District Judge has recorded a finding against the petitioner on this point. The finding is based on appreciation of evidence and, therefore, ordinarily the appellant-petitioner is not entitled to ask this Court to go into the evidence again and come to its own finding. However, the learned counsel Mr. Paranjape, appearing on behalf of the appellant-petitioner, has argued that though the finding is a finding of fact, the learned Judge having misread the whole evidence, this Court may not accept it and at any rate, for finding out whether or not the learned Judge has misread the evidence, it would be necessary to consider the evidence again in this Court. The learned Counsel Mr. Paranjape, therefore, took me through the evidence on this point and I must say that on going through the evidence, I find that there is no reason why I should differ from the view taken by the learned District Judge.

6. The most important piece of evidence on this point is that of Dr. Sardesai, P. W. 5. The witness is an M. D. of the Bombay University and has also passed M. R. C. P. examination of the Edinburgh Royal College of Physicians. Since February 1959 he is attached to the Sassoon Hospital as an Honorary consulting physician. He is both a physician and neurologist practising as a consulting Physician at Poona since August 1960. He is also practising in Neurology since then. Admittedly, the respondent is being treated by this Doctor since about February 1961 for epilepsy. Now, he says that it would not be correct to say that the type of epilepsy the respondent is suffering from, is incurable. He has prescribed 'Dilantin Sodium' to the respondent for this disease and the Doctor says that he has prescribed it with a view to keep her malady under control. When he was asked whether it could be said that the respondent was cured of the disease, he replied that it would not be possible for him to say whether her epilepsy had been cured, because this could only be said if the drug is withdrawn. Later on, he has stated thus:—

"It would be wrong to say that epilepsy is a disease which cannot be cured. The latest publication on 'Therapeutics' by Goodman and Gillam is the standard book on the Science of Treatment. An older view which believed in the past was that epilepsy was incurable. It would not be correct to say and it is also not to my knowledge that at the present day, there are some authorities in medical science of treatment, who believe that epilepsy is incurable."

It is, therefore, quite clear from his evidence that the disease epilepsy is not an incurable disease. As regards the type of epilepsy from which the respondent is suffering, he has said that if the respondent ceased to get any epileptic fits for a period of three years, he would say that she is cured. He has also said that he was treating the respondent since February 1961 and he could find that for a period of about one year before her marriage, she did not get any epileptic fits. He further says that the drug which he prescribed has worked well. According to him, the respondent is receiving the treatment even today and the disease is well under control. Reliance is then placed on the testimony of Dr. Otturkar, P. W. 3. According to the petitioner the prescription, Ex. 179, dated 2nd June 1962, given by Dr. Sardesai to the respondent, was shown to Dr. Otturkar by his father, Dr. Otturkar being his close friend. Dr. Otturkar asked the petitioner's father whether the respondent was getting any fits and when the latter

told him that she was, looking to the prescription, he told the petitioner's father that she was being treated for epilepsy. However, Dr. Otturkar further said that he would get it confirmed from Dr. Sardesai. Now, Dr. Otturkar has given his version of the talk Dr. Sardesai had with him, in his evidence. This version is little different on the point, from the one given by Dr. Sardesai and to which I have already made a reference. Now, according to Dr. Otturkar, what Dr. Sardesai told him was that epilepsy was such a kind of disease which could not be cured but could only be controlled. Dr. Sardesai also told him that the disease could only be kept under control by regular treatment and if the treatment is discontinued, the patient would again start getting epileptic fits. But later on, he admits that Dr. Sardesai also said that the patients suffering from epilepsy were required to take medicines for a very long time and continue the same treatment for about three years after they cease getting any epileptic fits. Now, I have already pointed out that Dr. Sardesai, who was examined by the petitioner himself, nowhere says that epilepsy does not admit of any cure. On the contrary, he says that it is not an incurable disease. But Dr. Otturkar, perhaps to oblige the father of the petitioner, who is his friend, told the Court something different from what the opinion of Dr. Sardesai was. It is material to note that no question was put to Dr. Sardesai regarding the version given by Dr. Otturkar. Coming to the evidence of the petitioner, he says that he came to know from Dr. Otturkar that the disease was incurable and hereditary. There is nothing in the evidence of Dr. Otturkar to show that the disease is hereditary. He only says that what he came to know from Dr. Sardesai was that it was incurable. But I have already pointed out that that was never the opinion of Dr. Sardesai, much less he gave that opinion to Dr. Otturkar. The petitioner's father, who is also examined in this case (P. W. 1), repeats the same story. When the petitioner took the respondent to the house of the latter's sister on 6th July 1962, his father was not at home. He was on tour in Nagpur. He, therefore, contacted the petitioner on telephone and what he came to know from the petitioner was that the opinion of Dr. Sardesai was that the disease was incurable and hereditary. Thus the evidence adduced by the petitioner not only does not show that the disease is incurable, but on the contrary it shows that the disease of epilepsy can be cured.

7. Coming to the evidence of the respondent, she has said that for about a year before her marriage with the petitioner, she was not getting any epileptic

fits and that is precisely what Dr. Sardesai has told us in his evidence. It was suggested to her in her cross-examination that she was also told by Dr. Sardesai that the disease was incurable, but she has refuted the suggestion. Her father also says in his evidence (R. W. 2) that after the treatment of Dr. Sardesai was started, the respondent did not get any fits for about one year prior to her marriage. It is no doubt true that after the marriage which took place on 30th March 1962, the respondent had epileptic fits at least once or twice. But the evidence on the record shows that that was perhaps due to the mental worries from which the respondent suffered on account of the treatment given by the members of the petitioner's family to her and her relations. Considering, therefore, the evidence on the record and particularly the testimony of Dr. Sardesai, I have no hesitation in accepting the finding recorded by the learned Judge below on this point. I, therefore, find that the petitioner has failed to prove that the type of epilepsy the respondent is suffering from is an incurable disease.

8. Then the next question that is agitated before me is whether the consent of the petitioner to the marriage was obtained by fraud within the meaning of Section 12 (1) (c) of the Hindu Marriage Act, 1955. In this connection, the facts found by the learned Judge below and which are not in dispute before me in this appeal are that the respondent was suffering from epilepsy before her marriage, that the petitioner or his father at no stage was told that the respondent was suffering from epilepsy, that the relations of the respondent had made general statements that the respondent was healthy, but that the respondent herself never represented either to the petitioner or to his relations at any stage that she was healthy. These findings of facts recorded by the learned Judge show that the fact that the respondent was suffering from epilepsy was never disclosed either to the petitioner or to his father, and secondly, the petitioner and his father were told that she was healthy. The learned Counsel Mr. Paranjape has, therefore, argued that this is a case where truth was suppressed deliberately and false representation was made to the petitioner that she was healthy. He also argued that if the fact that the respondent was suffering from epilepsy was disclosed to the petitioner or to his father, he would never have consented to this marriage. That being so, the conduct on the part of the respondent and her relations amounts to fraud within the meaning of that word used in Section 12 (1) (c) of the Hindu Marriage Act, 1955.

9. In support of this argument, the learned Counsel Mr. Paranjape has relied upon Section 25 (iii) of the Special Marriage Act, 1954. It provides that any marriage solemnized under that Act shall be voidable and may, be annulled by a decree of nullity if the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872. Now, fraud is defined in Section 17 of the Indian Contract Act, 1872, which runs thus:—

"'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

"Explanation:— Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

The learned Counsel Mr. Paranjape argued that the word "Fraud" used in Section 12 (1) (c) of the Hindu Marriage Act, 1955, must also be understood in the sense in which it is defined in Section 17 of the Indian Contract Act, 1872. The question, therefore, is whether the provisions of Section 17 of the Indian Contract Act, 1872, apply to fraud as understood in Section 12 (1) (c) of the Hindu Marriage Act, 1955.

10. The difficulty arises because the word "fraud" is not defined in the Hindu Marriage Act, 1955. But in my opinion, the provisions of Section 17 of the Indian Contract Act cannot apply to fraud as understood in Section 12 (1) (c) of the Hindu Marriage Act. It is necessary to bear in mind that there is a difference between the marriage under the Special Marriage Act, 1954, and the marriage under the Hindu Marriage Act, 1955. The Special Marriage Act, 1954 provides a special form of marriage in certain cases. It is permissible to a Hindu, by virtue of this Act, to have his marriage with another Hindu or a person belonging to any other community solemnized in accordance with the requirements of the Act. The rights, obligations and status of the parties to such civil mar-

riage in matters relating to restitution of conjugal rights, judicial separation, nullity of marriage and divorce are regulated by the provisions contained in that Act. The succession to property of two Hindus married under that Act as also to the property of the issues of such marriage is governed by the relevant provisions of the Indian Succession Act, 1925, and not by the Hindu Law of succession. It is significant to notice that no ceremonies are necessary for the marriage being valid under that Act. Obviously, therefore, the marriage under the Special Marriage Act, 1954, is a contract. The position under the Hindu Marriage Act, 1955, however, is different. It is needless to say that marriage under the Hindu Law is treated as a *samskara* or a sacrament. The Hindu Marriage Act, 1955, contemplates a ceremonial marriage which must be solemnized in accordance with the customary rites and ceremonies of one of the two parties. Non-observance of the essential customary rites and ceremonies of at least one of the parties would amount to failure to solemnize the marriage. In other words, a marriage under the Hindu Marriage Act which is not solemnized by performance of the essential ceremonies is, under the Act, no marriage at all. It is true that the conditions laid down in Section 5 of the Hindu Marriage Act must also be fulfilled before a marriage under that Act is gone through. But the non-fulfilment of every one of the conditions and requirements enacted in Section 5 does not ipso facto render the marriage null and void or even voidable. It seems to me, therefore, that under the Hindu Marriage Act, the marriage which is a ceremonial marriage is essentially a sacrament (*Samskara*).

11. In this connection, I may refer to *Boodapati Ankamma v. Boodapati Bamanappa*, AIR 1937 Mad 332, in which Vardachariar, J. has observed at page 334 that a Hindu Marriage is a sacrament and not a civil contract and that it will not be permissible to apply to a Hindu marriage all the principles of the Law of Contract. Similarly, in *Harbhajan Singh v. Smt. Brij Balab Kaur*, AIR 1964 Punj 359, which is a case after the Hindu Marriage Act, 1955, came into force, the Punjab High Court has said that the word "fraud" is not used in Section 12 of the Hindu Marriage Act in a general way and on every misrepresentation or concealment, the marriage cannot be dissolved. If the term "fraud" is to be interpreted according to the definition given in the Indian Contract Act, then it would become impossible to maintain the sanctity of the marriage. All sorts of misrepresentations will be alleged by the petitioners in order to break the marriage tie. This obviously could not be the intention

of the legislature. In *Anath Nath De v. Lajjabati Devi*, AIR 1959 Cal 778 also, the case was under the Hindu Marriage Act, 1955, and S. Datta, J., who delivered the judgment, has observed at page 779 that the marriage according to Hindu law not being a contract, the consent at the stage of negotiations though obtained by fraud cannot affect the validity of the marriage. It is true that in that case no fraud was alleged at the time of the solemnization of the marriage and, therefore, the petitioner could not be granted any relief. But at the same time, the case was decided on the footing that even under the Hindu Marriage Act, the marriage is a sacrament and not a civil contract. My attention is also drawn to the provisions of Section 19 of the Indian Divorce Act, 1869. That section so far as it is relevant here, reads thus:—

"Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud." This Act also does not define fraud and, therefore, it is of no assistance to us in this case. But it is well settled under the Indian Divorce Act that fraudulent misrepresentation in inducing consent to marriage does not vitiate a marriage. I have not been pointed out any decided case under the Indian Divorce Act, 1869, which lays down that non-disclosure or concealment of a fact and/or misrepresentation of a fact amounts to fraud. It seems to me, therefore, that even under the Indian Divorce Act, 1869, the definition of 'fraud' given in Section 17 of the Indian Contract Act does not appear to apply. It is true that this High Court has held in *A. v. B.*, 54 Bom LR 725 = (AIR 1952 Bom 486) that a Hindu marriage is also a civil contract. But at the same time, the learned Judge (Tendolkar, J.) has held in that case that a Hindu marriage is also a sacrament. The Hindu Marriage Act, 1955, does not depart from this position, under the Hindu Law. I am, therefore, of the opinion that Section 17 of the Indian Contract Act, 1872, does not apply to a case of fraud under Section 12 (1) (c) of the Hindu Marriage Act, 1955.

12. The question still remains what then is the meaning of the word "fraud". D. Tolstoy on the Law and Practice of Divorce, 6th edition, has expressed thus at page 112:—

"The test in all cases is whether there is real consent, not only to marry, but also to marry the particular person. But provided such consent exists, it is immaterial whether it is induced by a fraudulent misrepresentation." Similarly, Rayden on Divorce, 10th edi-

tion, at page 98, says that "fraudulent misrepresentation, or concealment, does not affect the validity of a marriage to which the parties freely consented with a knowledge of the nature of the contract. But if a person is induced to go through a ceremony of marriage by threats or duress, or in a state of intoxication, without any real consent to the marriage, it is invalid. In all cases, the test of validity is real consent to the marriage." Latey on Divorce, 14th edition, at p. 19, also observes that "misrepresentation or concealment of facts which if known to one of the parties might have prevented his or her marriage does not invalidate a marriage, providing that there were free consent." Coming to the authors on Hindu Law, Derrett in his Introduction to Modern Hindu Law, 1963 Edition, at page 193, says thus:—

"If in fact the marriage would have been agreed to even had the facts been known, it seems that the marriage cannot be annulled, nor, it seems, in even stronger cases where full disclosures would have prevented the marriage; for fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage in question." Similarly, in Mulla's Hindu Law, 13th edition, at page 682, we have these observations:—

"A person who freely consents to a solemnization of the marriage with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot raise an objection to the validity of the marriage on the ground of any fraudulent representation or concealment. The test to be applied is whether there was any real consent to the solemnization of the marriage."

It would thus be seen that the word "fraud" used in Section 12 (1) (c) of the Hindu Marriage Act does not speak of fraud in any general way, nor does it mean every misrepresentation or concealment which may be fraudulent. If the consent given by the parties is a real consent to the solemnization of the marriage, the same cannot be avoided on the ground of fraud. The marriage, therefore, solemnized under the Hindu Marriage Act cannot be avoided by showing that the petitioner was induced to marry the respondent by fraudulent statements relating to her health.

13. Turning to the decided cases on the point, I first propose to refer to the cases decided before the Hindu Marriage Act, 1955, came into force. In *Emmanuel Singh v. Kamal Saraswati*,

AIR 1934 Pat 670 (1) (FB), which was a case under the Indian Divorce Act, the Patna High Court held that the fact that the marriage was induced by some sort of fraud is no ground for divorce under the Indian Divorce Act. In *Bai Appibal v. Khimji Cooverji*, 38 Bom LR 77 = (AIR 1936 Bom 138) this High Court has held that a fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consent with knowledge of its nature and with the clear and distinct intention of entering into the marriage, unless one of the spouses is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without any real consent to the marriage. That was a case where the plaintiff who was a Naikin or a dancing girl by profession, and was in the keeping of several persons as mistress from time to time, was married to the defendant. The defendant contended that the marriage was null and void and of no legal effect because of certain representations made to him by the plaintiff or on her behalf and with her consent, which according to him were false. The representation were that the plaintiff was the widow of one Ramchandra Kamat, that she was a Brahmin by caste, that she was a person of good character, and that she was willing to live with the defendant at Ujjain. The defendant also alleged in that case that the plaintiff suppressed from him the fact that she was a Naikin by profession, and the fact of her having been in the keeping of more than one person prior to her meeting the defendant in Bombay. Even then, this Court held that such a fraudulent misrepresentation or concealment did not affect the validity of the marriage. Coming to the cases decided after the Hindu Marriage Act, 1955, came into force, in AIR 1959 Cal 778, the allegations of the husband was that during the course of the negotiations of the marriage, the respondents represented to him that the wife Lajjabati Devi was of sound health and was not suffering from any disease. However after the marriage it was discovered that she was suffering from Tuberculosis from some time before the marriage was gone through. Though this case was decided also on the point that there was no allegation in the plaint that the alleged fraud was perpetrated at the time of the solemnization of the marriage, the Calcutta High Court observed that the marriage, according to Hindu Law, not being a contract, the consent at the first stage though obtained by fraud cannot affect the validity of the marriage. In AIR 1964 Punj 359, the allegation was that the respondent was of bad character

before the solemnization of the marriage. The petitioner alleged in that case that the negotiations for his marriage with the respondent took place between him and his father on the one hand, and the father of the respondent on the other, in the month of February 1955 at Jullundur, and the respondent's father assured him that she was a virgin. He was further assured that the character of the respondent was unblemished. On this assurance, his consent for the marriage was obtained by the respondent. The Punjab High Court held that the fact that the respondent was of bad character before the solemnization of the marriage could not be a ground for the annulment of the marriage, because fraud as a ground for the annulment of the marriage under the Hindu Law is limited only to those cases where the consent of the petitioner at the solemnization of the marriage was obtained by some sort of deception. It is not used in a general way and on every misrepresentation or concealment, the marriage cannot be dissolved. In that case, the Punjab High Court also found that because there was a specific Cl. (d) of Section 12 (1) dealing with such a matter, it indicated that the Legislature did not intend that the past conduct of the respondent, except what is mentioned in Cl. (d), should become a ground for the dissolution of the marriage. Similarly, in *Surjit Kumar v. Smt. Raj Kumari*, AIR 1967 Punj 172, the allegation was that the girl had an unchaste career and this fact was not disclosed to the husband. On the contrary, it was generally represented to him that the girl was good. The Punjab High Court held that a general observation by the relation of the girl at the time of engagement to the effect that the girl was good did not amount to obtaining consent of the husband by force or fraud within the meaning of Section 12 (1) (c) of the Hindu Marriage Act. They were not obliged to disclose to the husband or his relations, without any enquiry from them about the old unchastity of the girl, even if it was known to them. Merely keeping quiet about such past history would not amount to obtaining the consent of the husband to marriage by fraud. If the husband attached so much value to the past unchastity of his would-be wife, he should have made enquiries on his own or from the girl's relations at the time of the negotiation of the marriage. It is only then he should be able to show that though the relations of the girl were aware of her past unchastity, they misled him. In this case, Rattigan on Divorce was relied upon by the learned Judge and is quoted at page 173. It is in these words:—

"Generally speaking, concealment or deception by one of the parties in re-

spect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves by acquaintance and satisfactory enquiry before entering into a contract of the first importance to themselves and to society, in general"

These decisions, therefore, before and after the Hindu Marriage Act, 1955, came into force, definitely show that the Indian Contract Act, 1872, does not apply to the marriage under the Hindu Marriage Act, 1955, and that the word "fraud" used in Section 12 (1) (c) of the Hindu Marriage Act does not mean any fraudulent representation or concealment. The test to be applied is whether there is any real consent to the solemnization of the marriage.

14. The learned Counsel Mr. Paranjape has, however, relied upon *Bimla Bai v. Shankerlal*, AIR 1959 Madh Pra 8. In that case, the alleged fraudulent misrepresentation was that the father of the bridegroom, who was his illegitimate son, represented that the bridegroom was his son meaning thereby a legitimate son. The Madhya Pradesh High Court held that there was misrepresentation which amounted to fraud and consequently the marriage which was induced by it was liable to be set aside. With respect, I am unable to agree with this view. In the first place, if the parties freely consented with knowledge of the nature of the marriage and with clear and distinct intention of entering into the marriage, the non-disclosure or concealment of caste would not amount to fraud. Moreover, in my opinion, on general considerations of public policy, misrepresentation as to caste should not be held fatal to a marriage under the Hindu Law, much more so when the marriage is under the Hindu Marriage Act, 1955, which applies to any person who is a Hindu as defined under Section 2 of that Act.

15. I am, therefore, of the opinion, that the Indian Contract Act, 1872, does not apply to a marriage under the Hindu Marriage Act, 1955. Section 12 (1) (c) of the Hindu Marriage Act does not speak of fraud in any general way or of every misrepresentation or concealment which may be fraudulent. A person who freely consents to a solemnization of the marriage under the Hindu Marriage Act with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of fraudulent representation or concealment. Moreover, in the present case, the fraud alleged is non-disclosure or concealment of epilepsy from which the respondent

was suffering since before her marriage, and false representation that she was healthy. I have found that the type of epilepsy she was suffering from is curable. I am also, therefore, of the opinion that non-disclosure or concealment of such curable epilepsy and false representation that the respondent was healthy does not amount to fraud within the meaning of that word used in Section 12 (1) (c) of the Hindu Marriage Act, 1955. The petitioner, therefore, has failed to prove that his consent was obtained by the respondent or her relations by fraud.

16. In this view of the case, it is unnecessary to go into the questions whether fraud was discovered on 26th June 1962 or on 2nd July 1962 or thereabout and further whether after the discovery of the alleged fraud, the petitioner with full consent lived with the respondent as her husband. However, both these questions being argued before me, I would briefly discuss them.

17. As regards the discovery of the fraud, the petitioner has said in his evidence that Dr. Otturkar told his father on 26th June 1962 that the respondent was suffering from epilepsy. Dr. Otturkar gave this opinion because the petitioner's father approached him with the prescription, Ex. 179, given by Dr. Sardesai. However, Dr. Otturkar also told the petitioner's father that he would get the opinion confirmed by Dr. Sardesai who was treating the respondent. The evidence of Dr. Otturkar shows that two or three days thereafter, that is to say, on or about 28th or 29th June 1962, Dr. Otturkar discussed the illness of the respondent with Dr. Sardesai, and the latter told him that the respondent was suffering from epilepsy since before her marriage. 2 or 3 days thereafter, Dr. Otturkar met the petitioner and his father in the latter's shop where he reported to them what Dr. Sardesai told him about the illness of the respondent. Thus, according to the petitioner, he discovered the alleged fraud on 1st or 2nd July 1962 when he came to know from Dr. Otturkar that the respondent was suffering from epilepsy since before her marriage. It is contended on behalf of the respondent that in fact the alleged fraud was discovered by the petitioner on 26th June 1962 when Dr. Otturkar went through the prescription, Ex. 179, issued by Dr. Sardesai, and on receiving the information from the petitioner's father that the respondent was getting fits since after the marriage, Dr. Otturkar told the petitioner and his father that it was a case of epilepsy. In my opinion, what was discovered by the petitioner on 26th June 1962 was that the respondent was suffering from epilepsy. Before Dr. Otturkar

discussed the illness of the respondent with Dr. Sardesai and learnt from him that the respondent was suffering from epilepsy since before her marriage, there could be no discovery of fraud, because the fraud alleged is that the fact that the respondent was suffering from epilepsy even before her marriage with the petitioner was concealed from the petitioner and his relations at the time of the marriage. Obviously, therefore, the petitioner could come to know that the respondent was suffering from epilepsy since before her marriage only after Dr. Otturkar had a talk about it with Dr. Sardesai and reported the talk to the petitioner and his father on 1st or 2nd July 1962. In my opinion, therefore, the fraud was discovered on 1st or 2nd July 1962 and not on 26th June 1962. The petitioner has also stated in his evidence that he discovered the fraud on 2nd July 1962 after Dr. Otturkar reported the talk he had with Dr. Sardesai to him and his father, which he did on 1st or 2nd July 1962.

18. The question then arises whether after the fraud was discovered on 1st or 2nd July 1962, the petitioner lived with the respondent as her husband with free consent. In this connection, the learned Counsel Mr. Paranjape has drawn my attention to the evidence of the petitioner, where he has said that immediately after he came to know from Dr. Otturkar that the respondent was suffering from epilepsy since before her marriage, he straightway went home and on the very day told her to leave his house. The petitioner wants us to believe that at that time the respondent threatened him. But at the same time, he also says that she kept quiet. He further says that on that day he developed hate and aversion towards the respondent. Further, according to the petitioner, on the very day, that is to say, on 2nd July 1962, he also wrote a letter to the respondent's father accusing him of this fraud. The learned Counsel Mr. Paranjape says this letter is deliberately kept back by the respondent. It seems to me, however, that such a letter was never written by the petitioner to the respondent's father. In the first place, he could have retained a copy thereof as he retained the copy of the telegram which he sent to the respondent's father on 6th July 1962 immediately after he left the respondent at the house of the latter's sister. Secondly, we have on the record a very strong letter written by the respondent's father to the petitioner on 4th July 1962 (Vide Ex. 142). If the petitioner had written any letter on 2nd July 1962, surely the respondent's father would have received it on 4th July 1962. In fact, the grievance

of the respondent's father in the letter, Ex. 142, is that he had written so many letters to the petitioner, but he did not give reply even to a single letter. The question, therefore, is whether the petitioner's evidence that he developed hatred and aversion towards the respondent since 1st or 2nd July 1962, and therefore, he did not live with the respondent as her husband with free consent, can be accepted. It is in evidence that since after the marriage the petitioner and the respondent were allotted a separate room in the house. Presumably, both of them used to sleep in that room even after 2nd July 1962. At any rate, the petitioner nowhere says that since 2nd July 1962 he and the respondent started sleeping separately in the same house and not in the same room. Thirdly, the evidence on the record definitely shows, and I agree with the learned Judge, that the petitioner took the respondent to the house of her sister on 6th July 1962 and left her there not because there was any discovery of the alleged fraud, but because the letter, Ex. 142, upset the petitioner. Now, a perusal of the letter would show that any young man in place of the petitioner would get exasperated on receipt of such a letter. Fourthly, it is significant that even the notice, Ex. 137, given by the petitioner to the respondent through his Advocate, shows that the grievance of the petitioner was that the respondent left him and was not prepared to live with him. Lastly, the respondent has said in her evidence that till 6th July 1962 the petitioner had sexual relations with her. It is true that the petitioner has denied this in his evidence and has alleged that since 2nd July 1962 he had no sexual relations with the respondent. However, considering all the facts and circumstances in this case, I am of the opinion that even after the discovery of the alleged fraud on 2nd July 1962, the petitioner lived with the respondent as her husband with full consent. I have no doubt in my mind that if the petitioner had not received the letter, Ex. 142, from the respondent's father, he would not have taken her to the house of her sister and would have continued to live with her as her husband, even though she was suffering from epilepsy. In this connection, the learned Counsel Mr. Paranjape, relying on *Rajani Prabhakar Lokur v. Prabhakar Lokur*, 59 Bom LR 1169, at p. 1172 = (AIR 1958 Bom 264) has argued that "living as husband" within the meaning of that expression used in Section 12 (2) (a) (ii) of the Hindu Marriage Act, means living continuously for an appreciable period. He points out that the expression "living in adultery" is interpreted

in the above case meaning a continuous course of adulterous life as distinguished from one or two lapses from virtue. I cannot agree. In the first place, the expression which the learned Judge were interpreting in the above case was "living in adultery", while the expression used in Section 12 (2) (a) (ii) is "the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife." The observations, therefore, in the aforesaid case are of no assistance to us. It seems to me that the expression "the petitioner has, with his full consent, lived with the other party to the marriage as husband" emphasizes living as husband with full consent for whatever period it may be, provided the alleged fraud is condoned. If the husband or the wife as the case may be, overlooks the alleged fraud and condones it, with the result that there is a reconciliation, whatever may be the period, the petitioner can be said to have lived with full consent with the other party to the marriage as husband or wife as the case may be. In other words, the condition laid down in Section 12 (2) (a) (ii) of the Hindu Marriage Act does not depend upon the lapse of any time after the discovery of the alleged fraud. In fact, if the fraud is condoned and there is a reconciliation, such a reconciliation may be called with full consent. If the evidence shows that the husband or the wife, as the case may be, after the fraud was discovered, lived together for whatever period as wife and husband with full consent, it would be sufficient for not entertaining the petition for annulling the marriage. I am, therefore, of the opinion that on this ground also, the petition was rightly dismissed by the lower Courts.

19. The learned Counsel Mr. Paranjape also referred to the petitioner's claim for judicial separation on the ground of alleged cruelty. Now, in the first place, in the original petition, the ground of cruelty was not taken by the petitioner. Even after the amendment by Ex. 101, what the petitioner alleged was that he was treated by the respondent with such cruelty as to cause a reasonable apprehension in his mind that it would be harmful or injurious for the petitioner to live with her. He did not allege in the petition any fact regarding the nature of the cruelty and how he could say that the respondent treated him with any such cruelty. Even in the lower appellate Court, the learned Judge has observed that this ground was not seriously pressed and rightly so, because there is absolutely no evidence in this case to prove any cruelty as required by Section 10 (1) (b) of the Hindu Marriage Act. The learned Counsel Mr.

Paranjape has argued that the fact that the respondent was suffering from epilepsy was sufficient to say that the petitioner was suffering from tremendous mental pain because of the illness of the respondent. Now, in every case when a wife suffers from any serious illness, the husband goes through mental agony, but can it be said that therefore the ailing wife treats her husband with cruelty within the meaning of that word used in Section 10 (1) (b) of the Act? The learned Counsel also pointed out that the allegations made by the father of the respondent in the letter, Ex. 142, also added to this cruelty. Now, I have already pointed out that the petitioner received the letter on 6th July 1962 and on the very day, he took the respondent to the house of her sister and left her there. It is, therefore, impossible to hold that the letter, Ex. 142, also added to the alleged cruelty. In fact, the requirement of Section 10 (1) (b) is that the treatment given by husband or wife as the case may be, to the other party must amount to cruelty, and there is no evidence in this case that the respondent had treated the petitioner with such cruelty, much less can it be said that it caused a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for him to live with her. I, therefore, do not see any substance in this case either.

20. The result, therefore, is that the decree passed by the lower Court is confirmed and the appeal is dismissed. The appellant-petitioner to pay the costs of this appeal to the respondent and bear his own.

Appeal dismissed.

AIR 1972 BOMBAY 141 (V 59 C 26)

APTE, J.

Jambu Anna and others, Appellants
v. Shri Bapu and others, Respondents.

A. F. A. D. No. 143 of 1962, (with Second Appeal No. 336 of 1962), D/- 17-6-1970, from decision of K. R. Powar, Asst. J., at Kolhapur in Appeal No. 586 of 1959.

(A) Civil P. C. (1908), Section 11 — Res judicata — Applicability to execution proceedings.

The section and its explanations do not apply to execution proceedings but the general principles of res judicata embodied in the section are applicable to execution proceedings. (1884) ILR 6 All 269 (PC) and AIR 1953 SC 65, Rel. on. (Para 11)

(B) Civil P. C. (1908), Section 11 Explanation IV — Execution application — Defence of limitation not raised — Grant of relief — Implied decision — Whether res judicata in subsequent execution proceedings.

When to an execution application the judgment-debtor does not raise a defence of bar of limitation and the executing court grants relief as prayed, it amounts to a decision by executing court that the application is not barred by limitation. That decision becomes binding on the judgment-debtor and operates as res judicata in subsequent execution proceedings and the judgment-debtor cannot plead in those proceedings that the previous application was barred by limitation and could not operate as a step-in-aid. AIR 1936 All 21 (FB), Referred.

(Paras 11, 15)

Cases Referred: Chronological Paras

(1953) AIR 1953 SC 65 (V 40) =

1953 SCR 377, Mohanlal Goenka

v. Benoy Krishna Mukherjee

11

(1936) AIR 1936 All 21 (V 23) =

ILR 58 All 313 (FB), Gendalal

v. Hazari Lal

12

(1884) ILR 6 All 269=11 Ind App

37 (PC), Ram Kirpal v. Rupkuari

11

P. J. Vaidya for Dr. B. R. Naik, for Appellants. (In both); N. S. Shrikhande, for Respondents Nos. 1 to 3 (In both).

JUDGMENT:— These two companion appeals raise a short point as to whether objection to the execution taken by the respondent-judgment-debtor on the ground of limitation is barred by constructive res judicata.

2. Although the decree-holders in these two cases are different, the Respondent-Judgment-debtor is common to both. The facts on which the above question arises are almost similar. It would be enough therefore, if the facts in the case in which Second Appeal No. 147 of 1962 arises are stated. They are as follows:—

3. A money decree was obtained by the appellant against the respondent on 31-7-1939. The decree made the decretal amount payable by annual instalments and it contained a default clause to the effect that in default of payment of any two instalments, the entire balance due under the decree would be payable at once. The judgment-debtor having committed default in payment of the very first two instalments, the decree-holder filed an application for execution within three years from the date of default to realise the entire decretal amount. That darkhast was infructuous and was disposed of on 12-10-1943. A second darkhast which was filed by the decree-holder on 13-10-1944 also came to be disposed of on

6-4-1945 without any success. In the other case the first darkhast which was filed on 24-1-1952 (sic) by the decree-holder was disposed of on 27-3-1945 as being infructuous. In the meantime the Bombay Agricultural Debtors Relief Act having come into force on 1-5-1945, the decree-holders made an application on 31-10-1945 to the Special Court established under that Act for adjustment of the decretal debt, provided the judgment-debtor was found to be an agriculturist within the meaning of that Act. In both the cases that application was disposed of on 27-2-1954 on the ground that the judgment-debtor was not an agriculturist. Thereafter the decree-holder filed a fresh darkhast on 6-9-1956 in the Civil Judge's Court at Kurandwad for realisation of the decretal debt by arrest and detention of the judgment-debtor in civil prison. It may be mentioned here that under Section 52 of the B. A. D. R. Act, the period during which a proceeding under that Act was pending, has to be excluded in computing the period of limitation prescribed for any suit or proceeding. Excluding, therefore, the period from 31-10-1945 to 27-2-1954 (inclusive of both days) during which the B. A. D. R. proceeding was pending, obviously this darkhast was filed beyond three years from 6-4-1945 on which date the last darkhast was disposed of by the Civil Court and was, therefore, barred by limitation under Article 182 of the Limitation Act, 1908.

4. A notice under O. 21, R. 37, Civil Procedure Code was issued to the judgment-debtor in this darkhast to show cause against his detention in civil prison. He raised certain contentions such as that his ordinary place of residence was within the jurisdiction of the Civil Court at Ichalkaranji, and hence the Kurundwad Court had no jurisdiction to execute the decree against him. It may, however, be mentioned here that contention that this darkhast was barred by limitation was not raised by the judgment-debtor. After hearing both sides, the executing court ultimately made an order to issue warrant of arrest against the respondent. It, however, appears that thereafter the decree-holder having informed the court that he did not wish to prosecute the darkhast further, it came to be disposed of on 26-11-1957.

5. The decree-holder thereafter got the decree transferred for execution to the Court of Civil Judge (Junior Division) at Ichalkaranji and on 3-4-1958 filed a fresh darkhast which has given rise to this appeal seeking to realise the decretal amount by attachment and sale of the property of the Judgment-debtor.

6. The Judgment-debtor in response to the notice under Order XXI,

Rule 22, Code of Civil Procedure, *inter alia*, contended that the execution was barred by limitation. In this respect his specific contention was that the previous darkhast which was filed after the disposal of the B. A. D. R. proceeding, having been filed beyond three years after the date of the disposal of the darkhast filed prior to the initiation of the B. A. D. R. proceeding, the first mentioned execution application was barred by limitation, and consequently, it could not be treated as a step-in-aid of execution and therefore, the present darkhast was also barred by limitation.

7. On behalf of the decree-holder, it was contended that this contention not having been raised in the previous darkhast, the same was barred by constructive *res judicata* in the present darkhast proceeding.

8. Both the courts below having upheld the contention of the judgment-debtor, the decree-holder in each case has preferred these second appeal.

9. It was urged on behalf of the appellants that both the Courts below were in error in holding that the judgment-debtor's plea on the point of limitation was not barred by constructive *res judicata*. The only question that, therefore, arises in this appeal is whether the objection to execution raised by the judgment-debtor on the ground that the previous darkhast application which was filed immediately before the filing of the present execution application is barred by constructive *res judicata*.

10. Section 11 along with its explanations embodies the doctrine of *res judicata*. It provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been, subsequently raised, and has been heard and finally decided by such court. Out of the six different explanations which have been appended to this section, only explanation IV is material. Under that explanation any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. In other words, under this explanation even if a particular matter was not raised in the pleadings by the parties in the former suit, still it would operate as *res judicata* in the subsequent suit provided such matter ought to have been made ground of defence or attack in such former suit.

11. From the language of the above provision, it cannot be disputed that this section and its explanations do not in terms, apply to execution proceedings. It is however, well settled that the general principles of *res judicata* as embodied in this section are applicable to execution proceedings as well. In *Ram Kirpal v. Rupkuari*, (1884) ILR 6 All 269 (PC), it was pointed out that Section 11 of the Civil Procedure Code is not exhaustive and that the principle of *res judicata* still remains apart from the limited provision of the Code. Prior to that decision courts in India generally held that Section 13 of the Code of 1882 (Corresponding with the present section) was not applicable to execution proceedings. The Judicial Committee, however, in the above decision held that though the section in terms did not apply to execution proceedings, the principle of *res judicata* did apply to such proceedings. Subsequently, the Supreme Court has also in "*Mohanlal Goenka v. Benoy Kishna Mukherjee*, (AIR 1953 SC 65) held that the principle of constructive *res judicata* is applicable to execution proceedings as well. In view of these decisions, Mr. Shrikhande, the learned Advocate for the respondent-Judgment-debtor conceded this position, and he also conceded that the doctrine of constructive *res judicata* would even extend to a question of limitation. He, however, argued that this principle of constructive *res judicata* cannot be extended to a case where under the provisions of law an obligation is cast on the Court to dismiss a proceeding which is instituted before it after the prescribed period of limitation even though limitation has not been set up as a defence by the other side. In this connection Mr. Shrikhande referred to Section 3 of the Limitation Act, 1908, which governs to the present case inasmuch as this proceeding was started when that Act was in force. That section provides that subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed although limitation has not been set up as a defence. According to Mr. Shrikhande, even though the judgment-debtor did not plead bar of limitation in the previous darkhast, the executing Court, before which that darkhast was filed, was bound to examine whether the darkhast was filed beyond the period of limitation prescribed under Article 182 of the Limitation Act, and if on examination it was found that it was filed beyond three years from the date on which the previous darkhast application was disposed of, the Court was bound to dismiss it. It was,

therefore, submitted by Mr. Shrikhande that in this case even if the judgment-debtor did not raise the plea of limitation, the previous execution application having been on the face of it filed after the expiry of three years from the date of disposal of the execution application filed next before it could not be treated as a step-in-aid. Admittedly, in the previous darkhast application, notice was issued to the judgment-debtor before any order was passed in the proceedings. In response to that notice, the judgment-debtor appeared and did file his contentions and did raise certain contentions. He, however, did not plead bar of limitation. Now, even if under Section 3 of the Limitation Act it was for the court to dismiss the darkhast if it found that it was filed beyond the period of limitation, still if this defect had escaped the notice of the court or its officials it was for the judgment-debtor to point it out to the Court, and if he did not do so, the judgment-debtor must thank himself. Since the court did not detect this defect, it must be said that impliedly the court held that the darkhast application was within limitation. The Court has jurisdiction to decide rightly as well as wrongly and if on the question of law, it gave a wrong finding, none-the-less it would operate as *res judicata*. It would not be open to the executing court to entertain the contention in the subsequent application and to go behind the order passed in the previous darkhast application and examine whether the previous darkhast was barred by limitation under Article 182, Clause 5, Column 3 of the Limitation Act, 1908. When a darkhast is filed before a Court what the Court would be required to see is whether the darkhast before it had been filed within three years from the date of the final order passed on an application made in accordance with law for execution previously. It need not go into the question as to whether the application next before it was made in time. It, therefore, follows that when the present darkhast was filed, all that the executing Court was required to do was to see whether the present darkhast was filed within three years from the final order passed in the previous darkhast. It is the judgment-debtor who wants to raise this question. But since he had not raised that question in the previous darkhast, as already pointed out, it follows that impliedly it must be held the executing court in that darkhast held that that darkhast was not barred by limitation, and therefore, that finding which was impliedly given by the Court would be binding on the judgment-debtor.

12. The lower Courts appear to have relied on the Full Bench ruling of

the Allahabad High Court in: *Gendalal v. Hazarilal*, ILR 58 All 313 = (AIR 1936 All 21) (FB), but on a careful reading of the entire report of the case, it appears to me that the ratio of this Full Bench decision has not been properly understood by the lower Courts. In that case a money-decree was passed against the applicant before the High Court on the 12th of March 1928. Thereafter the judgment-creditor made an application to the Court under Order XXI, Rule 2 to certify payment of Rs. 50/- by the Judgment-debtor under the decree, which was said to have been made on 11th November 1930. That payment was certified on 29th November 1932 without notice to the judgment-debtor. Thereafter an application for execution of the decree was made on 15th February 1933. This application was obviously barred by limitation, but for the fact that the judgment-debtor was said to have made a payment of Rs. 50/- as stated above. A notice was issued to the judgment-debtor in this execution proceeding under Order XXI, Rule 22, Civil Procedure Code, but the Process-server returned the notice reporting that the judgment-debtor had refused to take it. A note was, therefore, made on the proceeding that the judgment-debtor was duly served and as he did not raise any objection on the score of limitation, the application be deemed to be within time, and registered and put up subsequently before the Court for proper orders. As the relief claimed by the decree-holder was for execution of the decree by arrest of the judgment-debtor, warrant of arrest was ordered to issue and the judgment-debtor was brought under arrest. It was then that he pleaded that the execution application was barred by limitation. His objection was rejected on the ground that he had not taken it after notice under Rule 22 of the Civil Procedure Code was served on him. Then he was committed to prison, but was released within a week on non-payment of the subsistence allowance by the decree-holder. The judgment-debtor then filed petition of objections to the executing court, protesting against the execution proceedings on the ground of limitation. This objection having been rejected, the judgment-debtor went in revision to the High Court in which the Full Bench gave the above decision. It was held that the objection raised by the judgment-debtor on the ground of limitation was maintainable even though he had failed to raise it in reply to notice under Order XXI, Rule 22, Civil Procedure Code. Sulaiman, C. J., who delivered the main Judgment formulated five propositions of which fourth propo-

sition is material for our purpose. That proposition was:—

(4) "Where no objection to the execution is taken but the application becomes partly or wholly fructuous and such fructification necessarily involves the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of *res judicata* from raising the question that that application was not within limitation."

This proposition clearly shows that where a judgment-debtor fails to raise any objection to the execution of the decree and the Court proceeds to issue process for execution of the decree and the application for execution partly or wholly fructifies, the judgment-debtor is precluded from raising the question that the application was barred by limitation, because the very fact that the court orders process to issue on the execution application implies that it came to the conclusion on merits that the application was within limitation.

13. Now, Mr. Shrikhande contended that in order that an application for execution can be said to have become partly or wholly fructuous, the decree-holder must realise the fruits of the decree either in part or in whole. According to Mr. Shrikhande, where after the court grants the relief prayed for by the decree-holder, and orders process to issue, if the decree-holder drops execution proceedings without actually realising the fruits of the decree, either partly or wholly, the execution application must be deemed to be infructuous, and therefore, this proposition set out above, would not be applicable and the judgment-debtor would not be precluded from raising a plea of limitation. It is difficult to accept this argument. Application for execution is fructuous when the court grants relief asked for by the judgment-creditor no matter whether actually the decree-holder succeeds in realising the fruits of the decree. In the present case, admittedly in previous darkhast relief claimed by the decree-holder was arrest and detention of the judgment-debtor in civil prison. The executing court granted that relief and ordered process to issue for arrest and detention of the judgment-debtor. It was at that stage that the judgment-creditor, for some reason or the other, thought of dropping the proceeding for the time being. It, therefore, cannot be said that the previous darkhast application was infructuous. As a matter of fact, it was fructuous although the judgment-debtor was not actually put in civil prison.

14. The above argument advanced on behalf of the judgment-debtor ap-

pears to have appealed to the lower Courts and they have come to the conclusion that since actually the judgment-debtor was not put in prison in execution of the decree, the previous darkhast was infructuous, and therefore, the judgment-debtor's plea on the point of limitation was not barred by constructive res judicata.

15. This view taken by the lower Court is obviously incorrect. It must, therefore be held that the plea raised by the judgment-debtor in the present proceeding that the previous darkhast was barred by limitation, and consequently it could not be taken as a step-in-aid of execution, and hence the present darkhast, also is barred by limitation is barred by constructive res judicata.

16. Mr. Shrikhande lastly submitted that the judgment-debtors should not be saddled with costs. But, in my opinion, since the decree-holders have succeeded, they are entitled to their costs throughout. Had it not been for the fact that the judgment-debtor took this untenable plea, the decree-holders would not have been required to come to this court for getting the relief to which they were entitled.

17. Both the appeals are, therefore, allowed. Orders passed by the lower Court are set aside and the execution proceedings are sent back to the executing court for proceeding further according to law. The respondent in both these appeals to pay the costs of the appellants throughout.

Appeal allowed.

AIR 1972 BOMBAY 145 (V 59 C 27)

K. K. DESAI, J.

Aiyasha Begum and others, Appellants v. Kapurchand Rahmal, Respondent.

A. F. O. D. No. 770 of 1967, D/- 26-3-1971, against judgment and decree of P. C. Kapadia, Principal Judge, City Civil Court at Bombay, D/- 22-6-1967.

Civil P. C. (1908), Section 107 — Power to frame issues and refer case for trial.

Where the appellate Court finds that the trial Court had failed to frame issues which had arisen from the pleadings of the parties it can set aside the decree, frame fresh issues and remand the case for fresh trial. (Para 14)

M. J. Rajani, for Appellants; K. K. Vyas for N. N. Vaishnawa, for Respondent.

JUDGMENT:— This is an appeal on behalf of the original defendants 1-A, 1-B and 1-C against the judgment and decree dated June 22, 1967, made by the Principal Judge of the City Civil Court declaring that the gala No. 10 mentioned in the plaint had been validly assigned to the plaintiff under the deed of assignment dated September, 19, 1958, and further declaring that these appellants were trespassers and not entitled to remain in possession of a portion of the above gala No. 10 and granting a decree in ejectment as against these appellants and further granting compensation at the rate of Rs. 20/- per month as from April 19, 1958, till delivery of possession and costs of the suit.

2. The plaintiff's case was that defendants 2 and 3 i.e., Chhotu Balu and Hansu Murat were joint tenants of the above gala No. 10. These two persons resided at and in a portion of the above gala and also carried on their business of gas welding in the gala. These two persons sold to the plaintiff under a deed of assignment dated April 19, 1958, their business of gas welding together with all stock-in-trade, fixtures, furniture and goodwill thereof along with the tenancy rights of the business premises as incidental to the said running concern for the price of Rs. 2,500/-.

3. One Zainullah, the original defendant, was occupying a portion of this gala even prior to the date of the above assignment as licensee of Chhotu Balu and Hansu Murat. The plaintiff granted leave and licence and permission to Zainullah to continue in occupation of the portion already occupied by him in consideration of Rs. 20/- per month payable by Zainullah as licence fee to the plaintiff. In the correspondence that had taken place Zainullah falsely contended that the portion in his occupation had been obtained by him under a deed of assignment dated July 10, 1957, whereby a running business was sold as a going concern to Zainullah by Chhotu Balu. The plaintiff had duly revoked the licence granted by him to Zainullah and he accordingly claimed that Zainullah was a trespasser by reason of the termination of the licence. That was one part of the cause of action mentioned in the suit. The other part was that the assignment relied upon by Zainullah was illegal and in violation of law. For this reason, the plaintiff claimed that Zainullah was a trespasser. The plaintiff claimed compensation at the rate of Rs. 20/- per month aggregating to Rs. 120/- for the period April 19 to October 18, 1958. The plaintiff craved leave to file a further suit against Zainullah for damages for wrongful occupation from and after October 18, 1958. He accord-

ingly claimed declaration about the validity of his assignment and that Zainullah was a trespasser and for a decree in ejectment and for money decree for Rs. 120 and a further sum of Rs. 1320/- and interest and costs.

4. Zainullah had filed his written statement dated February 2, 1959. Before the trial could take place, Zainullah died on October 15, 1965. Fresh writs of summonses were issued and served on the present defendants 1-A, 1-B and 1-C. They were the heirs and legal representatives of Zainullah. These defendants filed their own written statement dated June 22, 1967, and without prejudice to the pleas and defences raised in the written statement of Zainullah further pleaded that "the deceased defendant was deemed to be the sub-tenant in respect of the suit premises and that these defendants are protected under the provisions of the Bombay Rent Act. * * * there had been no privity of contract between the plaintiff and the deceased defendant and the present defendants and that there is no cause of action against these defendants". The pleas taken in the written statement of Zainullah which were adopted by the present defendants were as follows:—

5. That Chhotu Balu and Hansu Murat had executed a valid and legal agreement in favour of the plaintiff for sale of business of gas welding with tenancy rights was denied. The assignment was not registered and had been executed to defraud Zainullah of his rights in the portion of the gala occupied by him. The assignment did not create any right, title and interest in the tenancy rights. Zainullah was not occupying the suit portion of the gala as a licensee and in that connection the allegations of facts made in the plaint were denied. He denied any privity of contract with the plaintiff. He denied that the plaintiff had the ownership of and title to the gala No. 10. He denied that the plaintiff was entitled to eject him from the suit premises. He contended that the assignment in which he relied was a valid assignment and it was binding on the plaintiff. He denied that he was a trespasser. He denied the plaintiff's right to the reliefs claimed in the suit.

6. Hearing of the suit reached before the learned Judge below from June 22, 1967. Advocate Mr. Rajani then appeared for the present defendants and submitted draft issues. The learned Judge appears to have brushed aside the draft as not raising proper issues. He raised the following six issues:—

1. Whether there is any privity of contract between the plaintiff and the original 1st defendant?

2. Whether the original 1st defendant is the licensee of the plaintiff in respect of the suit premises as alleged?

3. If the answer to issue No. 2 is in the affirmative, whether defendants Nos. 1A, 1B and 1C are liable to hand over possession to the plaintiff?

4. Whether the plaintiff is entitled to any compensation and/or damages as claimed?

5. Whether the plaintiff is entitled to any relief? If so, what?

6. Generally?

7. It may at once be stated that it appears from the discussion contained in paragraph 3 of his judgment that during the hearing of the suit and whilst he was delivering his judgment, the learned Judge completely failed to notice that in the written statement filed by the present defendants the plea that Zainullah had become sub-tenant in respect of the suit premises and that accordingly the present defendants were protected under the provisions of the Bombay Rent Act had been raised. He did not formulate any issue in connection with the above plea. He indulged into discussion on the question of Zainullah having become sub-tenant of the suit premises on the footing that the question of sub-tenancy had been orally discussed by Mr. Rajani from the Bar. He observed: "In the absence of any such plea having been made in the written statement (of Zainullah), I am unable to accept the argument of Mr. Rajani that Zainullah was a lawful sub-tenant by reason of the Ordinance promulgated under the Rent Act." The learned Judge was in error in discussing and deciding this question without raising any issue in that connection in the first instance. The learned Judge was patently wrong in this connection in not referring to the written statement filed by the present defendants. The plea had been raised in the written statement of the present defendants and an issue in that connection was liable to be formulated.

8. Mr. Vyas for the plaintiff attempted to contend that since a portion of the tenement consisting of gala No. 10 only had been in occupation of Zainullah and the defendants, it was patent that in law sub-tenancy could not exist. The argument was that sub-tenancies could only be created in respect of an entire tenement. As at present advised, I am not aware that such is the law but I do not find it necessary to decide that question at this stage. Mr. Vyas further submitted that the plea of sub-tenancy was not raised by Zainullah in his written statement. It was, therefore, not permissible for the present defendants to raise such a plea in their written statement. The submission was that legal representatives of Zainullah

could not raise this new plea by their written statement. Now, it is quite patent that the declaration, the ejectment and the monetary claim for which decree was claimed in the suit were personal reliefs claimed against the present defendants. It is true that these defendants have been added in the suit in consequence of the death of Zainullah and as his heirs and legal representatives. Even so, it is not true that the reliefs claimed against them are only in the character of their being legal representatives. It requires to be emphasised and repeated that all the reliefs claimed in the suit are claimed personally as against these defendants. I have no doubt that these defendants were entitled to raise by their written statement pleas contrary to and inconsistent with the case made by Zainullah in his written statement. It is well established law that defendants who are brought on the record as legal representatives of one of the defendants before any decree is passed in the suit must have a right to raise such pleas as they desire in defence to the reliefs claimed against them. The decree claimed against them must be personal. Possibly, where decree is not claimed against them personally and relief can only be granted to the extent of the estate come to their hands, there can be an argument that inconsistent defence may not be allowed to be raised. However, of this also I am not quite sure.

9. Now, it is abundantly clear that the learned Judge failed in his ordinary duty to frame an appropriate issue on this plea about sub-tenancy of the portion occupied by Zainullah and the defendants as raised in the written statement of these defendants.

10. As regards the question of licence and a contract having been made between Zainullah and the plaintiff for a licence and Zainullah being the licensee, the learned Judge proceeded to deliver his judgment by totally disregarding the oral evidence tendered on behalf of the parties. It is somewhat abnormal and extraordinary that the learned Judge proceeded to decide the question of existence of the alleged contract of licence without reference to the evidence tendered on behalf of the parties. The learned Judge has made findings in the affirmative on these questions in favour of the plaintiff by proceedings in a manner in which no Court of law should proceed. The findings made on these questions in the above manner are liable to be set aside in this appeal by my discussing the whole of the oral evidence tendered on behalf of the parties. I have however, not thought it appropriate to do so, because, after formulating appropriate issues as arose for decision, I propose to restore the suit for a fresh hearing before the trial Court.

This has become necessary because on the issues which arose the parties should be entitled to lead such further evidence as they desire. The issues framed can thus be finally disposed of only after the parties have the benefit of the opportunity of leading fresh evidence.

11. The learned Judge proceeded to make a finding that Zainullah must be a licensee and must have made a contract to remain in the suit premises as licensee merely on the ground that since the assignment on which Zainullah relied was not a valid and/or sufficient assignment and since the assignment on which the plaintiff relied was valid assignment, Zainullah could not be in occupation of the suit premises except as under a contract of licence made between the plaintiff and Zainullah. It is sufficient to state that the learned Judge has proceeded to decide this question in extremely improper manner and the method adopted by the learned Judge was such as the findings made by him must be set aside. I would have decided this question myself if I was not making an order of remand as already stated above. The learned Judge failed to formulate any issue as regards the defendants being trespassers on the suit premises. Even, so, he proceeded to make a finding that the defendants were trespassers. In spite of the fact that compensation was not claimed in the suit for occupation of the suit premises from and after October 18, 1958, and in that connection leave was claimed, the learned Judge made a decree in favour of the plaintiff for such compensation for the period ending with delivery of possession of the suit premises to the plaintiff. It is difficult to imagine how the learned Judge could proceed to pass such a decree when the claim was in fact not made in the plaint. For the simple reason that the claim was not made in the suit that decree is liable to be set aside.

12. At this stage, Mr. Vyas has intervened and applied that the plaintiff should be allowed to amend his plaint for making claims for further compensation. I have informed him that he must make such an application to the trial Court.

13. The issues which arose for decision in the suit were as follows:—

1. Whether under the assignment dated April 10, 1958, the plaintiff has in law become assignee of the right, title and interest of defendants Chhotu Balu and Hansu Murat as tenants of the gala No. 10 mentioned in the plaint?

2. Whether the above deed of assignment dated April 10, 1958 is for the reasons alleged in the written statement of the defendants 1A to 1C and/or otherwise in law invalid and of no effect?

3. Whether Zainullah was merely a licensee of the portion of gala No. 10 that was in occupation of Zainullah along with defendants 1A to 1C?

4. Whether the defendants 1A to 1C are trespassers in the above portion of gala No. 10?

5. Whether under the assignment dated July 10, 1957 Zainullah during his lifetime and defendants 1A to 1C thereafter were entitled to continue in occupation of the above portion of gala No. 10?

6. Whether, having regard to the facts and circumstances of the case, Zainullah during his lifetime and thereafter the defendants are entitled to continue in occupation of the above portion as sub-tenants?

7. Whether the plaintiff is entitled to the sum of Rs. 120/- claimed in prayer (e) of the plaint?

8. Whether the plaintiff is entitled to a sum of Rs. 1320 as claimed in prayer (f) of the plaint?

9. To what other reliefs is the plaintiff entitled?

10. Generally?

14. The issues as above which had properly arisen on the pleadings of the parties were not framed and have not been properly discussed and decided by the trial Court. The decree passed by the trial Court is set aside. The suit is remanded back to the trial Court with a direction that the trial Court will allow parties to lead such further evidence as they desire and decide the issues as formulated above in due course. The plaintiff must pay costs of this appeal. Since the suit is now of very old date, the trial Court will give necessary directions and will dispose of the same before the end of July 1971.

Case remanded.

AIR 1972 BOMBAY 148 (V 59 C 28)

VIMADALAL, J.

Jivanlal Damodardas Wani, Applicant
v. Narayan Ukha Sali, Opponent.

Civil Revn. Appln. No. 6 of 1970, D/- 4-3-1971 against order of B. B. Varale, Civil J. Jr., Division Shahada, D/- 8-10-1969.

Civil P. C. (1908), O. 1. R. 10 — Addition of parties — Application for, opposed by plaintiff — Court cannot grant application unless the party sought to be joined is a necessary party — (X-Ref.— Section 115).

Thus where an application by the defendant tenant for addition of a party in a suit for eviction is opposed by the plaintiff and it has not been shown that the party sought to be added has any in-

terest in the property. It was held that the court in ordering the addition of that party had exercised its discretion unreasonably which entitled the High Court to interfere in revision with the exercise of that discretion. Case law discussed.

(Para 3)

Cases Referred: Chronological Paras

(1971) AIR 1971 Orissa 44 (V 58) =

36 Cut LT 1038, Daitari Prasad Naik v. Umakanta Nayak

(1970) 72 Bom LR 827 = 1970 Mah

LJ 260, Rupam Pictures v.

Chhaganlal Gulabchand

(1969) AIR 1969 Punj 57 (V 56) =

70 Pun LR 451, Banarasidas v.

Pannalal

(1960) AIR 1960 Madh Pra 84

(V 47) = 1959 Jab LJ 624,

Sampatbai v. Madhusing Gamb-

hirji

(1958) AIR 1958 SC 886 (V 45) =

1959 SCR 1111, Razia Begum v.

Sahebzadi Anwar Begum

(1956) 1956-1 All ER 273 = 1956-

1 QB 357, Amon v. Raphael Tuck

and Sons

(1939) AIR 1939 Bom 188 (V 26) =

41 Bom LR 249, Virbhadrappa

Shilvant v. Shekabal Haran

B. Y. Deshmukh for R. S. More, for Applicant; K. J. Abhyankar, for Opponent.

ORDER:— This is an application to revise an order passed by the Civil Judge (J. D.) Shahada, dated 8th October 1969, granting an application by the defendant that one Kamalabai be added as a party to this suit.

2. The facts of the plaintiff's case are that the property in question originally belonged to one Dwarkadas Vithaldas, from whom the plaintiff purchased it by a registered sale deed dated 30th March 1964. The defendant was a tenant occupying a part of the ground floor of the said property and the plaintiff by his notice to quit dated 28th September 1967 terminated that tenancy and filed the present suit on the 3rd of January 1968 to eject the defendant. On the 14th of March 1968 the defendant filed a written statement contending, inter alia, that the plaintiff had no title to the said property and that the owner thereof was Kamalabai the wife of the said Dwarkadas from whom the plaintiff claimed to have purchased the property. The defendant thereafter on the 7th of August 1969 made an application that the said Kamalabai be added as a party-defendant to this suit, and the learned Judge by his order dated 8th October 1969 under revision took the view that it was clear from the contention in the pleadings that Kamalabai had "some interest" in the suit property and was, therefore, a necessary party to the suit, that if Kamalabai was added as a

party-defendant to the suit no prejudice would be caused to the plaintiff, and that the defendant's application for the addition of Kamlabai as a party-defendant to the suit should, therefore, be granted. It is from that order that the plaintiff has approached this court in revision. The application made by the defendant for the addition of the said Kamlabai is undoubtedly an application under Order 1, Rule 10 (2) of the Code of Civil Procedure, the terms of which are very wide and empower the court to add any person as a party to a suit, either on the application of one of the parties or even suo motu, if in its opinion that person ought to have been joined or his presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The wide terms of Order 1, Rule 10 (2) have given rise to several conflicting decisions of various courts in regard to its interpretation, but having considered the authorities that were cited before me in the course of the hearing of this revision application, I think the following propositions emerge therefrom:—

1. That the question of addition of parties under Order 1, Rule 10, Civil P. C. is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case (AIR 1958 SC 886 Paras 7, 13 and 14);

2. That in a suit relating to property, like the present one in order that a person may be added as a party, he should be shown to have a direct interest in the subject-matter of the litigation (AIR 1958 SC 886, paras 8 and 13);

3. In exercising its discretion under Order 1, Rule 10, Civil P. C. the court would not "ordinarily" add a party without the concurrence of the plaintiff. (41 Bom LR 249 at p. 256) = (AIR 1939 Bom 188). I am bound by that decision of a Division Bench of this court, and I respectfully agree with the same because the plaintiff is a dominus litis as far as the litigation in question is concerned. From this it would follow that it is only in exceptional cases that a party would be added as a party-defendant to the suit without the concurrence of the plaintiff (AIR 1969 Punj 57 para 9).

4. The court would add a person as a party-defendant to a suit without the concurrence of the plaintiff to that suit only where the party sought to be added is a necessary party as distinguished from a mere proper party. This is the view which a single Judge of the Punjab High Court has taken in the case of Banarasi-das v. Pannalal, AIR 1969 Punj 57, para 9

cited above, after considering the various authorities on the point, and it is a view with which I am in agreement, since a person can be joined as a party-defendant to a suit without the concurrence of the plaintiff only in exceptional cases, the only line that the court can draw to distinguish the ordinary rule from an exceptional case would be to distinguish between a "proper party" and a "necessary party". This distinction has been recognised in Order 1, Rule 10, Civil P. C. itself it has been held by a single judge of this court that a real owner is not a necessary party to a suit by the benamidar, but is only a proper party (1970-72 Bom LR 827).

5. A necessary party is, as has been stated in Order 1, Rule 10 (2), Civil P. C. itself a party whose addition is absolutely necessary in order to enable the court to adjudicate effectually and completely on the matter in controversy between the parties. That has been interpreted, in my opinion rightly, to mean that no decree could be passed in the suit without affecting the rights of the party who is sought to be added and the presence of that party is necessary for an effectual adjudication of the questions involved in the suit. It is only when both those conditions are fulfilled that a party could be said to be a necessary party to a suit (vide AIR 1971 Orissa 44; AIR 1960 Madh Pra 84 & (1956) 1 All ER 273).

6. In all the decisions cited above, the application to be added as a party was made by the party himself who was sought to be added and Mr. More on behalf of the appellant sought to distinguish those cases on that ground. In my opinion, however, if such party is a necessary party, as stated above it makes no difference as to who makes the application for the addition of such party, and indeed, under the very wide terms of Order 1, Rule 10 (2), Civil P. C. the court may even add such party suo motu.

3. Having regard to the legal propositions as formulated above, I must now proceed to consider whether, on the facts of the present case, Kamlabai is a necessary party to this suit in the sense, (1) that any decision in this suit is bound to affect her rights and (2) that her presence is necessary to effectually adjudicate upon the questions involved in this suit. There is nothing before the court, apart from certain bare statements made by the defendant in the written statement filed by him to show that Kamlabai has a direct interest in the subject-matter of this litigation or, for the matter of that, that she has any right at all in the property in question which would be affected by the decision given in this suit. I have had the written statement in this case officially translated and have perused

the same carefully, and I find that there is no statement in the written statement that the property stands or has ever stood in the municipal and/or government records in the name of Kamlabai. The written statement only contains vague statements referring to her as "the landlord", and to her having rented out portions of the property and recovered rents. The written statement no doubt contains, in para 3 thereof, an averment that Kamlabai is the owner of the said property by adverse possession because of those acts, and because she has according to the defendant, been in possession of that property but those averments have no value at all when it is remembered that Kamlabai was after all the wife of the said Dwarkadas Vithaldas in whose name, according to the plaintiff, the property stood at all material times, particularly when Kamlabai herself does not say so and has not come forward to assert any right or title to the property in question. It is difficult to conceive of a case in which a third person can set up and prove a title by adverse possession in Kamlabai by reason of the acts alleged. It is significant indeed that not a single receipt given by Kamlabai for the rent alleged to have been recovered by her has been produced to show in whose name and on whose behalf rents were recovered and the receipts given. I, therefore, hold that on these bare and baseless averments in the written statement of the defendant, it has not been shown that Kamlabai has any direct interest, or for the matter of that any interest at all in the property in question, and the lower court has exercised its discretion unreasonably in ordering her to be added as a party to this suit. I am, therefore, entitled to interfere in revision with the exercise of that discretion by the lower court.

4. In the result, I make the rule absolute and set aside the order dated 8th October 1969 passed by the learned Civil Judge (J. D.) Shahada, in this case, and order that the defendant's application for amendment of the plaint by the addition of Kamlabai be dismissed. The defendant must pay the plaintiff's costs in both the courts.

Rule made absolute.

AIR 1972 BOMBAY 150 (V 59 C 29)
VIMADALAL, J.

Kisan Sahakari Punarvasan Society Ltd., Applicants v. N. M. Gowalkar and Co., Opponent.

Civil Revn. Appln. No. 252 of 1969, D/- 26-2-1971 against order of B. M. Role, Civil J. Sr. Division, Poona, D/- 3-9-1968.

BO/BO/B169/72/MNT/BNP

Court-fees Act (1870), Sch. 1, Art. 1
— Counter claim for equitable set-off —
Court-fee must be paid.

The term set-off in the article is not limited to legal set-off only. In S. 2 (c) of Bombay Court-fees Act also the term is not restricted only to legal set-off. A court-fee has, therefore, to be paid on the equitable set-off claimed by the defendant in his written statement. (X-Ref:—Bombay Court-fees Act (36 of 1959), Section 2 (c)). AIR 1934 All 115, Diss.; AIR 1943 Bom 227 & AIR 1935 Mad 115 (1), Rel. on. (Para 4)

Cases Referred: Chronological Paras

(1950) C. R. A. No. 566 of 1949, D/- 17-1-1950 (Bom), B. S. Lokhande v. Kashinath

(1943) AIR 1943 Bom 227 (V 30) = 45 Bom LR 516, Wilrow v. Mahadeo Govind

(1935) AIR 1935 Mad 115(1) (V 22) = ILR 58 Mad 338, Lakshmanan v. Ramanathan

(1934) AIR 1934 All 115 (V 21) = 1934 All LJ 421, Madan Garg v. Bohra Ram

(1914) AIR 1914 Bom 299 (V 1) = ILR 38 Bom 631, Tayabali v. Atmaram

C. R. Dalvi for Applicants; K. J. Abhyankar, for Opponents; M. B. Kadam, Asstt. Govt. Pleader as per Court's Order.

ORDER:— The only question that arises in this Revision Application is whether court-fees are payable in respect of an equitable set-off. The plaintiff has filed this suit as a building contractor for the recovery of over rupees one lakh, interest and costs. In paragraph 23 of the written statement filed on behalf of the defendant, a co-operative society which had entrusted the work of construction of certain buildings in Poona to the Plaintiff, it has been stated that the plaintiff had not done the work according to the contract and that many of the items in the contract had been left undone, and in para 31 of that written statement it is pleaded that loss had been caused to the defendants by reason thereof. It is further pleaded in the said paragraph that, although the loss was much more, the defendants were restricting their claim "by way of equitable set-off" to Rs. 50,000/-. The plaintiff thereafter filed an application dated 11th June 1968 (Ex. No. 11) in which, in addition to asking for particulars of the set-off claimed by the defendants, he prayed that the defendants' claim for set-off should be rejected for want of court-fees. On that the learned Civil Judge (S. D.) at Poona passed an order dated 3rd September 1968 directing the defendants to give particulars and ordering them to pay court-fees on the equitable set-off claimed by them on or before 13th September 1968. It is from

that order that the defendants have approached this court in revision.

2. Apart from the fact that the defendants have, in terms, stated that the set-off claimed by them is an equitable set-off, it does sound in damages and, therefore, though they have sought to limit it to a specific amount, in my opinion, it is really a claim for an unascertained sum arising out of the same transaction and is in the nature of an equitable set-off. On behalf of the defendants reliance was placed on the decision of the Allahabad High Court in the case of *Madan Garg v. Bohra Ram*, AIR 1934 All 115 in which the view taken was that court-fee is not payable on an equitable set-off. The plaintiff in that case had sued for arrears of rent to which the defendant pleaded a set-off for the value of timber supplied by the defendant to the plaintiff as a legal set-off under Order 8, Rule 6, Civil P. C. The trial Court allowed that set-off though no court-fee had been paid thereon. On Revision, a single judge of the High Court, treated it as an equitable set-off and held that the trial court had not acted "illegally" in allowing the set-off observing as follows (at p. 117):—

"If however the set-off could be claimed as an equitable set-off there is no reason why the Court should not have allowed it without payment of a court-fee. A legal set-off requires a court-fee because it is a claim that might be established by a separate suit in which a court-fee would have to be paid. But there is no such fee required in the case of an equitable set-off which is for an amount that may equitably be deducted from the claim of the plaintiff where a court-fee has been paid on the gross amount. An equitable set-off may however only be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim."

With respect to the learned judge who decided that case, I am unable to appreciate his reasoning in the passage quoted above. A legal set-off which must be for an ascertained amount may though it need not, arise out of the same transaction as the plaintiff's claim, and be in the nature of a deduction from the claim of the plaintiff. Even so, court-fee would have to be paid on the amount of the legal set-off, so claimed. On the other hand, an equitable set-off, though for an unascertained sum, may also be in respect of a claim that could be established by a separate suit in which court-fee would have to be paid. Neither the fact that an equitable set-off arises out of the same transaction as the plaintiff's claim, nor the fact that an equitable set-off would be for an amount that may be deducted from the claim of the plaintiff, can justify

any distinction being made between an equitable set-off and a legal set-off in regard to liability to court-fees. I, therefore, do not agree with the view taken by the Allahabad High Court in *Madan Mohan's* case. It may be stated that, as against the view of the Allahabad High Court, the Nagpur, Madras and Calcutta High Courts have taken the view that court-fee is payable on an equitable set-off. It is, however, not necessary for me to deal with the decisions of those Courts in view of the fact that the question has been considered by two decisions of this Court, one of a single judge, and the other of a Division Bench approving of the view taken by the single judge, and I am in agreement with the view taken in those two cases. In the case of *Wilrow v. Mahadeo Govind*, 45 Bom LR 516 = (AIR 1943 Bom 227), the plaintiff sued the defendant for recovery of Rs. 544 in respect of rent, and the defendant claimed to set-off Rs. 800 being the cost of construction of an oven in the house which the plaintiff-landlord had agreed to pay. The question as to whether court-fees were payable on the defendant's set-off having arisen, Macklin, J. took the view that the defendant's claim was not really for an equitable set-off as contended by him, but was for an ascertained sum by way of legal set-off, and court-fees would, therefore, be payable by him thereon. The learned judge, however, also proceeded to consider the question of payment of court-fees on the assumption that the claim was a claim in the nature of an equitable set-off and took the view that, even so, court-fee would be payable by the defendant thereon. He did not agree with the view taken by the Allahabad High Court in the case of AIR 1934 All 115 referred to above, but agreed with the contrary view taken by the Madras High Court in the case of *Lakshmanan v. Ramanathan*, ILR 58 Mad 338 = (AIR 1935 Mad 115(1)) and rejected the contention of the learned advocate for the defendant that a claim to an equitable set-off does not require payment of court-fees. It does appear that, having regard to the view taken by Macklin, J. that the claim was really one by way of legal set-off, his observations on the question as to whether court-fees are payable on a claim by way of equitable set off are obiter dicta.

3. In the case of *B. S. Lokhande v. Kashinath*, C. R. A. No 566 of 1949, D/-17-1-1950 (Bom) the same question arose before a Division Bench consisting of *Rajadhyaksha* and *Shah, JJ.* The plaintiff in that case claimed a sum of Rupees 700 due at the foot of an account in respect of goods supplied to the defendants from time to time. Several defences were pleaded by the defendants in answer

to that claim, one of them being that out of the goods supplied by the plaintiff many had been returned to him, and that those were valued at a sum of Rs. 1008 and the defendants, therefore, claimed a set-off in respect of those goods. In order however to bring the case within the jurisdiction of the Court of Small Causes at Poona, the defendants had reduced the claim for set-off to a sum of Rs. 1000. The learned Judge of the Court of Small Causes, however, took the view that the defendants were not entitled to plead the set-off without payment of the requisite court-fee as required by Art. 1 of Schedule I of the Court-fees Act, 1870. The matter having come to this Court in revision, Rajadhyaksha, J. delivering the judgment of the Bench distinguished an earlier decision of this Court in the case of *Tayaballi v. Atmaram*, (ILR 38 Bom 631) = (AIR 1914 Bom 299) on the ground that the said decision was governed by the law as it stood before Art. 1 Schedule I of the Court-fees Act, 1870, was amended, and then proceeded to consider the decision of Macklin, J. in the case of *Wilrow v. Mahadeo Govind* which has already been dealt with above and, in terms expressed agreement, with the view taken by Macklin, J. therein, observing that that was also the view that had been taken in various decisions by the Nagpur, Madras and Calcutta High Courts. In the course of the judgment, Rajadhyaksha, J., after expressing a doubt as to whether the set-off claimed in the said case by the defendants was an equitable one in so far as they had claimed a definite sum of Rupees 1000, stated that the claim should really be regarded as being a legal set-off and not an equitable one, and that there was no dispute that on a legal set-off court-fees would have to be paid. Thereafter, the learned judge stated that, even assuming that the claim was for an equitable set-off, the question would be whether, under the prevailing law, court-fees would have to be paid thereon. In my opinion, therefore, in the judgment in the case before the Division Bench also, the view taken in regard to payment of court-fees on an equitable set-off was in the nature of an obiter dictum.

4. I agree with the obiter dicta of Macklin, J. in *Wilrow's* case and of the Division Bench in *Lokhande's* case. On principle, if the plaintiff filing a suit for an unascertained sum of money by way of damages has to pay court-fees, there is no reason why a defendant who pleads a set-off in respect of an unascertained amount should not be called upon to pay court-fees. In Art. 1 of Sch. I of the Court-fees Act, 1870, it was stated that court-fees at the rate specified in that Article had to be paid on a plaint, writ-

ten statement pleading a set-off or counter claim, and on certain other documents specified therein. The term "set-off" in that Article was not limited to a legal set-off. Under Section 2 (c) of the Bombay Court-fees Act, 1959, which came into force in this State on 1st August 1959, the term "plaint" is defined as including a written statement pleading a set-off or counterclaim, and there is no reason whatever for restricting the term "set-off" in that definition to a legal set-off. The position has, therefore, remained unchanged after the coming into effect of the Bombay Court-fees Act, 1959, and both on principle as well as on the view taken in the obiter dicta in the two decisions of this court referred to above, which were based on the Court-fees Act, 1870, and with which I am in agreement, I hold that court-fees are payable not merely on a legal set-off, but on an equitable set-off as well. The view taken by the lower court in the present case is, therefore, correct and this Revision Petition must be dismissed with costs. The petitioner must pay the costs of the Government Pleader also. I may, for the sake of clarification, state that no point except the point in regard to the liability to pay court-fees on the equitable set-off claimed by the defendant was argued before me.

Petition dismissed.

AIR 1972 BOMBAY 152 (V 59 C 30)
VIMADALAL, J.

Shivamurti, Appellant v. Vijaysing Vinayakrao Dudhe, Respondent.

A. F. O. D. No. 624 of 1970, D/- 27-1-1971 against order of N. H. Sukhija, Asstt. J. Satara in Misc. Appln. No. 28 of 1969.

(A) Hindu Minority and Guardianship Act (1956), S. 8 (2) — Application for permission of Court for transfer of immoveable property of minor by intending purchaser is not maintainable — It is only the natural guardian who can maintain such application — (X-Ref:— Guardians and Wards Act (1890), S. 29) — (X-Ref:— Bombay Civil Manual (1960), Vol. 1, Para 271, page 95, R. (12). Vol. 2, page 431. Appendix C, Form G). (1965) 67 Bom LR 908, Dist. (Paras 2, 3)

(B) Interpretation of Statutes — Civil Manual issued by High Court — Contains rules for guidance of subordinate Courts and officers — It cannot be used as an aid to the construction of a statutory provision. (Para 2)

(C) Interpretation of Statutes — Hardship — Effect.

BO/BO/A898/72/YPB

Consideration like hardship cannot affect the construction of a statutory provision when the intention of the legislature is manifest from the language used in and the tenor of the enactment. It is a platitude that hard cases make bad law. In such cases, the remedy, if any, lies with the legislature and not with the court which must interpret an enactment as it stands. (Para 4)

Cases Referred: Chronological Para
(1965) 67 Bom LR 908 = 1966 Mah
LJ 171, Tukaram Zipru v. Baban
Dhondur 2

Raghavendra A. Jahagirdar, for Appellant; V. N. Gadgil, for Respondent.

JUDGMENT:— The respondent is a minor represented by his mother as his guardian ad litem. Some time in the year 1957, there was a partition as between the members of the joint family of which he was a member till then, in which the land in dispute in the present proceedings came to the share of the respondent. It appears that thereafter it was the mother of the respondent who acted as the natural guardian in respect of his property. On the 7th of February 1962, an agreement for Sale of the land now in dispute was executed in favour of the appellant by the respondent's father as the constituted attorney of the respondent's mother acting as the natural guardian of the respondent for the price of Rs. 6000/-. A fresh agreement for Sale of the said land for a higher price was thereafter executed on 17th July 1962 by the respondent's father, as such constituted attorney, under which it was stipulated that a Sale Deed was to be executed on or before 11th December 1962. Payments aggregating in all to Rs. 4250/- were made by the appellant from time to time towards the price payable in respect of said land. The respondent's father as constituted attorney having failed to execute a Sale Deed, the appellant filed a suit for specific performance on 10th December 1965, being Reg. Civil Suit No. 8 of 1966, in the Court at Wai against the respondent as represented by his father as the guardian-ad-litem. The said court did not grant specific performance, but passed only a decree for refund of the said sum of Rs. 4250/- in favour of the appellant. That decree was, however, set aside on appeal on 9th March 1968 by the Assistant Judge at Satara who remanded the suit to the trial court for rehearing, directing that that the mother of the respondent should be appointed his guardian-ad-litem for the said suit, and not his father. On the 25th of March 1969, the appellant filed an application under Section 8 of the Hindu Minority and Guardianship Act, 1956, in the Court of the District Judge at Satara against the

respondent, as represented by his mother, for permission for the execution of a registered Sale Deed in favour of the appellant on payment of the remaining amount of the price viz., Rs. 1750/-, by the parents of the respondent as constituted attorneys, or by the Court on his behalf. That application was opposed by the respondent both on the ground that, under the provisions of the Hindu Minority and Guardianship Act, the appellant had no right to make such an application, as well as on merits. A preliminary issue in regard to the maintainability of the application was framed and tried by the Assistant Judge at Satara who, by his judgment dated 30th June 1970, held that under the provisions of Section 8 of the Hindu Minority and Guardianship Act, 1956, it was for the natural guardian alone to make such an application. He, therefore, dismissed the application, and it is from that Order of dismissal that the present appeal has been preferred by the intending purchaser (original applicant).

2. The material portion of Sec. 8 of the Hindu Minority and Guardianship Act, 1956, is in the following terms:—

"8. (1) Powers of natural guardian.— The natural guardian of a Hindu minor has power, subject to the provisions of this section to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the Court:—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immoveable property of the minor;

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act 1890, shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under Section 29 of that Act, and in particular:—

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of Section 4-A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of S. 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court."

(6)

Sub-section (2) of S. 8 quoted above, under which the present application was made is almost identical with Section 29 of the Guardians and Wards Act, 1890, with this difference that the latter section applies only to guardians appointed or declared by the Court. The learned advocates on both sides have assured me that there is not a single reported decision of any Indian Court on the point as to whether any person other than the guardian can maintain an application for permission for the transfer of immovable property under Section 8 (2) of the Hindu Minority and Guardianship Act, 1956, or under Section 29 of the Guardians and Wards Act, 1890. The only decision on the point which was cited before me was that in the case of *Tukaram Zipru v. Baban Dhondur*, (1965) 67 Bom LR 908 which, however, was a decision under Section 4 (2) of the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950, which, in my opinion, is very differently worded, and the said decision therefore affords no assistance in the present case. Reference was made in the course of the arguments to Rule (12) of para 271 at page 95 of Vol. I read with Form G in Appendix C at page 431 of Vol. II of the Civil Manual, 1960. The form of the Certificate to be issued by the Court when granting an application for permission under Section 29 of the Guardians and Wards Act, or under Section 8 of the Hindu Minority and Guardianship Act, clearly shows that an application by the guardian alone is contemplated. The Civil Manual issued by the High Court, however, only contains Rules for the guidance of subordinate courts and officers and cannot be used as an aid to the construction of a statutory provision. The question that arises in this Appeal will, therefore, have to be decided on a plain reading of Section 8 of the Hindu Minority and Guardianship Act, 1956.

3. Turning to that section, it is important to note at the outset that sub-section (1), thereof lays down the powers of a natural guardian in general terms, to which sub-section (2) proceeds to engraft certain limitations. This scheme intrinsic in the section would itself indicate that the permission contemplated by sub-section (2) must be applied for by the natural guardian himself. The way in which sub-section (2) is worded also points to that conclusion. It enacts that the natu-

ral guardian shall not, without the previous permission of the Court, effect a transfer, or a lease of immovable property of long duration. This makes it clear that, in such cases, it is the natural guardian himself who must apply for that permission. Sub-section (4) however lays down that the Court cannot grant that permission except in case of necessity or for evident advantage to the minor. This goes further than the normal requirement of Hindu law under which it is sufficient for a purchaser or mortgagee from the manager of a joint Hindu family to prove that he made a proper and bona fide enquiry as to the existence of legal necessity. Since sub-section (4) requires that it must be proved that there was in fact necessity for or advantage to the minor concerned, no person other than the natural guardian could be expected to prove the same as an applicant under that section. The use of the words "permission to the natural guardian" in sub-section (4) and in Cl (c) of sub-section (5), in regard to the Order to be made by the Court on an application under that section, in my opinion, also shows that the legislature intended that the application contemplated by that section has to be made by the natural guardian. Moreover, those words leave no room for doubt that the permission under that section could be granted to the natural guardian and to none else. In the present case, it could not, therefore, be granted to the respondent's father.

4. It was sought to be contended by Mr. Jahagirdar that such a construction of Section 8 of the Hindu Minority and Guardianship Act, 1956, would place an innocent purchaser at the mercy of an unscrupulous natural guardian. Such considerations cannot, however, affect the construction of a statutory provision when the intention of the legislature is manifest from the language used in and the tenor of the enactment. It is a platitude that hard cases make bad law. In such cases, the remedy, if any, lies with the legislature and not with the court which must interpret an enactment as it stands.

5. I hold that the appellant was not entitled to maintain the application which he made to the District Court under Section 8 of the Hindu Minority and Guardianship Act, 1956, and the same was rightly dismissed by that court. This appeal therefore fails and must be dismissed with costs.

Appeal dismissed.

AIR 1972 BOMBAY 155 (V 59 C 31)

K. K. DESAI AND DESHPANDE, JJ.

Annasaheb Sakham Rajamane,
Petitioner v. T. K. Kamble and others,
Respondents.

Special Civil Appln. No. 1038 of
1967, D/- 11-12-1970.

Maharashtra Municipalities Act (40 of 1965), Section 16 (1) (h) — Disqualification under — When commences. (X-Ref:— Maharashtra Municipalities Act (40 of 1965), Sections 150, 151, 169, 170).

The disqualification mentioned in sub-section (1) (h) and the arrears mentioned therein both commence and come into existence as from the moment of the presentation of the bill for the tax due.
(Para 5)

P. S. Patankar for S. C. Pratap, for Petitioner; S. N. Naik instructed by M/s. Little and Co., Attorneys (for Nos. 1 and 3). P. S. Joshi (for No. 2) and B. N. Naik for Prakash Shah (for No. 5), for Respondents.

K. K. DESAI, J.:— The petitioner was one of the candidates from Ward No. 27 Vakharbhag, Sangli, for the municipal elections to be held on May 10, 1967. The petitioner was the owner of the immovable properties situated in the Municipal area and bearing city survey Nos. 95-A and 253. For the period ending with March 31, 1968, i. e. for the year 1967-68, having regard to the assessment levied and fixed in respect of the above two immovable properties, the petitioner was liable to pay respectively as tax the sum of Rs. 801.75 and Rupees 226.40. The petitioner filed nomination for his candidature prior to May 10, 1967. The scrutiny of the nomination papers was fixed for May 13, 1967. On May 8, 1967 the petitioner was served with a bill dated April 27, 1967 bearing No. 12141 in respect of the immovable property bearing City Survey No. 95-A for the tax of Rs. 801.75 for 1967-68. On May 10, 1967 the petitioner was served with bill dated April 28, 1967 bearing No. 12294 in respect of the property bearing City Survey No. 253 for Rupees 226.40 for 1967-68. At the time of the scrutiny of the petitioner's nomination paper on behalf of the other contesting candidates it was contended that the petitioner was disqualified from becoming a candidate and/or a councillor at the above election on the ground that the petitioner was in arrears of the above two sums due by him to the council after the presentation of the above two bills on him under Section 150 of the Maharashtra Municipalities Act, 1965. The Returning Officer accepted the above contention and rejected the petitioner's

nomination paper by his order dated May 13, 1967. The above order of the Returning Officer was challenged before the learned District Judge, who by his appellate Judgment and impugned order dated May 29, 1967 rejected the petitioner's appeal.

2. Mr. Patankar for the petitioner has relied on the provisions in Sections 16 (1) (h), 150, 151, 169, 170 and 327 of the above Act and contended that the above decisions of the Returning Officer as well as the learned District Judge are unwarranted in law. His submission was that in connection with the above dues in respect of the taxes on the above properties default of payment had not been completed by the petitioner for the period of 15 days mentioned in the bills. In that connection he relied on the language used in Sections 150 and 151 and provisions in Sections 167 and 170 where a period of 15 days is mentioned. The substance of his submission was that simple arrears of payment of taxes could never be default in payment, since the bills mentioned a period of 15 days for payment of the dues mentioned in the bills. There was neither default nor arrears in that connection. The reasoning in the decisions of the Returning Officer and the learned District Judge are contrary to the above provisions of law and liable to be set aside.

3. Mr. S. N. Naik for respondents Nos. 1 and 3 as well as Mr. Joshi and Mr. B. N. Naik for respondents Nos. 2 and 5 have strenuously submitted that on a true construction of the provisions in Section 16 (1) (h), the disqualification in respect of a candidate at the election arises immediately upon presentation on him of the bill for the taxes due. The disqualification and the arrears mentioned in that section has no relevance to the period of time mentioned in Sections 150, 151 and the provisions in Sections 169 and 170.

4. The relevant parts of the above Sections run as follows:—

"16 (1) No person shall be qualified to become a Councillor whether by election, co-option or nomination, who—

(h) is in arrears of any sum due by him to the Council after the presentation of a bill therefor to him under Section 150."

"150 (1) When any amount becomes due to the Council, ... the Chief Officer shall, with the least practicable delay, cause to be presented to the person liable for the payment thereof, a bill for the sum claimed as due.

(2) Every such bill shall specify the period for which, and the property, occupation or thing in respect of which the sum is claimed and shall also give notice of the liability incurred in de-

fault of payment and of the time within which an appeal may be preferred as hereinafter provided against such claim.

(3) If a person to whom such bill is presented pays, within fifteen days from the presentation thereof, the whole sum claimed as due, then a discount shall be paid by the Council to him."

"151. If the person to whom a bill has been presented as provided under the last preceding section does not, within fifteen days from the presentation thereof, either

(a) pay the sum claimed as due in the bill, or

(b) show cause to the satisfaction of the Chief Officer why he is not liable to pay the same, or

(c) prefer an appeal in accordance with the provisions of Section 169 against the claim the Chief Officer may cause to be served upon the person liable for the payment of the said sum a notice of demand in the form of Schedule IV"

Sections 152 onwards contain a scheme for compulsory payment and recovery of the amounts mentioned in the bill after service of the notice of demand.

5. Sections 160 and 170 provide for the Tribunals of appeals and the procedure in connection with the institution of appeals. Under sub-clause (c) of Section 170 the appeal filed by an assessee is directed not to be entertained unless the amount claimed from is deposited by him in the municipal office. Now, having regard to the provisions in Section 151 relating to the circumstances in which notice of demand can be issued and that the fact that such notice of demand cannot be issued unless there is default in payment within 15 days, Mr. Patankar's submission was that there could be no arrears and default during the period of 15 days from the presentation of the appeal. Similar contention was made having regard to the period of 15 days in connection with the discount to be granted as mentioned in sub-clause (3) of Section 150. There is no doubt that notice of demand contemplated under Section 151 cannot be issued where the assessee makes an application for showing cause to the Chief Officer that he was not liable to pay the amount mentioned in the bill and where he prefers an appeal under Section 169. This provision has the effect of preventing compulsory enforcement of payment of the tax due by machinery mentioned in Section 151 and next following sections. Provision in Section 151 accordingly has no bearing on the question of the assessee being not in arrears during the period of 15 days mentioned in Section 151. The right of discount that

is available if payment is made within 15 days, as provided in sub-section (3) of Section 150 only goes to show that even during the period of 15 days mentioned in that sub-section, the amount mentioned in the bill was always payable by the assessee to the Municipal Council. The liability of an appellant-assessee to deposit the amount mentioned in the bill in connection with the appeal that he would file under Sec. 169 does not help in arriving at a true construction of the provisions in Section 16 (1) (h). Same is true of the contents of Sections 150 and 151. The language of sub-clause (h) of sub-section (1) of Section 16 is clear and unambiguous. The scheme of levy of house-tax as contained in Chapter IX, and the language of Section 150 clearly goes to show that the house-tax fixed and levied under Chapter IX becomes payable by each owner of immovable property to the Municipal Council for the ensuing year as from April 1 of the very year. In respect of such tax due from April 1 of the current year, the bills are required to be prepared in accordance with the provisions in sub-section (1) of Section 150.

Friday, the 11th December 1970.

Apparently the bills must be for the amounts which already have become due. The presentation of the bills has the consequence of making the amounts payable as from the dates of the presentation of the bills. The amounts mentioned in the bills presented accordingly must be held to have become due and payable during the whole of the period of 15 days on which reliance is placed on behalf of the petitioner. The contention that arrears in respect of the amounts mentioned in the bills presented arises only upon expiry of that period of 15 days is prima facie misconceived and erroneous. The arrears grow from the moment of the presentation of the bill and continues in existence from that very moment. This period of 15 days is only relevant in connection with the scheme for compulsory enforcement and recovery contained in Section 151 and next following sections. The period of 15 days mentioned in these sections is entirely irrelevant in connection with the tax which becomes due at a date prior to the issuance of the bills and payable from the date of the presentation of the bills. On a reading of the contents of Section 16 (1) (h) in the light of the above true position, it is clear that the disqualification mentioned in sub-section (h) and the arrears mentioned therein both commence and/or come into existence as from the moment of the presentation of the bill for the tax due. There is no warrant for the submission

made by Mr. Patankar that the arrears in respect of the amounts mentioned in the bill do not come into existence at the above moment. There is the result of the scheme for levy of the house-tax for each year with the commencement of April 1 of each year and the scheme in Section 150 onwards for making the house-tax not only due but payable as from the date of the presentation of the bill.

6. Having regard to this position, this petition must fail. Rule is accordingly discharged. There will be no order as to costs.

Petition dismissed.

AIR 1972 BOMBAY 157 (V 59 C 32)

VIMADALAL, J.

In the matter of M/s. R. T. Engineering and Electronics Co., Applicants.

Misc. Petn. No. 58 of 1970, D/- 23-7-1970.

Trade and Merchandise Marks Act (1958), Sections 11, 12, 18, 20 — Mark likely to deceive or cause confusion — It is not obligatory on Registrar before accepting application for registration to advertise and call for evidence of likelihood of deception or confusion in every case — Distinction between Sections 11 (a) and 12 (1) pointed out. (Paras 3, 6)

Whilst, generally speaking, the court would follow the procedure of advertising the mark and deciding the question of confusion or deception only when it is opposed and evidence taken in regard to the same, before it applies the bar of Section 11 (a) of the Act, there is nothing in the said section to deprive the Registrar of the power which he has under Section 18 (4) of the Act in a proper case, to refuse to accept an application for registration without advertising it or calling for evidence of likelihood of deception or confusion. It is not difficult to conceive of case in which the likelihood of confusion or deception may be so patent that to compel the Registrar to advertise and call for evidence would be sheer waste of public time, and it is for that reason that the legislature has advisedly not made it obligatory on the Registrar to do so in every case under Section 11 (a).

(Para 3)

The distinction between Sections 11 (a) and 12 (1) of the Act is: (1) whereas under Section 11, Actual user must be taken into account, including the mode of user, or the fact that the goods are known in the market by a particular name, for the purpose of considering the possibility of deception or confusion

under Section 12, the court has only to take into account, what may tersely be called, notional fair user on the basis of the similarity of the two marks, though it must no doubt consider not only visual or phonetic similarity, but also the possibility of contextual confusion or confusion or deception as to trade origin, as well as the other surrounding circumstances such as the nature of the goods and the kind of customers who would be likely to buy those goods; (2) whereas Section 12 comes into play only when the opponent's mark is a registered trade mark, there is no such limitation in regard to the applicability of Section 11, and (3) whereas Section 12 applies only when the mark applied for is identical with or deceptively similar to a registered trade mark, there is no such limitation in regard to the nature of the goods in a case under Section 11. In either case, however, the Court has to consider the position from the point of view of an unwary purchaser who is a man of average intelligence and of an imperfect recollection. (Para 6)

Held (considering the instant case in the light of the legal position) that the mark applied for could not be held to be deceptively similar to the competing registered trade mark. Nor were there any exceptional circumstances which would justify the court in directing that the petitioners' (appellants) mark be advertised before acceptance under the proviso to S. 20 (1) of the Act. Case law ref. (Para 7)

Cases Referred: Chronological Paras

(1969) 1969 RPC 102, Bulova Accutron Trade Mark, Re	3
(1969) 1969 RPC 472, "Ball" Trade Mark, Re	3
(1963) AIR 1963 SC 449 (V 50) = (1963) 2 SCR 484, Amritdhara Pharmacy v. Satya Deo Gupta	5, 7
(1954) 71 RPC 136, Harker Stagg Ltd.'s Trade Mark, Re	3
(1953) AIR 1953 SC 357 (V 40) = 1953 SCR 1028, N. S. Thread Co. v. James Chadwick and Bros. Ltd.	4
(1949) 66 RPC 110, John Fitton and Co., Re	3, 7
(1947) 64 RPC 119, Hans Emanuel Enoch, Re	3
(1906) 23 RPC 774, Pianotist Co. Ltd., Re	3
(1889) 6 RPC 311, Australian Wine Importers, Re	3

J. I. Mehta with Shavksha, for Petitioners instructed by M/s. Daruvala & Co.; K. S. Cooper, for Registrar of Trade Marks.

ORDER :— This is an appeal under Section 109 (2) of the Trade and Merchandise Marks Act, 1958 from the decision of the Assistant Registrar of

Trade Marks under Section 18 (4) of that Act refusing to register the Petitioners' trade mark on the ground that the same conflicts with registered trade mark No. 213586-B as also with the mark in application No. 253773-B with both of which the Petitioners' mark was held by him to be "deceptively similar". The Petitioners had originally applied to the Trade Marks Registry for the registration of his mark in Part A of the Register in Class 7 in respect of diesel oil engines, but subsequently the same was converted by the Petitioners into one for registration in Part B and the designation of the goods was modified so as to read "Diesel Oil Engines" (not for land vehicles) for sale in the State of Gujarat." The Assistant Registrar, after hearing counsel on behalf of the Petitioners, declined to accept the application and dismissed the same under Section 18 (4) of the Act. In the grounds which were furnished by the Assistant Registrar for arriving at the said decision, it was stated that neither visually nor phonetically was the Petitioners' mark similar to registered mark No. 213586-B or with the mark in application 253773-B. The Assistant Registrar, however, took the view that, though the Petitioners' mark had no visual or phonetical resemblance to the said mark or the said application, confusion was likely to ensue as to trade origin in so far as there was "a definite possibility that a substantial number of purchasers would assume that the two sets of goods sold in the market come from the same trade source." He also held that the Petitioner was not entitled to concurrent registration under Section 12 (3) of the Act. In the result, he refused the Petitioners' application, as stated above, and it is from that the present appeal has been preferred.

2. Learned counsel on behalf of the Petitioners contended that in view of the conclusion arrived at by the Registrar that the Petitioners' mark was neither visually nor phonetically similar to registered mark No. 213586-B or to the mark in application No. 253773-B, it was not open to him to refuse the Petitioners' application summarily under Section 18 (4) without advertising the same in accordance with Section 20 of the Act and taking evidence in regard to the likelihood of confusion on other grounds. In order to deal with that contention of the Petitioners, it is necessary to refer to Sections 11 (a) and 12 (1) of the Act and to compare the scope of those two sections. The relevant portion of Section 11 is in these terms:—

"11. Prohibition of registration of certain marks.—

A Mark:—

(a) The use of which would be likely to deceive or cause confusion; or—
shall not be registered as a trade mark."

The relevant portion of Section 12 reads as follows:—

"12. Prohibition of registration of identical or deceptively similar trade marks.— (1) Save as provided in subsection (3) no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods."

The expression "deceptively similar" which is to be found in Section 12 (1) is defined in Section 2 (1) (d) in the following terms:—

"(d) "deceptively similar":— A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion;"

In almost all the English authorities in which any question under either of these sections fell to be decided, the scope of Section 11 was considered in relation to Section 12, or vice versa, and these two sections have been dealt with in a comparative way. It may be mentioned that Section 11 of our Act corresponds to Section 11 of the U. K. Trade Marks Act, 1938, and Section 12 of our act corresponds to Section 12 (1) and (2) of the U. K. Trade Marks Act, 1938.

3. The scope of Sections 11 and 12 was considered in the case of Hans Emanuel Enoch, (1947) 64 RPC 119 which was strongly relied upon by Mr. Mehta on behalf of the Petitioners. The facts of that case were that Enoch applied to register the word mark "Vivicillin" for products of mould metabolism prepared for pharmaceutical purposes. The word "Cyllin" and two other marks incorporating that word, had already been registered by M/s. Jeyes' Sanitary Compounds Co. Ltd., for articles of the same class. The Acting Registrar was of opinion that there might be likelihood of confusion, but offered to allow the application go to an advertisement if the applicant obtained the consent of the said Jeyes' Sanitary Compounds Co. Ltd., for registration of the mark. The applicant was unwilling to apply for such authorization and the application was accordingly refused. The applicant appealed to the court and Cohen, J. allowed the appeal and set aside the order of the Registrar, holding that there was not sufficient similarity between "Vivicillin" and "Cyllin" to render confusion likely. In the course of his judgment Cohen, J. observed (at p. 122) that it was common ground that in dealing with the said case

which was a case under Section 12 of the U. K. Act, the court must consider only the marks side by side, when written as well as when spoken and decide whether there was risk of confusion either in sight or in sound. He then stated that he approached the matter with some hesitation because he was hearing an appeal from somebody who was dealing with these matters with great frequency and was a man of great experience in cases of that kind, but in his opinion, the Registrar had gone astray in the said case when for refusing registration he gave the reason as being: "Even if the distinction between the two words be clearly appreciated there will, I think, be many persons who will detect the similarity between them and who will think that "Vivicillin" goods have some connection with the proprietors of the "Cyllin" marks already on the register." The learned judge then went on to observe (at p. 124) that it was admitted that the said passage could not be supported as "it was a matter which would have been relevant under Section 11 and may well become relevant again if this application is opposed after it is advertised." This passage from the judgment of Cohen, J. was strongly relied upon by Mr. Mehta on behalf of the Petitioners before me as supporting his contention that the bar of Section 11 would be attracted only after the mark was advertised and was opposed and evidence taken in regard to the likelihood of confusion or deception. I am not prepared to accept the statement in the passage from the judgment of Cohen, J. quoted above as authority for that proposition, or to accept that proposition itself. Whilst, generally speaking, the court would follow the procedure of advertising the mark and deciding the question of confusion or deception only when it is opposed and evidence taken in regard to the same, before it applies the bar of Section 11 (a) of the Act, there is nothing in the said section to deprive the Registrar of the power which he has under Section 18 (4) of the Act, in proper case, to refuse to accept an application for registration without advertising it or calling for evidence of likelihood of deception or confusion. It is not difficult to conceive of case in which the likelihood of confusion or deception may be so patent that to compel the Registrar to advertise and call for evidence would be sheer waste of public time, and it is for that reason that the Legislature has advisedly not made it obligatory on the Registrar to do so in every case under Section 11 (a). The observation of Cohen, J. quoted above which is relied upon by Mr. Mehta only brings out the possibility of such evi-

dence becoming relevant after the mark is advertised and opposed, but does not, in my opinion, lay down the proposition of law that in every case under Section 11 of the Act the mark must be advertised and evidence considered by the Registrar, if it is opposed. The scope of Sections 11 and 12 again came up for consideration before the Assistant Comptroller in the case of John Fitton and Co. Ltd., (1949) 66 RPC 110 in which the facts were that the application for registration of the mark "Easyjest" for medicated sweets was opposed by Jests Ltd. as proprietors of three registered trade marks consisting of or including the word "Jests". At the hearing, the applications restricted their specifications to medicated boiled sweets, and the evidence established that the applicants and the opponents' goods would normally be made up in different forms and sold through different channels by sweet dealers and chemists respectively. The evidence also established that the applicants had prior use of their mark. It was held by the Assistant Comptroller that, although no actual confusion had been proved, there was a probability of traders and the public being confused as to whether goods under the two marks had a common origin and that that probability would have been sufficient to justify the refusal of the mark if there had been no user. The Assistant Controller, however, then proceeded to register the applicants' mark with the limitation that it was to be in respect of specification of different medicated boiled sweets for sale in England and Wales. In considering the matter under Sections 11 and 12 (1) of the U. K. Trade Marks Act, 1938, the Assistant Comptroller referred to the observations of Cohen, J. in Enoch's case cited above, but declined to follow the same in view of the decision of the Court of Appeal in the Australian Wine Importers' Case, (1889) 6 RPC 311 which, being a decision of the Court of Appeal, was binding upon him. The Assistant Comptroller observed (at p. 113) that the evidence furnished on behalf of the opponents was directed not so much towards showing that the two marks "Jests" and "Easyjests" might themselves be confused either visually or orally, as towards establishing that confusion would result owing to the presence of the common element "Jest" in each mark, in traders and the public being induced to believe that the two sets of goods sold under the marks emanated from one and the same trade source. Following the view taken in the Australian Wine Importers' case, the Assistant Comptroller stated that the issue upon deception of the Character involved in the case before

him was one to be dealt with under Section 12 (1) of the U. K. Trade Marks Act, 1938, and he then proceeded to state as follows (at p. 113):—

"Now, under Section 12 (1) of the present Act the Registrar is required to postulate a simultaneous use of the two marks under consideration, whether or not one is already in use, and to assess to the best of his ability the likelihood of ensuring confusion or deception, and no limitation is, to my mind, placed upon the nature of the confusion or deception so envisaged, whether it be visual or phonetic confusion of the marks themselves, or what is termed contextual confusion, or confusion or deception as to the trade provenance of the goods." He then took the view that on the facts of the case and the evidence before him, there was likelihood that a substantial number of persons would assume that the two sets of goods sold under the trade marks emanated from the same trade source and that, though he would not describe that likelihood as very considerable, it was sufficient to constitute a bar to the registration of the mark "Easyjest" as a new mark. Contrary to the view expressed in Enoch's case, (1947) 64 RPC 119 (at p. 122), the law as laid down by the Court of Appeal in the Australian Wine Importers' case, (1889) 6 RPC 311 which was followed by the Assistant Comptroller in John Fitton and Co.'s case, (1949) 66 RPC 110 was that in dealing with a case under Section 12 the Court was not confined to considering visual or phonetic confusion of the marks themselves, but could also take into account contextual confusion or confusion or deception as to the trade origin of the goods. The relative scope of Sections 11 and 12 was laid down by the Court of Appeal in England in the case of Harker Staggs Limited's Trade Mark, ((1954) 71 RPC 136). It is not necessary for me to go into the facts of the said case but in regard to the scope of Sections 11 and 12 of the Act, Evershed M. R. stated the legal position as follows (at p. 141):—

"As Mr. Mould pointed out, Section 11 may be invoked by a person who has not got a registered mark at all, but, whether he has or whether he has not got a registered mark, the question under Section 11 is, as I myself stated in the "Hevis" case, whether, having regard to the use made of the objector's or applicant's mark and the inferences to be drawn from its use, confusion is likely, under Section 12, which is only available to a registered proprietor of a mark, the question of confusion has to be considered with regard to any possible user by the registered objector or

applicant of his mark in regard to any of the subjects in respect of which it is registered. Prima facie, therefore, it must follow that the scope for possible confusion under Section 12 is wider than the scope for confusion under Section 11, so that if the Court concludes adversely to the present applicants, or an applicant in a similar situation, under Section 12, such applicants must also fall under Section 11."

It is important to note that whereas the Court has under Section 11 to consider the actual user of the mark in question, under Section 12 the question of confusion has to be considered with regard to any possible or notional user. Mr. Cooper who appeared for the Registrar of Trade Marks whom I had directed to appear in the present case, relied on the decision in the case of Bulova Accutron Trade Mark, (1969 RPC 102) as being very similar to the present case as far as facts are concerned. The facts of that case were that the High Court dismissed the appeal from the decision of the Assistant Registrar and confirmed his Order refusing registration of the applicant's mark "Bulova Accutron" on the ground that it so nearly resembled the opponent's mark "Accurist" as to be likely to cause deception and confusion. Though the mark sought to be registered in that case was a combination mark, a part of which resembled a mark already on the register as in the present case, I am afraid, as far as facts are concerned, one case cannot be regarded as authority for another, and I am unable to derive any assistance from the decision in Bulova Accutron's case. The distinction between Sections 11 and 12 of the Act has, however, been very carefully considered by the House of Lords in the recent case relating to the "Bali" Trade Mark, (1969 RPC 472). The facts of that case were that, in 1938, a trade mark of the word "Bali" in respect of the brassieres, in script set in a device, had been registered. In 1959 the Bali Company applied for registration of the word "BALI" in block capitals and the said application was opposed by another company named Berlei Co. which had previously sold brassieres in the U. K. under a registered trade mark, and the Berlei company also applied for rectification of the register by the removal therefrom of the 1938 Bali registration, inter alia, as offending Section 11 of the Act, in that the mark was likely to cause deception or confusion having regard to the Berlei Company's reputation in their own mark. The Registrar found in favour of the Berlei Company, rectified the existing 1938 Bali registration and also refused the 1959 application of the Bali Co. to register

the mark. After intermediate proceedings by way of appeal to the Court of Appeal, the House of Lords upheld the decision of the Registrar that to establish that a mark offended against Section 11 it was necessary only to show the likelihood of deception or confusion, and not necessary to show something further, such as possible, probable or certain success in a passing off action. Lord Upjohn, after tracing the legislative history of Section 11 stated (at p. 495) that the said section was designed not so much for the protection of other traders in the use of their marks or their reputation as for the protection of the public. He then formulated the distinction between Section 11 and Section 12 in the following terms (at p. 496).

"Section 12 is principally a weapon in the hands of a registered proprietor though it is not necessary that he personally should object. Here no user by the registered proprietor need be shown: it is purely a question of similarity. Section 11 is, as I have said, for the protection of the public and anyone may object, but if he relies only on similarity he must prove the practical likelihood of confusion to the public and this he can only do, for the purposes of the section, by proving the existing user by another, not necessarily by himself, which is likely to cause deception or confusion; but if he does not establish likelihood of confusion by some present user of a similar mark likely to cause deception or confusion the court would not treat that as sufficient to disentitle the mark in suit to protection."

Lord Upjohn then proceeded to clarify that, under Section 11, what the court had to consider was whether, having regard to the user of the opponents' marks, the court was satisfied that the mark applied for, if used in a normal and fair manner in connection with any goods covered by the registration proposed, would not be reasonably likely to cause deception and confusion amongst a substantial number of persons. The view taken in the Ball Trade Mark's case, therefore, is that since the Court is not concerned in considering a case under Section 12 with actual user, the question was purely one of similarity of marks; whereas in a case under Section 11 the Court was concerned with the practical likelihood of confusion to the public by reason of the existing user by another which was likely to cause deception or confusion. The legal position in regard to the scope of Sections 11 and 12 of the Act emerging from the decisions of English Courts discussed above, has been set out in Kerly's Law of Trade Marks and Trade Names (9th Edition) at pp. 169-171, where it is pointed out that if an

opposition is based upon a registered trade mark, the inquiry under Section 12, embracing as it does, notional and fair use upon any of the goods concerned, is wider than that under Section 11 under which the earlier mark must be considered precisely as it has in fact been used. In considering the question of deception under Section 12 (1) of the U. K. Trade Marks Act, 1938 a passage from a judgment of Parker, J. in the Pianotist Co. Ltd.'s case (23 RPC 774 at p. 777) has been quoted by Kerly (at p. 453) and adopted as laying down the correct rule. Passage is as follows:—

"You must take the two words. You must judge them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks." In further considering the rules of comparison it is stated in Kerly (at pp. 465-466) that the marks ought not to be merely looked at as they stand side by side, because from the very nature of the case they would not be so put before any customer when it was sought to deceive by means of either of them, and the question would be whether a person who sees the proposed trade mark in the absence of the other trade mark of which he has an imperfect recollection was liable to be deceived.

4. As far as Indian cases are concerned, reference may be made to the case of N. S. Thread Co. v. James Chadwick & Bros. Ltd. (AIR 1953 SC 357). The facts of that case were that the appellants before the Supreme Court carried on the business of manufacturing cotton sewing thread, and the respondents were a company registered in England who were also manufacturing sewing thread. One of the trade marks used by the English company consisted of the device of an eagle with outspread wings and was known as the "Eagle Mark", and that mark was first advertised in the Gazette on 5th June 1896 and goods bearing the said mark had since then been regularly imported into and sold in India on an extensive scale. Some time in the year 1940, the applicant started selling cotton sewing thread under a mark consisting of the device of a bird with wings fully spread out perched on a cylinder of cotton sewing thread with the words "Eagle Brand" and the name of the appellant company printed on the mark. On the respondent company ob-

jecting to the mark, the appellant substituted the words "Vulture Brand" in place of the words "Eagle Brand", but the mark remained the same in all other respects. A passing off action filed by the respondent failed on the ground of want of evidence. Thereafter, in the year 1942, the appellants applied to register their trade mark, whereupon the respondents gave notice of their opposition to that application. The Registrar of Trade Marks allowed the opposition and rejected the application of the appellants for registration of their mark on the ground that the mark applied for so closely resembled the respondents' mark as to be likely to deceive or cause confusion. On appeal to this Court, Shah, J. allowed the appeal, set aside the order of the Registrar and directed the Registrar to register the appellants' mark. On a Letters Patent Appeal, however, the decision of Shah, J. was set aside and the order of the Registrar restored. The matter was thereafter taken to the Supreme Court in further appeal, and the Supreme Court in dismissing that appeal held (para 23) that the appellants had failed to discharge the onus that rested heavily on them to prove that the trade mark which they wanted the Registrar to register was not likely to deceive or cause confusion, within the terms of Section 8 of the Indian Trade Marks Act, 1940, which it may be stated, corresponds to Section 11 of the present Act. In arriving at that decision, the Supreme Court observed (para 21) that, under the said Section 8, an application to register a trade mark which was likely to deceive or to cause confusion had to be refused notwithstanding the fact that the mark might have no identity or close resemblance with any other trade mark and that the Registrar had to come to a conclusion on that point independently of making a mere comparison of the mark applied for with any other registered trade mark. It was further laid down in the judgment of the Supreme Court that what the Registrar had to see under that section was whether, looking at the circumstance of the case, a particular trade mark was likely to deceive or to cause confusion. Mahajan, J., in delivering the judgment of the court, further observed (para 22) that the real question to decide in such cases was to see as to how a purchaser, who must be looked upon as an average man of ordinary intelligence would react to a particular trade mark, what association he would form by looking at the trade mark and in what respect he would connect the trade mark with the goods which he would be purchasing.

5. There is another and a later decision of the Supreme Court in the case

of Amritdhara Pharmacy v. Satya Deo Gupta, (AIR 1963 SC 449) in which Section 8 of the Trade Marks Act, 1940, which corresponds to Section 11 of the present Act, and Section 10 of the Act of 1940 which corresponds to Section 12 of the present Act, came up for consideration. The facts of that case were that an application for the Registration of the trade name "Lakshmandhara" in respect of a medicinal preparation for the alleviation of various ailments was opposed by the proprietors of the trade name "Amritdhara" which was already registered as a trade name in respect of a similar medicinal preparation of the opponents. The Supreme Court held that, on a consideration of all the circumstances, the overall similarity of the two names in respect of the same description of goods was likely to cause deception or confusion within the meaning of Section 10 (1) of the Trade Marks Act, 1940. It was observed in the judgment of the Supreme Court (para 7) that the Act did not lay down any criteria for determining what was likely to deceive or cause confusion, and that every case must depend on its own particular facts and the value of the authorities lies not so much in the actual decision as in the test applied for determining what was likely to deceive or cause confusion. It was then laid down that, for deceptive resemblance, two important questions arise viz. (1) who are the persons whom the resemblance must be likely to deceive or confuse; and (2) what rules of comparison are to be adopted in judging whether such resemblance exists. The Supreme Court then took into account (para 8) the fact that the medicinal preparations of the nature in question before them would be purchased mostly by people who, instead of going to a doctor, wish to purchase a medicine for the quick alleviation of their suffering, both villagers and townfolk, literate as well as illiterate, and laid down (para 9) that the question had to be approached from the point of view of "an unwary purchaser of average intelligence and imperfect recollection." It was then observed (para 11) that what degree of resemblance was necessary to deceive or cause confusion must, in the nature of things be incapable of definition a priori, and (para 12) that the question had to be determined as a case of first impression and irrespective of earlier decisions. The Supreme Court however, took the view that the circumstances of the case before them established the plea of acquiescence on the part of the appellant in the use of "Lakshmandhara" in the State of Uttar Pradesh so as to bring the case within sub-section (2) of S. 10 of the Trade Marks Act, 1940 (corresponding to Section 12 (2) of the present Act), and that

the Registrar was, therefore, right in imposing the limitation allowing registration of "Lakshmandhara" for sale in the State of Uttar Pradesh.

6. The distinction between Sections 11 (a) and 12 (1) of the Act therefore, is (1) whereas, under Section 11, Actual user must be taken into account.

including the mode of user, or the fact that the goods are known in the market by a particular name, for the purpose of considering the possibility of deception or confusion, under Section 12, the court has only to take into account, what may tersely be called, notional fair user on the basis of the similarity of the two marks, though it must no doubt consider not only visual or phonetic similarity, but also the possibility of contextual confusion or confusion or deception as to trade origin, as well as the other surrounding circumstances such as the nature of the goods and the kind of customers who would be likely to buy those goods. (2) whereas Section 12 comes into play only when the opponent's mark is a registered trade mark, there is no such limitation in regard to the applicability of Section 11; and (3) whereas Section 12 applies only when the mark applied for is identical with or deceptively similar to a registered trade mark, there is no such limitation in regard to the nature of the goods in a case under Section 11. In either case, however, the Court has to consider the position from the point of view of an unwary purchaser who is a man of average intelligence and of an imperfect recollection.

7. I must now proceed to consider the Assistant Registrar's judgment under appeal in the present case in the light of the legal position formulated in the preceding paragraph. The first question that arises is whether the Assistant Registrar has in refusing registration acted under Section 11 (a) or under Section 12 (1) of the Act. Though the Assistant Registrar has not specifically mentioned the section, in my opinion, reading the grounds of his decision as a whole, having regard particularly to the fact that he has also proceeded to consider the case under Section 12 (3) of the Act in the concluding part of his judgment, it is clear that he has proceeded under Section 12 (1) of the Act. That position was not disputed by the learned counsel appearing on his behalf before me. In view, however, of the fact that Section 12 can come into play only when the competing mark is a registered trade mark, the Assistant Registrar is clearly wrong in applying it to the mark in Application No. 253773B which was not yet registered. It, therefore, remains for me to consider whether his decision is correct in regard to re-

gistered trade mark No. 213586B. The Assistant Registrar has, in terms, decided that, visually and phonetically, the applicant's mark and the registered trade mark No. 213586B are not similar and, in my opinion, he is right in arriving at that conclusion. He was also right in holding that, both by reason of the shortness of the period of user of the applicant's mark as well as by reason of that user not having been shown to be honest as far as the adoption of the word "Master" therein was concerned, the petitioner's case did not come within the ambit of S. 12 (3) of the Act. The Assistant Registrar has held, as the Assistant Comptroller did in John Fitton & Co. Ltd.'s case, (1949) 66 RPC 110 (at pp. 113-114) cited above, that there was likelihood of contextual confusion or confusion as to trade provenance in respect of the goods to which the applicant's mark related and the goods to which registered trade mark No. 213586B related. The Assistant Registrar has, in the present case stated, "There may be likelihood of confusion as to trade origin if the competing marks are likely to be understood by the public as complementary marks, because of the presence of the word "MASTER" in them." He also took the view that since the word "MASTER" appeared in the applicant's mark as a separate word "with the letter 'M' in capital", it had not lost its identity by association with the coined word "Rece". In doing so, the Assistant Registrar has, in my opinion, completely disregarded the nature of the goods and the kind of customers who would buy them which, as stated in Kerly (at p. 453) and by our Supreme Court in Amritdhara's case, AIR 1963 SC 449 (para 7), he was bound to consider in comparing the marks in question for the purpose of determining whether they were "deceptively similar" within the terms of Sec. 12 (1). Diesel oil engines or engines are not goods which are bought and sold over the counter, and persons who buy them would not be illiterate persons. They would be persons who would know what they have come to buy or, at any rate, would be accompanied by persons who are mechanically knowledgeable. These are factors which the Assistant Registrar has completely overlooked and, having regard to the same, I am afraid, I am unable to agree with the conclusion at which he has arrived when he held that the mark applied for is deceptively similar to the competing registered trade mark No. 213586B within the terms of Sec. 12 (1). This appeal must, therefore, be allowed and the decision of the Assistant Registrar set aside. There are no "exceptional circumstances" which would justify me in directing that the Petitioners' mark be advertised before acceptance under the

[proviso to Section 20 (1) of the Act. I accordingly direct that the Assistant Registrar do accept the Petitioners' application for registration of their mark and advertise the same and proceed in accordance with law. He should bear his own costs in this Court,

Appeal allowed.

AIR 1972 BOMBAY 164 (V 59 C 33)

CHITALE AND NATHWANI, JJ.

Sadashiv Shankar Wani and others, Appellants v. Bala Nisbat Babaji Wani and another, Respondents.

A. F. A. D. No. 551 of 1964, D/- 17-7-1970, against order of V. V. Joshi, Asstt. J., Sangli in Appeal No. 19 of 1963.

Hindu Law — Illegitimate son of shudra — Right to succeed to father's property. (Para 16)

An illegitimate son of a shudra is entitled to succeed to his separated father's property whether ancestral or separate in his hands. Case law discussed. (Para 16)

Cases Referred: Chronological Paras

- (1962) AIR 1962 Andh Pra 515
(V 49), China Apparao v. Narasimha Rao 13, 14
(1961) AIR 1961 SC 1334 (V 48) = 1962-1 SCR 347, Singhai Ajit Kumar v. Ujayar Singh 11
(1952) AIR 1952 SC 225 (V 39) = 1952 SCR 869, Gur Narain Das v. Gur Tahal Das 11
(1949) AIR 1949 Nag 43 (V 36) = 1949 Nag LJ 129, Shamrao Fakirro Hatkar v. Munnabai, Fakirrao 2, 15
(1938) AIR 1938 Bom 433 (V 25) = 40 Bom LR 937, Hiralal v. Meghraj 3, 10
(1933) AIR 1933 Mad 397 (V 20) = 64 Mad LJ 500, Raju Thambiran v. Arunagiri Thambiran 13, 14
(1932) AIR 1932 Bom 234 (V 19) = 34 Bom LR 191, Sakhamam Satu v. Shamrao Maruti 13, 14
(1931) AIR 1931 PC 294 (V 18) = 33 Bom LR 1526 = 58 Ind App 402, Vellaiyappa Chetty v. Natrajan 6, 11, 15
(1890) 17 Ind App 128 = ILR 18 Cal 151 (PC), Raja Jogendra Bhupati v. Nityanand Mansingh 5, 11, 15
(1885) ILR 8 Mad 557, Ranoji v. Kandoji 7, 14
(1880) ILR 4 Bom 37 (FB), Sadu v. Baiza 5, 11, 14, 15

N. D. Hombalkar, for Appellants; K. J. Abhyankar, for Respondent No. 1.

NATHWANI, J.:— This appeal raises the question whether an illegitimate son (dasiputra) of a Hindu Shudra can claim

against a legitimate son of his father partition of property which was ancestral in his father's hands.

2. The facts in so far as they are material for this appeal are as under: One Babaji Wani, a Shudra, died in 1915 leaving him surviving his widow Tara, a son Shankar by her, and two illegitimate sons and a daughter by his mistress Savu, namely, Bala the plaintiff Satappa defendant No. 1 and Kondibai. Babaji also left lands and other immovable properties which were ancestral in his hands. After Babaji's death the plaintiff along with Shankar and other members of the family formed a joint Hindu family and Shankar as the Karta thereof managed the joint family property. Shankar died leaving three sons, viz., Dadu, Sadashiv-defendant No. 2, and Madhav-defendant No. 3. Dadu managed the joint family property till 1949 when he died leaving his widow Hirabai and a minor son Ananda-defendant No. 4. Since then defendant No. 2 was in management of the joint family property. The plaintiff demanded partition and separate possession of his share in the said property but as defendant No. 1 and others refused to do so he filed on April 11, 1961 the present suit against the defendants for partition and possession of his one-sixth share in the joint family property. Defendants contested the suit, inter alia, on the ground that the plaintiff as the illegitimate son (Dasiputra) could not claim partition or any interest in the suit property which was ancestral in the hands of Babaji. The trial Court upheld defendants' above contention and dismissed the suit. On appeal by the plaintiff the learned Assistant Judge considered the ratio of the Nagpur case in Shamrao Fakirro Hatkar v. Mt. Munnabai Fakirrao, AIR 1949 Nag 43; as binding on him and held that the plaintiff was entitled to partition of the ancestral property and decreed partition and possession of plaintiff's share in the said property. Defendants Nos. 2 to 5 have preferred this appeal against the said decision.

3. Mr. Hombalkar, the learned Advocate for the appellants contends that the right of an illegitimate son of a Shudra to claim a share in his father's property extends only to his self-acquired or separate property and not to property which was ancestral in his hands. He submits that there is no text of smriti or Mitakshara or any direct authority of this Court or of the Supreme Court applicable to the case and that the decisions of other High Courts taking a contrary view, apart from being not binding on this Court, should not be followed as they are contrary to the view of the relevant text taken by this Court in Hiralal v. Meghraj, 40 Bom LR 937 =

(AIR 1938 Bom 433). On the other hand Mr. Abhyankar for the respondent disputes the correctness of the above contentions and supports the decision of the lower appellate Court.

4. Now, the source of right of inheritance and partition of an illegitimate son is a verse of Yagnavalkya as expounded in the Mitakshara. The relevant text of Mitakshara, i. e., Chapter 1, Section 12, as translated by Colebrooke, is as follows:—

"1. The authority next delivers a special rule concerning the partition of a Sudhra's goods. Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share; and one, who has no brother, may inherit the whole property, in default of daughter's sons."

"2. The son, begotten by a Sudra on a female slave, obtains a share by the father's choice, or at his pleasure. But, after (the demise of) the father, if there be sons of a wedded wife let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment.

However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But, there be such, the son of the female slave participates for half a share only."

"3. From the mention of a Sudra in this place (it follows that) as son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he, receives a simple maintenance." (Stoke's Hindu Law Books page 426) (vide also page 72 Book I of the Digest Hindu Law by West and Buhler).

5. There are decisions by the Privy Council and Courts in India on the interpretation of the above text and it is necessary to refer to some of these authorities cited at the Bar by the parties. The first case in order of date is a Full Bench decision of this Court in *Sadu v. Baiza*, (1880) ILR 4 Bom 37 (FB). In this case the legal status of an illegitimate son of a Shudra as a son was recognised and it was held that after the death of his father such a son along with a legitimate son succeeded as a coparcener with right of survivorship to the property in his father's hand, he, however, taking only half a share. Mr. Hombalkar contends that in that case the point was not raised whether an illegi-

timate son can succeed to ancestral property in his father's hands and there is nothing in the Full Bench judgment delivered by Westropp C. J. to indicate that the suit property was ancestral and not self acquired in the hands of the putative father and, therefore, the case does not help the present plaintiff. Now it is true that the issue was not raised and it seems that in the said judgment it is nowhere stated that the suit property was ancestral property in father's hands. But from the statement of facts given at page 38 it appears that when after his father's death the plaintiff, started living separately from his brother, the legitimate son, the latter had allowed the plaintiff five compartments of the family house and 7½ bighas of ancestral land under an agreement in writing. This shows that the estate left by the father comprised property which was ancestral in his hands and thus though the question which arises here was not judicially decided, the actual decision was that the plaintiff as an illegitimate son succeeded as a coparcener to the suit property which was ancestral in his father's hands. In the next case of *Raja Jogendra Bhupati v. Nityanand Mansingh*, (1890) 17 Ind App 128 (PC) the Rajah who had succeeded to an impartible Raj as the only legitimate son of the last holder died without leaving any male issue, and the plaintiff, who was an illegitimate son of the same father filed the suit to establish his title to the Raj. The Privy Council approved *Sadu's* case and held that the plaintiff was entitled by right of survivorship to succeed to the impartible Raj. It is apparent from the fact of this case that the property in the hands of the deceased Raja was ancestral property though as in *Sadu's* case the question was not raised whether the plaintiff could succeed to property which was ancestral in father's hands. It would be observed that if in the Privy Council case the right of an illegitimate son extended to ancestral property of the nature of impartible Raj, the rule will apply with greater force to ordinary property as in the present case.

6. The next important case is the Privy Council case of *Vellaiyappa Chetty v. Natarajan*, 33 Bom. LR 1526 = 58 IA 402 = (AIR 1931 PC 294). The main question that arose for determination in that case was whether the plaintiffs who were illegitimate sons of a Sudra by a concubine were entitled after their putative father's death to maintenance out of the joint family property in the hands of their father's uncles and uncles' sons as his surviving coparceners. The father died joint in estate with his said collateral coparceners leaving considerable joint family property but no separate property of his own. The learned Single Judge of

the Madras High Court decreed plaintiffs' claim for maintenance for life, and on appeal the Division Bench of the High Court confirmed the decree. From that decree the defendants collaterals of plaintiffs' father, filed an appeal to the Privy Council. Sir Dinsha Mulla who delivered the judgment of the board pointed out that there was no text of Smriti or Mitakshara which covered the point in question but relying on the principle of Hindu Law that where a person is excluded from inheritance to property or from a share on partition of joint family property he is entitled to maintenance out of that property and on certain Indian cases on the subject held that an illegitimate son of a Shudra by a continuous concubine has the status of a son and is a member of the family, that the share of inheritance given to him is not merely in lieu of maintenance but in recognition of his status as a son, and therefore the plaintiffs were entitled to maintenance out of the joint family property. In the course of judgment, His Lordship after referring to the three verses in Mitakshara quoted above said: (1528)

"It has been held in India that the text of Yagnavalkya cited in verse 1 and the commentary on the text refer to the estate of a separated householder. The view so taken has not been contested before their Lordships."

7. In support of the above rule, His Lordship cited four Madras High Court cases, the first of which is *Ranoji v. Kandoji*, (1885) ILR 8 Mad 557, at p. 561. Now, in (1885) ILR 8 Mad 557, the facts were as follows:—two of the three brothers of Shudra caste who formed a joint Hindu family died leaving legitimate sons and the third an illegitimate son, and the latter brought a suit for partition of joint family estate against his father's brothers' sons. Muttu Sami Ayyar J. held that the illegitimate son was not entitled to a share but only to maintenance on the ground that all the texts dealing with the right of an illegitimate son to succeed and claim share on partition related to the estate of separate householders. The learned Judge further observed: (p. 561)

"Where his (illegitimate son's) father has died 'Vibhakta' or separated, there can be no question that the right of the illegitimate son extends not only to his father's acquisitions, but to ancestral property which may have come to the father's hands."

Now, the Privy Council no doubt overruled the view expressed by Muttu Sami Ayyar, J., that the share of inheritance given to an illegitimate son was in lieu of maintenance and held that he had the status of a son though with limited rights as compared with a legitimate

son. But what is of importance to note here is that His Lordship cited with approval *Ranoji's* case in support of the view that the Text of Mitakshara quoted above refers to the estate of a separated householder; and such estate, as pointed out by Muttu Sami Ayyar, J., comprised not only father's self acquired or separate property but only ancestral property which came to his hands. Thus it would be seen that the estate of a separated householder in which an illegitimate son is entitled to have a share includes ancestral property, or as a matter of fact, any other joint family property, come to his father's share at the time of separating from his collateral coparceners. Further on principle it can make no difference if the father got ancestral property by way of his share in partition or he succeeded to it as a sole surviving co-parcener.

8. Now, the rule or law based upon the Privy Council case of *Vellaiyappa Chetty* is stated in Mulla's Hindu Law (1970) Reprint, 13th Edition, p. 365 paragraph 362) as follows:—

"If the father was joint at his death with his collaterals, e. g. his brothers or their sons, or his uncles or his sons, the illegitimate son is not entitled to demand a partition of the joint family property, but he is entitled as a member of the family to maintenance out of such property, provided his father left no separate estate."

9. Mr. Hombalkar seized upon the expression "his uncles or his sons" in the above proposition and contends that the words "or his sons" therein mean father's sons as the words 'his uncles' mean father's uncles, he therefore argues that as in the present case *Babaji*, was joint at the time of his death with his legitimate son *Shankar* the plaintiff is not entitled to demand partition of the ancestral property in the hands of *Babaji* but is merely entitled to maintenance out of such property. There is no merit whatsoever in this argument. On a plain reading of the said proposition it is obvious that the example of a father dying undivided with "his uncle or his sons" is given as an illustration of the father being joint with his collaterals, and therefore, the words "his sons" therein appear to be used in the sense of "their sons", i. e. uncles' sons. In this connection it will be recalled that in the Privy Council case of *Vallaiyappa Chetty* plaintiff's father had died joint with his (father's) uncles and uncles' (their) sons. Further none of the other cases cited in the foot-note (n) to the said proposition in paragraph 363 deal with a father of an illegitimate son dying joint only with his legitimate son or sons and the illegitimate son therefore (held to be) being barred from demanding a partition of

ancestral or other joint family property in his father's hands. Thus there is no basis for defendant's above argument.

10. Mr. Hombalkar also sought to derive support from the observations made by Mr. Justice Broomfield and Mr. Justice Macklin in the Division Bench case of this court in *Hiralal v. Meghraj*. In that case the plaintiff, an illegitimate son of a Jain father, filed the suit for maintenance against his father's brother on whom his father's interest in the joint family property had devolved by survivorship. The trial Court decreed plaintiff's claim, and the appeal filed by the defendant to this Court was dismissed. It would have been seen from the above facts that the claim for maintenance in the suit was by a Jain, a member of a regenerate class. In the course of Judgment Macklin J. observed that the statement of law as to the right of an illegitimate son of a Shudra in *Mitakshara* Ch. I Section 12 referred to father's separate property (page 949). Broomfield J. also said that the said texts apply *proprio vigore* only in the case of separate property (P. 943). (underlinings by us). Mr. Hombalkar relying upon the said words "separate property" in the judgments argues that they mean only self-acquired property as distinguished from ancestral property in the hands of putative father. This argument is devoid of any substance. Both the learned Judges have referred to the case of *Vellaiyappa Chetty* in support of their statements. Now, in the passage quoted from the said case, the Privy Council said that the text of *Yagnavalkya* relates to the property of a "separated householder." It is thus evident that both the learned Judges used the expression "separate property" of a father in the sense of property of a father who had "separated" from other collateral coparceners and not as meaning the self-acquired property of the father.

11. Next, our attention was invited to two Supreme Court cases, viz. *Gur Narain Das v. Gur Tahal Das*, AIR 1952 SC 225 and *Singhai Ajit Kumar v. Ujagar Singh*, AIR 1961 SC 1334. In the first case the material facts were these: One Ramlu, a Shudra had 2 sons, Budparkash and Nandkishore. After the death of Ramlu, Budprasad died leaving one Kuldeep, his daughter's son, as his heir. Then died Nandkishore leaving his widow and two legitimate sons and two illegitimate sons. The plaintiff an illegitimate son of Nandkishore, brought a suit against the widow and other sons of Nandkishore for partition of the property left by Nandkishore. He contended that Budparkash and Nandkishore formed a joint Hindu family and Budprakash died without any male issue in a state of jointness

with Nandkishore and thereupon the entire joint family property devolved on Nandkishore by survivorship and claimed his share therein by partition. Kuldeep, who was joined as party defendant to the suit contended that Budparkash had separated from Nandkishore and as Budparkash's heir he was entitled to a moiety in the family property. The Supreme Court (Fazalalli and Bose, JJ.) held that Budparkash had separated in status from Nandkishore each of them having a moiety of the joint family property and following the rule laid down in *Vellaiyappa Chetty's* case held that the plaintiff succeeded as a coparcener to one-half share of Nandkishore in the joint family property. From the above facts it is apparent that after the severance of joint family status between Budparkash and Nandkishore, the latter's moiety in the joint family property formed his estate to which the plaintiff succeeded as a coparcener with the legitimate sons of his father Nandkishore. In that case the point that arises before us was not disputed because it seems to have been thought that in view of the earlier decisions in *Sadu v. Baiza*, *Jogendra Bhupatti v. Nityanand Mansingh* and *Vellaiyappa Chetty v. Natrajan* it was settled at least inferentially, that an illegitimate son of a Shudra had a right to succeed to his father's property even though it may be ancestral in his hands. We may incidentally note that in this case also the expression "separate estate of plaintiff's father" in paragraph 8 of the judgment is used in the sense of property belonging to the father who had separated in status from his collateral-coparceners.

12. In the other Supreme Court case of *Singhai Ajit Kumar*, the property to which the illegitimate son claimed to succeed was self-acquired property of the deceased father and it has therefore, no bearing on the point.

13. Mr. Abhyankar for the respondent-plaintiff relied upon a decision of this court in *Sakharam Satu v. Shamrao Maruti*, AIR 1932 Bom 234, and two decisions of Madras and Andhra Pradesh High Courts respectively in *Raju Thambiran v. Arunagiri Thambiran*, AIR 1933 Mad 397 and *China Apparao v. Narasimha Rao*, AIR 1962 Andh Pra 515. In the Bombay case the facts were: One Satu, a Shudra, died in 1913 leaving three sons by a married wife and three illegitimate sons by his mistress Rakhma. In 1903, prior to his death Satu had executed a gift deed in favour of Rakhma and his illegitimate son conveying two lands and a house, described as his self-acquired property. Sakharam, an illegitimate son, filed the suit in 1925 against the legitimate sons of Satu to recover his share in the property held by them. The trial court decreed the suit but on an appeal

by the defendants the District Court set aside the decree and dismissed the suit holding that the transaction of gift was as a matter of fact a giving of share in the property by Satu, and, therefore, the plaintiff was not entitled to claim partition. On appeal by the plaintiff the Division Bench of this court on a consideration of the gift-deed itself and other surrounding circumstances reversed the finding of the District court and held that by making the said gift Satu did not intend to extinguish any further claim of his illegitimate sons to the property and restored the trial court's decree. Now, from a perusal of the judgment it appears that the suit property was ancestral in the hands of plaintiff's father Satu. However, it is to be noticed that in the District Court the defendants-legitimate sons, conceded that the plaintiff and his two brothers were "dasiputras" and also agreed that they were entitled as illegitimate sons to the share in the father's property if the claim had not been disposed of in some other way. Thus it is clear that the parties had not joined an issue on the point whether an illegitimate son is entitled to claim partition of ancestral property in the hands of his father, but the controversy centred only round the question whether by the gift transaction the father had during his lifetime given a share of property to his illegitimate sons. Having regard to the concession made by the defendants the Division Bench case cannot be said to be an authority for the right of an illegitimate son to have a share in property which was ancestral in his father's hands.

14. As regards the other two cases of *Raju Thambiran v. Arunagiri Thambiran* and *China Apparao v. Narasimha* they are no doubt direct authorities on the point before us. In these cases it was held that an illegitimate son of a Shudra is entitled to claim partition of property irrespective of the fact whether the property left by the father was ancestral or self acquired. We may, however, point out that in *Raju Thambiran's* case the Madras High Court, besides relying on its earlier case of *Ranoji v. Kandoji* also relied on two Bombay cases of *Sadu v. Baiza* and *Sakharam v. Shamrao*. However as already seen in neither of these two cases the question here directly arose but the right of an illegitimate son to a share in ancestral property was not questioned.

15. It now remains to refer to the Nagpur case of *Shamrao v. Munnabai*, which the lower appellate court followed as binding upon it. In that case the facts were as follows: One Fakirrao, a Shudra, died leaving two sons, i.e. the original minor plaintiff an illegitimate son by his mistress, and Shamrao a legitimate son.

After his father's death the plaintiff filed the suit against Shamrao for partition and possession of his share of the property left by Fakirrao. The plaintiff succeeded in both the lower courts and Shamrao's appeal to the High Court was also dismissed by Mr. Justice Bose (as he then was). In that case there was no dispute that the suit property was ancestral in the hands of Fakirrao who at the time of his death was joint in estate only with Shamrao or that after Fakirrao's death a new coparcenery consisting of the plaintiff and Shamrao was created. But the question directly arose: what property this coparcenery can claim to hold? the father's self-acquired property? — the property which was ancestral in the father's hand? — or both? (See para 18 at page 45) Bose, J. on a construction of the text of *Mitakshara*, i.e. chapter I, Section 12, verse 2, in the light of J. R. Gharpure's *Treatise on the Mitakshara* held that every member of the fresh-coparcenery created after father's death obtains right in all the family property including that which was ancestral. The learned Judge also based his decision on the rulings in *Satu v. Baiza* and *Jogendra Bhupati v. Nityanand*. Now, Mr. Hombalkar is right in his contention that this authority was not binding on the learned appellate Judge, as assumed by him. However, a decision of another High Court deserves respect and that too by an eminent Judge has great persuasive value. Mr. Hombalkar, however, pointed out that in the Nagpur case there is no reference to *Vellaiyappa Chetty's* case and he says that the interpretation of the said verse 2 by Bose, J. goes beyond the ruling in that case. Now as mentioned earlier the Privy Council in that case held that the text of *Yagnavalkya* regarding the right of an illegitimate son relates to the estate of a separated householder. But it would have been seen that in the Nagpur case there was no question of the father having died undivided with any collateral-coparcener and the learned Judge was dealing only with a case of fresh coparcenery consisting of a legitimate son or sons and an illegitimate son or sons after their father's death which could happen if the father was at the time of death either separated from his collateral-coparceners or was a sole surviving coparcener. Thus, so far as the present point is concerned decision was in consonance with the above rule in *Vellaiyappa Chetty's* case and with the decisions in *Satu v. Baiza*, *Jogendra Bhupati v. Nityanand Mansingh*.

16. From the foregoing review of the case law it would have been seen that it is well settled proposition that an illegitimate son of a Shudra is entitled to succeed to his separated father's property whether ancestral or separate in his

hands. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

AIR 1972 BOMBAY 169 (V 59 C 34)

(NAGPUR BENCH)

CHANDURKAR, J.

Govinda Zibla Doye, Petitioner v. Udhao Dharmaji Nikhade and others, Respondents.

Special Civil Applns. Nos. 2 and 3 of 1970, D/- 17-8-1971 against order of Y. G. Shirke, Member, Maharashtra Revenue Tribunal, Nagpur, D/- 26-9-1969.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 50 — Tenant failing to exercise his right of purchase under S. 50 — Effect — (X-Ref:— Section 43 (14-A)).

The intention of the legislature as disclosed in Section 50 and S. 43(14A) was that land in respect of which the tenant has failed to exercise his right of purchase is either to be retained by the landlord if he is so entitled to retain having regard to the provisions of Section 21 (1) or the land was to be treated as surplus land of which management was deemed to have been assumed for a public purpose. If that was the intention of the legislature and if sub-section (14A) of S. 43 contemplated that fictionally a surrender has taken place in favour of the landlord and consequently how the land was to be dealt with was to be decided with reference to Section 21, it cannot be said that because the tenant continues to be in possession after the end of the agricultural year for which the lease was taken and after the tenant had failed to exercise his right of purchase the landlord must be deemed to have granted a second lease for the subsequent year. The statute itself has laid down what consequences follow on the failure of the tenant to exercise his right of purchase under Section 50. These consequences follow irrespective of inaction on the part of the landlord in not taking any steps to take possession of the land from the tenant who has failed to exercise his right of purchase. (Para 14)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 43 (14A) — Landlord cannot create tenancy after the statutory surrender — Mere lawful possession after such surrender will not clothe person in possession with the right of a tenant — (X-Ref:— Section 50).

The commencement of the tenancy which is referred to in Section 50 is the tenancy which is created by a landlord

and it does not deal with any deemed tenancy under Section 6. The provisions of Section 43(14A) make it impossible for the landlord to deal with the land in any manner other than the one provided by Section 43(14A) read with Section 21 of the Tenancy Act and he is incompetent to create any tenancy for a subsequent period of time after the statutory surrender as provided by Section 43 (14A) has come into operation. Even the concept of holding over by a tenant is ruled out by the scheme of Section 50 read with Section 43(14A) of the Tenancy Act.

(Para 15)

(C) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 50 — Limitation for exercise of right of purchase.

The right of purchase can be exercised under Sec. 43 (1) (a) and the tenant under Section 50 must within one year from the commencement of the tenancy serve a notice as contemplated by Section 43 (1) (a). Where the tenancy was created by the landlord for the first time from the agricultural year 1964-65 the tenant should have exercised his right of purchase as required by S. 43 (1) (a) within the period of one year from the commencement of tenancy and an application made on 17-11-1965 was obviously beyond the prescribed period. The tenant in such a case was clearly not entitled to statutory ownership as contemplated by Section 50. (Para 16)

(D) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 36 (1) — Application for restoration of possession — Maintainability.

Though the effect of the fiction introduced in sub-section (14A) of S. 43 is that the land must be said to have been surrendered to the landlord by the tenant and the landlord must be said to have accepted the surrender, merely on this it does not necessarily follow that the person in possession is a trespasser. The Landlord cannot dispossess him except under an order of Tahsildar under Section 36(2). (Para 19)

Where he is dispossessed without an order of Tahsildar he is entitled to maintain an application for restoration of possession though his tenancy stands terminated by virtue of S. 43(14A). (Para 22)

Cases Referred: Chronological Para
(1971) AIR 1971 Bom 106 (V 58)=
1970 Mah LJ 991 (FB), Madho
v. Maharashtra Revenue Tribunal,
Nagpur

19

B. R. Mandlekar, for Petitioner; P. N. Karekar, for Respondents Nos. 1 to 3, 5 and 6. S. N. Kherdekar, for intervener, for Petitioner-tenant; B. N. Deshpande, intervener, for Respondents Landlords.

ORDER: This judgment shall govern Special Civil Applications Nos. 2 and 3 of 1970. The questions involved in these petitions relate to the construction of Section 50 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereinafter referred to as the Tenancy Act. The petitioner in both these petitions is the tenant and the respondents are the legal representatives of one Dharmaji who was the owner of Khasra No. 63/1, area 6.76 acres, and Khasra No. 63/3, area 0.52 acre, both situated at village Pitichuwa, Tahsil Warora, District Chandrapur. Petitioner Govinda had filed an application on 17-11-1965 claiming that he was entitled to purchase both the fields which he cultivated as a tenant since the year 1964-65 and that he should, therefore, be declared to be the owner of these fields. This application was registered as Revenue Case No. 1/59(14)/65-66. Landlord Dharmaji denied that the petitioner was the tenant and according to him the petitioner was a close relative of his and since he owned land adjacent to the fields in dispute he got his name recorded as a tenant in collusion with the Patwari. It was the landlord's case that both the fields were cultivated by him personally throughout. He also contested the application of the tenant on the grounds that he has no right to purchase the fields.

2. It appears that during the pendency of this application the tenant was dispossessed by the landlord on 13-3-1966 and the tenant, therefore filed an application on 13-6-1966 claiming restoration of possession under Section 36(1) of the Tenancy Act. Both these applications were dealt with by the Additional Tahsildar who was also functioning as the Agricultural Lands Tribunal.

3. On evidence the Agricultural Lands Tribunal held that the application made on 17-11-1965 was within the period provided by Section 50 of the Tenancy Act, because, according to him, the tenant had cultivated the fields for the period 1-4-1965 to 31-3-1966 also and the application was filed within one year from 1-4-1965 when the tenancy for the second year was created. The Agricultural Lands Tribunal also determined the price payable by the tenant. Dealing with the application of the tenant under S. 36(1) of the Tenancy Act the Lands Tribunal held that the tenant was entitled to restoration of possession.

4. Against this common order the legal representatives of the landlord filed two separate appeals which were also decided by a common order passed by the Special Deputy Collector, Land Reforms, Chandrapur. The Deputy Collector also took the view that the application filed on 17-11-1965 was within time and that the tenant was entitled to restoration of possession. He, however, set

aside the order of the Agricultural Lands Tribunal determining the purchase price because he found that if the tenant so desired he may exercise the right conferred by Section 41 subject to the provisions of Section 43 (1) of the Tenancy Act. Subject to the modification of the order regarding determination of purchase price the order of the Agricultural Lands Tribunal was upheld.

5. The respondents then filed two revision applications before the Maharashtra Revenue Tribunal. The Maharashtra Revenue Tribunal accepted the finding given by the Revenue authorities that the tenancy had initially commenced in the year 1964-65, but on a construction of provisions of Section 50 of the Tenancy Act it held that the application for exercising the right of purchase should have been made within one year from 1-4-1964 and the application made on 17-11-1965 was, therefore, barred by limitation. So far as the claim for restoration of possession was concerned, the Tribunal found that since the provisions of Sections 41 to 44 were not complied with within one year from the commencement of the tenancy in view of the provisions of Section 43 (14-A) of the Tenancy Act, the tenancy must be deemed to have been surrendered and the tenant was not entitled to continue in possession. Thus according to the Tribunal the application under Section 36 (1) was liable to be rejected. The Tribunal, therefore, allowed both the revisions and set aside the orders of the Deputy Collector and the Additional Tahsildar and the Agricultural Lands Tribunal. The petitioner tenant has now filed these two petitions. Special Civil Application No. 2 of 1970 arises out of the application made under Section 50, while Special Civil Application No. 3 of 1970 arises out of the application made under Section 36 (1) of the Tenancy Act.

6. As the questions involved in these two petitions were of general importance and would affect large number of cases arising under Section 50 of the Tenancy Act, I permitted Shri R. N. Deshpande and Shri S. N. Kherdekar Advocates to intervene. Shri R. N. Deshpande supported the contentions raised on behalf of the Landlord and Shri S. N. Kherdekar supported the contentions raised on behalf of the tenant.

7. The learned counsel appearing on behalf of the petitioner contended that even though the tenancy commenced on 1-4-1964 the tenant continued to be in cultivating possession in the year 1965-66 and a fresh lease must be taken to have been granted by the landlord which commenced on 1-4-1965 and the period of one year provided by Section 50 of the Tenancy Act must be reckoned with refer-

ence to the commencement of the lease from 1965-66 and not from the commencement of the lease from 1964-65. It was contended that the tenant must be held to be holding over after the end of the lease for the year 1964-65 and the application filed on 17-11-1965 could not be rejected as barred by limitation.

8. Shri Kherdekar supported these contentions and contended that the lease for the year 1964-65 stood terminated at the end of that year by virtue of the provisions of Section 43 (14-A) of the Tenancy Act and since the landlord had not taken any steps for obtaining possession the continued possession of the tenant must be traceable to a fresh tenancy which must be presumed to have been created by the landlord. Even otherwise, according to the learned counsel, since the landlord had not taken steps for obtaining possession the tenant was entitled in law to continue in possession and was, therefore, in lawful possession of the fields with the result that he would become a deemed tenant under Section 6 of the Tenancy Act. This state of circumstances according to the learned counsel, would continue for every year in succession and there will be commencement of a fresh lease at the beginning of every agricultural year and the tenant would be entitled to exercise his right of purchase under S. 50 every year.

9. It is, however, contended on behalf of the respondents by Shri Karekar that the right to purchase the land which is cultivated by a tenant by virtue of a lease granted after 1-4-1963 is given to him by Section 41 which creates a right of purchase in favour of all tenants and that Section 50 prescribes the limitation for the exercise of the right under Section 41 of the Tenancy Act. According to the learned counsel, where this right of purchase is not exercised within limitation prescribed by Section 50 the right of the tenant to continue in possession comes to an end by virtue of the provisions of Section 43 (14-A) and since in the instant case the tenant had failed to exercise his right of purchase within the limitation prescribed in Section 50 within one year from 1-4-1964 on which date the tenancy commenced on the findings of the Revenue authorities, the land must be deemed to have been surrendered to the landlord in view of the provisions of Section 43 (14-A) and the possession of the tenant thereafter must be deemed to be the possession of a trespasser who could be evicted under Section 120 (c) of the Tenancy Act.

10. Shri R. N. Deshpande who supported the contentions raised by Shri Karekar also contended that the deeming fiction created in sub-section (14-A) of S. 43 must be given its full effect and ac-

cording to him where the tenant failed to exercise his right of purchase for all purposes the land must be deemed to be placed in possession of the landlord and the tenant was not, therefore, entitled to continue in possession and his possession was that of a trespasser who was liable to be evicted under Section 120 (c). It was contended by him that merely because the landlord did not take any steps to obtain possession an inference of a new tenancy being created again could not be drawn and there could not be a fresh commencement of tenancy every year even though the tenant continued in possession.

11. In order to appreciate these rival contentions it is necessary to refer to the material provisions of the Tenancy Act. Section 50 of the Tenancy Act, as it is found to-day, was not in the same form when the Act was first enacted in December 1958.

12. The original provisions of Section 50 of the Tenancy Act were as follows:—

"50. Right of tenant holding land under tenancy created after specified date to purchase land:— In the case of a tenancy created in any area after the date specified in sub-section (1) of S. 46, every tenant holding land under such tenancy and cultivating it personally shall be entitled to purchase within one year from the commencement of the tenancy so much of such land as he may be entitled to purchase under Section 41 and the provisions of Sections 41 to 44 (both inclusive) shall *mutatis mutandis* apply to such purchase".

In its original form the tenancies which were covered by Section 50 were those which were created after 1-4-1961 because that was the date on which there was a statutory transfer of ownership in favour of certain tenants who were entitled to purchase land under Section 41 of the Tenancy Act. It may be stated that Section 43 did not contain sub-section (14-A) initially and the concept of a deemed surrender of land which is contained in Section 43 (14-A) did not become relevant prior to 12-2-1962 when sub-section (14-A) was for the first time put on the Statute book by Act No. 2 of 1962. The next amendment of Section 50 was when Maharashtra Act 5 of 1961 was enacted and sub-section (2) was added to that section. It is not necessary to consider the effect of this amendment firstly because it dealt with creation of tenancies after 1-4-1961 by a serving member of the armed forces and secondly because this sub-section (2) is now deleted from Section 50. Section 50 was then again amended by Act No. 2 of 1962 and it is as a result of this amendment that the section is in its present form, except a small part of it which was the result of

an amendment by Maharashtra Act No. 39 of 1964. The section which falls for consideration in the present proceedings is as follows:—

"50. Where a tenancy is restored under Section 7, 10, 21, 52 or 128-A or is created by a landlord not being a landlord within the meaning of Chapter III-A in any area after the date specified in sub-section (1) of S. 49-A, every tenant holding land under such tenancy and cultivating it personally shall be entitled to purchase within one year from the commencement or as the case may be, the restoration of the tenancy so much of such land as he may be entitled to purchase under Section 41 and the provisions of Sections 41 to 44 (both inclusive) shall *mutatis mutandis* apply to such purchase."

The material amendment in this section was obviously the result of the enactment of Section 49-A in the Tenancy Act by Maharashtra Act No. 2 of 1962. By enactment of Section 49-A the legislature provided for a statutory transfer of ownership of all land held by a tenant being land which is not transferred to the tenant under Section 46 or which was not purchased by him under Section 41 or Section 50 with effect from 1-4-1963, if such land was cultivated personally by the tenant and if certain conditions which are set out in Section 49-A were satisfied. Section 49-A operated notwithstanding anything contained in Section 41 or 46, or any custom, usage, decree, contract or grant to the contrary. Having provided for a statutory transfer of ownership with effect from 1-4-1963 in respect of lands held by a tenant on that day Section 50 was made applicable in respect of tenancies created after 1-4-1963. Section 50 did not provide only for tenancies which were created after 1-4-1963 but it also dealt with tenancies which were restored either under Section 7 or 10 or 52 or 28 or 128-A of the Tenancy Act. This section provided that every tenant holding land under such tenancy, that is to say, a tenancy which was restored under any one of the sections referred to in that section, or under a tenancy created after 1-4-1963, by a landlord not being a landlord within the meaning of Chapter III-A of the Tenancy Act, if he was cultivating the land held by him under such tenancy personally he shall be entitled to purchase that land within one year from the commencement or from the restoration of the tenancy as the case may be. The section then provides that the provisions of Sections 41 to 44, both inclusive, shall *mutatis mutandis* apply to such purchase.

13. Now, it is difficult to accept the argument of Shri Karekar that when Section 50 refers to Section 41 the entitlement to purchase is found in Section 41

while Section 50 only lays down the period of limitation. Such a construction appears to be contrary to the tenor of the section. Section 50 refers to Sec. 41 twice. The first reference has been made in order to indicate the extent of the land which the tenant is entitled to purchase under Section 50 of the Tenancy Act. The material words of the section minus all the adjectival clauses would be "every tenant holding land under such tenancy and cultivating it personally shall be entitled to purchase so much of such land as he may be entitled to purchase under Section 41". The words "such land" refers to the land which he holds under tenancy and which he cultivates personally. When it is to be decided whether the tenant is entitled to purchase the entire land which he holds under tenancy and which he cultivates personally, the reference to Section 41 becomes material. The section says that the tenant is entitled to purchase only so much land as he may be entitled to purchase under Section 41. Section 41 deals with the right of a tenant to purchase land and this right is subject to the provisions of Section 42 in which the extent of the land which the tenant may purchase under Section 41 is set out. The words "which the tenant may be entitled to purchase under Section 41" has obvious reference to the restriction in Section 42. The reference to Section 41 thus is for a specific purpose, namely, to find out the extent of land which the tenant is entitled to purchase. Section 42 is as follows:—

"42. The right of a tenant under Section 41 to purchase from his landlord the land held by him as a tenant shall be subject to the following conditions, namely:—

(a) if the tenant does not hold and cultivate personally any land, as a tenure-holder, the purchase of the land by him shall be limited to the extent of three family holdings;

(b) if the tenant holds and cultivates personally any land as a tenure-holder the purchase of the land by him shall be limited to such area as will be sufficient to make up the area of the land held by him as a tenure-holder to the extent of three family holdings."

These restrictions are thus imported by reference into Section 50 of the Tenancy Act. The effect is that Section 50 not only gives right to the tenant of the kind specified therein a right to purchase land, but with reference to Sections 41 and 42 the extent of the land which the tenant is entitled to purchase is also specified. Section 50 also refers to other conditions, namely, that a tenant must be a tenant who is holding land under a tenancy created after 1-4-1963 or which is restored to him and he must also be cultivat-

ing that land personally. Section 50 is thus a self contained provision dealing with the kinds of tenancies referred to therein, namely, tenancies created after 1-4-1963 and tenancies restored under any of the provisions mentioned therein. It also deals with the extent of the land which the tenant is entitled to purchase and it also deals with the time within which this right to purchase given by Section 50 must be exercised. As indicated in the section the tenant is entitled to purchase the land within one year from the commencement of the tenancy.

14. It is at this stage that it is contended that there cannot be only one commencement of tenancy, but there could be commencement of tenancy every year if the landlord permits the tenant to continue in possession and does not take immediate steps to obtain possession from a tenant, who has failed to exercise his right within one year. Whether Sec. 50 contemplates repeated commencement of tenancy or not will depend on what is the effect of the tenant failing to exercise his right of purchase within the specified period. It is here that the concluding part of Section 50 becomes material. The concluding part of Section 50 provides that the provisions of Sections 41 to 44 shall *mutatis mutandis* apply to such purchase. Where a tenant desires to exercise his right of purchase it cannot be disputed that he has to comply with the requirement of Section 43 of the Tenancy Act. Section 43 deals with the manner in which the tenant has to act if he desires to exercise his right. As it is, Section 43 (1) (a) no doubt refers to the right conferred by Section 41, but in view of the provision in Section 50 that provisions of Sections 41 to 44 shall apply *mutatis mutandis* even in a case where a tenant is exercising his right of purchase under Sec. 50 the provisions of Sec. 43 will be attracted and S. 43 (1) (a) must be read as dealing with a tenant who desires to exercise the right conferred by S. 50. Under sub-cl. (a) of sub-sec. (1) of S. 43 such a tenant has to make an offer to the landlord stating the price at which he is prepared to purchase the land, such price not exceeding twelve times the rent payable by him and the depreciated value of any structures, wells and embankments constructed and permanent fixtures made and the value of any trees planted on the land by the landlord after the period of the last Settlement or where no such Settlement is made during the period of thirty years before the commencement of the Act and the amount of the arrears of rent, if any, lawfully due on the day on which the offer is made. Under sub-clause (b) of Section 43(i) where the tenant is entitled to purchase a part of the land then he has to choose the area and location of the land to be purchased from

the landlord and state in the offer the part which he has so chosen for being purchased. Under sub-section (2) of S. 43 if the landlord refuses or fails to accept the offer and to execute the sale deed within three months from the date of the offer, the tenant has to apply to the Tribunal for the determination of the reasonable price of the land. The further provisions deal with the determination of the purchase price by the Tribunal and under sub-section (8) of S. 43 when the purchase price is deposited in lump sum or the last instalment of the purchase price is deposited the Tribunal is required to issue a certificate of purchase in the prescribed form to the tenant in respect of the land and such certificate is made conclusive evidence of the purchase. Sub-section (9) provides that where the tenant fails to pay the entire purchase price within the period fixed under sub-s. (4) or (7) or is in arrears of four instalments under sub-section (4) or (7) the amount of the purchase price remaining unpaid and the amount of the interest thereon, if any, is recoverable as arrears of land revenue and on such recovery the Tribunal is to issue the certificate contemplated by sub-section (8). Sub-section (10) provides for the purchase becoming ineffective and sub-section (12) provides for the consequences of the purchase becoming ineffective. A reference to these provisions will be necessary at the later stage and these provisions are, therefore, being reproduced:—

43 (10). In the event of failure of recovery as arrears of land revenue under sub-section (9) the purchase shall not be effective and the amount deposited by the tenant shall be refunded to him after deducting the rent due from him for the period:

Provided that if the land is situated in a scheduled area the tenant shall also be refunded the amounts of land revenue and the cesses referred to in clauses (c) and (d) of sub-section (1) of S. 17 paid by him.

(11)

(12) Where any purchase of land becomes ineffective, the landlord shall be entitled to recover from the tenant the rent of the land as if the land had not been purchased and the rent due, if not paid within the period or extended period referred to in sub-section (13), shall be recovered from the tenant as an arrear of land revenue and paid to the landlord. The amount of rent so recoverable shall be deducted from the amount if any to be refunded to the tenant".

Under sub-section (14) of S. 43 after the issue of the certificate under sub-s. (8) the tenant is to be declared Bhumiswami or Bhumidhari by the Tribunal with effect

from the agricultural year next following the date of issue of the certificate. Then we come to the material provisions of sub-section (14-A) which are as follows:

"43 (14-A). If a tenant fails to exercise his right of purchase under Sec. 41 in respect of any land or the purchase of any land becomes ineffective, the land shall be deemed to have been surrendered to the landlord, and thereupon the provisions of sub-sections (1) and (2) of S. 21 and Chapter VII shall apply to such land as if the land was surrendered by the tenant under Section 20."

This sub-section sets out the consequences of the tenant failing to exercise the right of purchase under Section 41, which, in view of the provisions of Section 50, must also follow where a tenant fails to exercise his right of purchase under Section 50 and it also provides for the consequences of the purchase of any land becoming ineffective. The consequences are that the land shall be deemed to have been surrendered to the landlord and thereupon the provisions of sub-sections (1) and (2) of S. 21 shall apply to such land as if the land was surrendered by the tenant under Section 20. The consequence which is set out in this section is that the land is deemed to have been surrendered to the landlord and after such surrender an enquiry is required to be made having regard to the provisions of Section 21 (1) and (2) about the extent of the land which the landlord is entitled to retain with him. Section 21 of the Act provides that where a tenancy is terminated by surrender under sub-section (1) of S. 21, the landlord is entitled to retain only so much of land as will prevent the total area which he cultivates personally, whether as tenure-holder or tenant, or both from exceeding three family holdings. Under sub-section (2) if it is found that the landlord is not entitled to retain either the whole or any part of the surrendered land then that land has to be declared as surplus land. Under Sec. 81 of the Tenancy Act where any land is declared to be surplus land under any of the provisions of the Tenancy Act, the State Government is deemed to have assumed the management of such land for a public purpose from the date of the declaration. Reading the provisions of Section 50 and S. 43 (14-A) together it is clear that the intention of the legislature as disclosed in these two provisions was that land in respect of which the tenant has failed to exercise his right of purchase is either to be retained by the landlord if he is so entitled to retain having regard to the provisions of Section 21(1), or the land was to be treated as surplus land of which management was deemed to have been assumed for a public purpose. If that was the intention of the

legislature and if sub-section (14-A) of Section 43 contemplated that fictionally a surrender has taken place in favour of landlord and consequently how the land was to be dealt with was to be decided with reference to Section 21, it is difficult to accept the contention that because the tenant continues to be in possession after the end of the agricultural year for which the lease was taken and after the tenant had failed to exercise his right of purchase the landlord must be deemed to have granted a second lease for the subsequent year. The statute itself had laid down what consequences follow on the failure of the tenant to exercise his right of purchase under S. 50. These consequences follow irrespective of inaction on the part of the landlord in not taking any steps to take possession of the land from the tenant who has failed to exercise his right of purchase.

15. It is difficult to see how the provisions of Section 6 of the Tenancy Act which were sought to be invoked by Shri Kherdekar were attracted. No doubt until the landlord obtains possession from the tenant the tenant continues in possession but that continuance is contemplated by the provisions of the Tenancy Act itself. It is difficult to read in the provisions of Section 50 and Section 43 (14-A) the intention of the legislature that when the statutory surrender comes into effect merely because the possession was lawful the person in possession should again be clothed with the right of a tenant by Section 6 of the Tenancy Act. The commencement of the tenancy which is referred to in Section 50 is the tenancy which is created by a landlord and it does not deal with any deemed tenancy under Section 6. The provisions of Section 43 (14-A) make it impossible for the landlord to deal with the land in any manner other than the one provided by Section 43 (14-A) read with Section 21 of the Tenancy Act and he is incompetent to create any tenancy for a subsequent period of time after the statutory surrender as provided by Section 43 (14-A) has come into operation. Even the concept of holding over by a tenant on which reliance was sought to be placed by Shri Mandlekar is ruled out by the scheme of Section 50 read with Section 43 (14-A) of the Tenancy Act.

16. The consequences contemplated by Section 43 (14-A) of the Tenancy Act so far as the present kind of case is concerned arise only if a tenant fails to exercise his right of purchase. In a case covered by Section 50 of the Tenancy Act these consequences must, therefore, arise where the tenant fails to exercise his right of purchase within one year from the commencement of tenancy.

The words "shall be entitled to purchase within one year" in Section 50 must, therefore, be read in the light of the provisions of Section 43 (14-A) which refer to the tenant's failure to exercise his right of purchase. How the right of purchase is to be exercised is dealt with in Section 43 (1) (a) and in my view what the tenant is required to do within one year when Section 50 refers to the tenant being entitled to purchase the land within one year is that the tenant must within one year from the commencement of the tenancy serve a notice as contemplated by Section 43 (1) (a) of the Tenancy Act. In case a tenant invokes the provisions of Section 43 (1) (a) within a period of one year then, in my view, the tenant could be said to have exercised his right of purchase within one year as contemplated by Section 50. By the very nature of the proceedings which is contemplated by Section 43, it is impossible that the entire proceedings or even making of an application could in certain cases be made within a period of one year from the commencement of the tenancy. It would be enough if the first step to exercise the right of purchase, namely, the serving of a notice under Section 43 (1) (a) is served within one year in case a tenant wants to exercise the right which is given to him under Section 50 of the Tenancy Act.

Since the tenancy was created by the landlord for the first time from the agricultural year 1964-65 then as found by the Revenue Tribunal the tenant should have exercised his right of purchase as required by Section 43 (1) (a) within the period of one year and the application made on 17-11-1965 was also obviously beyond the prescribed period. The tenant was, therefore, clearly not entitled to statutory ownership as contemplated by Section 50 of the Tenancy Act. Special Civil Application No. 2 of 1970 must, therefore, stand rejected.

17. It is now necessary to decide whether the Tribunal was justified in holding that the tenant was not entitled to make an application under Section 36 (1). The Tribunal has taken the view that the tenant having forfeited his right under Section 50 had no right to continue in possession and consequently he was not entitled to make an application seeking restoration of possession. This view is sought to be supported both by Mr. Karekar and Mr. Deshpande and as already stated it is their contention that since the land is deemed to have been surrendered fictionally under Section 43 (14-A) the tenant became a trespasser and he could be ousted under Section 120 (c) of the Tenancy Act, and since he ceased to be a tenant neither was any application by the landlord

under Section 36 (2) necessary nor was the ex-tenant, according to them, entitled to apply for restoration of possession under Section 36 (1) of the Tenancy Act.

18. It is difficult to accept the argument that as a result of the operation of sub-section (14-A) of S. 43 the tenant was intended to be treated as a trespasser by the provisions of the Tenancy Act. It cannot be disputed that where a tenancy was created after 1-4-1963 there was no express provision in the Act which enabled the landlord to terminate the tenancy of the tenant. The provisions of Section 9 of the Tenancy Act provide that no tenancy of any land shall be terminated merely on the ground that the period fixed for its duration whether by agreement or otherwise has expired. The effect of the provisions of Section 9 and the absence of any provisions enabling the landlord to terminate the tenancy would have been that the tenant would have continued indefinitely in the capacity of a tenant in possession of the land with no remedy to the landlord to obtain possession or to terminate his tenancy. The scheme of Chapter III of the Tenancy Act appears to be that except for some exempted tenants statutory rights of ownership had to be vested in the tenants at some point of time or the other. Under Section 46 this date was 1st April 1961; under Section 49-A this date was put as 1st April 1963 and in case of tenants to whom Sections 46 and 49-A applied and where certain proceedings for termination of tenancy were pending these dates of statutory ownership were postponed. But one object which is apparent in the provisions of Chapter III is that either the landlord exercises his right of resumption and takes possession of land or in cases where he fails to exercise such a right or becomes unsuccessful in terminating the lease prior to 1-4-1963 the ownership is transferred to the tenant. Generally the Tenancy Act does not contemplate that the relationship of the landlord and tenant will continue to exist for an indefinite period of time. In the case of a tenancy created or restored after 1-4-1963 the legislature did not contemplate continuance of relationship of landlord and tenant beyond one year from the commencement or restoration of tenancy as the case may be. It is in the light of this scheme of the Act that the applicability of Section 43 (14-A) to a case covered by Section 50 will have to be considered. If there was no provision enabling the landlord to terminate the tenancy whether on the ground of personal cultivation or otherwise in the case of a tenant whose tenancy is created after 1-4-1963 and if one of the objects of Section 50 of the Tenancy Act was not to permit landlord-tenant relationship to

continue beyond a year in the case of a tenancy created or restored after 1-4-1963 then the legislature had provided by making the provisions of S. 43 (14A) applicable to a case covered by Sec. 50 to bring about termination of tenancy by providing for a fictional surrender. Surrender is one of the recognised modes of termination of tenancy, but it contemplates acceptance of possession by the landlord when the tenant surrenders it. A mere yielding up of an interest by the tenant in favour of the landlord unless the landlord accepts possession does not bring about termination of tenancy. A voluntary surrender of land by the tenant was obviously impossible in each case at the end of one year of tenancy and it was, therefore, that the legislature introduced a deeming fiction by which on the failure of the tenant to exercise his right of purchase the land was deemed to have been surrendered to the landlord. The purpose of the deeming fiction obviously was to bring about the effect of termination of tenancy by deeming that a tenant had surrendered the land. Beyond bringing about this result of termination of tenancy by a fictional surrender though actually the land continues to be in possession of the tenant there does not appear to be any other purpose of introducing the fiction that land must be deemed to have been surrendered to the landlord. But for this there could not be any other way of bringing about an end to the relationship of landlord and tenant. The question is whether on account of this fiction it necessarily follows that the tenant becomes a trespasser. Shri Deshpande contended that when the legislature has provided that the land must be deemed to have been surrendered to the landlord it must be held that the land must be deemed to be in possession of the landlord, the tenant was not entitled to be in possession, and therefore, the tenant was a trespasser.

19. Now, there is no doubt that the effect of the fiction introduced in sub-section (14-A) of Section 43 is that the land must be said to have been surrendered to the landlord by the tenant and the landlord must be said to have accepted the surrender, but merely on this it does not necessarily follow that the person in possession becomes a trespasser. There are several provisions in the Tenancy Act which refer to the tenant whose tenancy has been terminated as a 'tenant'. These provisions were considered by a Full Bench of this court in *Madhao v. Maharashtra Revenue Tribunal, Nagpur*, 1970 Mah LJ 991 = (AIR 1971 Bom 106) (FB). In paragraph 17 of the judgment the Full Bench has referred to the provisions of Sections 19, 29, 36, 57-B (2) and 36 (2) of the Tenancy

Act. The Full Bench was considering the question whether in a case where a tenant has surrendered his tenancy under Section 20 of the Tenancy Act, an order under Section 36 as contemplated by Section 36 (2) was necessary, to be obtained before the landlord took possession. A similar argument was advanced in that case and it was contended that where tenancy is terminated by surrender and it is verified then the person who was holding the land ceased to be a tenant, and therefore, possession can be taken from him without an order of Tahsildar. This argument was repelled and it was held that even in a case where a tenancy was terminated an order of a Tahsildar was necessary because the person was still referred to as a tenant by the Tenancy Act. There is no reason to take a different view with regard to the provisions of Section 43 (14-A) because it will appear from the provisions of sub-section (10) of Section 43 that even after the purchase has become ineffective the person in possession has been referred to as the tenant in the Act. Sub-section (10) of Section 43 provides that in the event of failure of recovery as arrears of land revenue under sub-section (9) the purchase shall not be effective and the amount deposited by the tenant shall be refunded to him after deducting the rent due from him for the period. Then there is sub-section (12) which says that where any purchase of land becomes ineffective the landlord shall be entitled to recover from the tenant the rent of the land as if the land had not been purchased and the rent due, if not paid within the period or extended period referred to in sub-section (13), shall be recovered from the tenant as an arrear of land revenue and paid to the landlord. Thus even in a case where a purchase becomes ineffective the person in possession is referred to as the tenant and there is an express liability on him to pay rent. In sub-section (14-A) itself a person failing to exercise his right of purchase is referred to as a tenant. Sub-section (14-A) comes into operation after the tenant has failed to exercise his right of purchase, and therefore, provides for a set of events subsequent to the last day before which he must exercise his right of purchase. Even in such a provision the person is referred to as a tenant.

20. The purpose of the fiction in Section 43 (14-A) was only to bring about termination of tenancy by surrender for which otherwise actual delivery of possession would have become necessary, but in view of the fiction it was no longer necessary. The person who continued to be in possession would still continue to be lawfully in possession until he is dispossessed by an order of the

Tahsildar under Section 36 (2) of the Tenancy Act. The landlord does not cease to be a landlord and the tenant whose tenancy was terminated was still described by the Tenancy Act as a tenant and in view of the plenary provision in Section 36 (2) that save as otherwise provided in sub-section (3-A), no landlord shall obtain possession of any land, dwelling house or site used for any allied pursuit held by a tenant except under an order of the Tahsildar the landlord has no right to obtain possession privately.

21. There is another reason why it should be improper to hold that the landlord need not approach the Tahsildar for an order for possession. In a given case a landlord may not be entitled to the whole or any part of the land in respect of which the statutory surrender had operated. An enquiry is required to be made whether any part of the land becomes surplus land. The proper forum for making such an enquiry is the Tahsildar and the proceeding in which such an enquiry could be made is the proceeding initiated by the landlord asking for possession. The provisions of Section 120 (C) are by themselves of a summary nature and if a detailed enquiry is contemplated by provisions of Section 21 (1) and (2) then that enquiry could only be made by the Tahsildar. If the construction canvassed on behalf of the landlord is accepted then there will be no forum in which the enquiry contemplated by Section 21 (1) and (2) could be made. It is not, therefore, possible for me to accept the contention that because of the fiction in sub-section (14A) of Section 43 the tenant becomes a trespasser and no order for possession is necessary under Sec. 36 (2) of the Tenancy Act.

22. In the instant case the landlord has admittedly taken possession without an order of a Tahsildar. The tenant has, therefore, been evicted in contravention of sub-section (2) of Section 36 because he was entitled to continue in possession till he was evicted by an order of the Tahsildar under sub-section (2) of Section 36. He was, therefore, clearly entitled to maintain his application for restoration of possession though his tenancy stood surrendered by virtue of Section 43 (14-A) of the Tenancy Act. It is not, therefore, possible to sustain the view taken by the Tribunal that merely because he had failed to exercise his right of purchase within the period of one year as prescribed by Section 50 he had lost the right to continue in possession. The order of the Tribunal rejecting the application under Section 36 (1) must, therefore, be quashed and it must be held that the tenant having been dispossessed in contravention

of Section 36 (2) of the Tenancy Act was entitled to restoration of possession. Special Civil Application No. 3 of 1970 which arose out of the application for restoration of possession is, therefore, allowed.

23. In the circumstances of the case there will be no order as to costs in both the Special Civil Applications.

Appeal allowed.

AIR 1972 BOMBAY 177 (V 59 C 35)

(NAGPUR BENCH)

MODY AND KHAN, JJ.

Ajitsingh, Petitioner v. The State of Maharashtra and others, Respondents.
Special Civil Appln. No. 377 of 1969,
D/- 16-11-1970.

(A) Land Acquisition Act (1894), Sections 4, 6 and 55 — Maharashtra Rules under Section 55, Rule 1 — Publication of Notice under Section 4 (1) — Rule 1 directing individual service of such notice is mandatory — Non-service of such notice renders notification under Sec. 6 invalid.

Service of individual notice contemplated by Rule 1 must stand on the same footing as the other two modes of publication mentioned in Section 4 (1) and it is therefore, mandatory and not merely directory. All the said three forms of publishing the notification under Section 4 are a pre-condition to the issue of a notification under Section 6. The non-service of an individual notice as contemplated by Rule 1 would render the notification issued under Section 6 invalid because it would not give proper opportunity to the person interested to urge his objections as contemplated by Section 5-A. (Para 7)

The correct stage at which the objections under the provisions of Sec. 5-A are to be urged is before the notification under Section 6 is issued. The petitioner had no opportunity to do so for want of service of an individual notice upon him. The mere fact that the petitioner did urge those objections and was heard after the notification was issued under Section 6 would not prevent the notification under Section 6 being held invalid. (Para 8)

(B) Land Acquisition Act (1894), Sections 4 and 6 — Notification under Section 6 vis-a-vis petitioner's land declared invalid for non-service of individual notice under Section 4 — Efficacy of Section 4 notification as regards that land is exhausted and no further notification under Section 6 can be issued on its basis. AIR 1966 SC 1593. Applied. (Paras 9, 10)

LO/LO/G2/71/KSB

Cases Referred: Chronological Paras
 (1966) AIR 1966 SC 1593 (V 53) =
 1966-3 SCR 557, State of Madhya
 Pradesh v. Vishnu Pd. Sharma 8
 C. G. Madkholkar, for Petitioner; P.
 G. Palshikar, Asstt. Govt. Pleader, for
 Respondents Nos. 1 to 4.

MODY, J.:— This is a petition praying for a writ under Article 226 of the Constitution of India quashing certain notifications issued under Sections 4 and 6 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act). The State of Maharashtra the Commissioner, Nagpur Division, the Collector, Chanda and the Special Land Acquisition Officer, Chanda are the respondents.

2. The petitioner by a purchase-deed purchased a land khasra No. 198/1 of Ballarpur, taluka and district Chanda admeasuring 2.45 acres from one Sadasshiv Krishnaji Khanke. The deed is dated 29th January 1966 and it was registered on the same day. On the same day, the petitioner gave intimation of his purchase to the Patwari of Ballarpur to effect mutation entries. It is stated in the petition and not denied in the counter-affidavit that such a mutation entry was made towards the end of 1967, the exact date is not mentioned, but we are informed across the Bar was 16th November 1967.

3. A notification under Section 4 of the Act was published in the Maharashtra Government Gazette dated 1-2-1968 for acquisition for the public purposes mentioned in the notification. Amongst the lands sought to be acquired by the notification were 47,250 sq. ft. out of the petitioner's said land bearing khasra No. 198/1. On 22nd August, 1968, a notification was published in the Maharashtra Government Gazette under Section 6 of the Act and amongst the lands acquired thereunder and the lands mentioned therein were 47,045 sq. ft. out of the petitioner's land bearing khasra No. 198/1. In the second week of November 1968, the petitioner received a notice from the Special Land Acquisition Officer, respondent No. 4, which states that it is a notice under clause (8) of Section 9 of the Act. The notice bears no date. It gave notice to the petitioner to appear before the fourth respondent on 26th November 1968. It is the petitioner's case that it was from this notice that the petitioner came to know for the first time about the said acquisition proceedings in respect of his said land. The petitioner appeared before the fourth respondent in pursuance of the said notice and raised various contentions. One of such contentions was that he had received no notice or an individual notice after the notification under Section 4 was issued and he had

therefore been unable to raise objections as contemplated by Section 5-A of the Act and that the notification under Section 6 having been issued in such circumstances was invalid.

4. The petitioner has raised several contentions in the petition in support of his case that the notifications under Sections 4 and 6 are invalid. At the hearing, the petitioner has, however, confined his case to one argument. That argument is that it is compulsory that an individual notice should have been served on the petitioner, that no such notice was served on him, that the petitioner, therefore, got no opportunity whatsoever to raise objections as contemplated by Section 5-A, that, therefore, the notification under Section 6-A has not been validly issued and lastly that not only the notification under Section 6 in so far as his land is concerned be set aside but that the notification under Section 4 also in so far as it affects his land should be quashed and set aside. In view of the fact that only this contention has been urged by the petitioner, it is unnecessary for us to refer, and we, therefore, do not refer, to the other facts and contentions contained in the petition and in the counter-affidavit filed on behalf of the respondents. It is stated in the counter-affidavit that the petitioner had urged all his contentions before the fourth respondent when he appeared in answer to the said notice under Sec. 9. It is, however, not disputed on behalf of the respondents that the objections which the petitioner can urge under Section 5-A could not in law have been urged at the stage when the petitioner appeared in answer to that notice under Section 9, that is, after the Section 6 notification was issued. It is not disputed that an opportunity to urge objections under Section 5-A must precede the publication of a notification under Section 6 and that they cannot be urged after such a notification is issued. It is clear that the mere fact that the petitioner attempted to urge or in fact urged objections which could have been urged under Section 5-A at the later stage after the Section 6 notification was issued, cannot prejudice the petitioner's present contention about invalidity of the notification under Section 6 on the ground of want of individual notice before the notification under Section 6 was issued. But what has to be decided is whether it was obligatory to serve the individual notice on the petitioner as canvassed by the petitioner (1) before the notification under Section 6 was issued.

5. In paragraph 9 of the counter-affidavit, it has been stated:

"It is submitted that the record-of-right was not corrected till 28-8-1967, on

which date, its copy was supplied by Patwari. Notice was then issued to the petitioner and his objections were duly considered by respondent No. 4, as stated hereinbefore."

It may be noted that an extract from the relevant record-of-rights as annexed as annexure R-1 to the counter-affidavit shows the name of the petitioner's vendor Sadashiv Krishnaji and not that of the petitioner against the land with which we are concerned in this petition. It should, however, be noted that under the signature of the Patwari "S. S. Dhakate" who certified the extract, there appears the date "28-8-1967", which is the date on which the Patwari issued the certified copy of the extract and it is this date which is referred to in paragraph 9 of the counter-affidavit. The words "notice was then issued to the petitioner" are capable of creating a little misunderstanding because of the use of word "then". The notice here referred to was not issued shortly after 28th August, 1967. Mr. Palshikar, the learned counsel for the respondents, stated that the reference to the notice here was to the said notice under Section 9, which was received by the petitioner in the second week of November 1968. The mutation entry was already made as stated earlier, towards the end of 1967.

6. The contentions urged on behalf of the petitioner divide themselves into three groups as under:

(i) to give an effective opportunity to the petitioner to be heard under Section 5-A of the Act, service on the petitioner of an individual notice of the notification under Section 4 was mandatory but that in this case, although the said purchase-deed in favour of the petitioner was not only registered but the necessary mutation was effected in the record-of-rights long prior to the issue of the notification under Section 4, no such individual notice of the Notification under Section 4 was served on the petitioner.

(ii) service of such individual notice on the owner of the land sought to be acquired being a pre-requisite to the issue of a notification under Section 6, the result is that if such individual notice is not served, the notification under Section 6 is invalid.

(iii) if the notification under Sec. 6 is invalid, the efficacy of the notification under Section 4 on which the former is based gets exhausted, and no second or further notification under Section 6 can be issued on the basis of the same notification under Section 4.

Sub-section (1) of Section 4 provides:

"Whenever it appears to the (appropriate Government) (or the Commissioner) that land in any locality (is needed or)

is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality."

It is clear that what sub-section (1) of Section 4 requires is that the notification under the sub-section must, firstly be published in the Official Gazette and, secondly, the Collector must cause public notice of the substance of such notice to be given at convenient places in the locality in which the land intended to be acquired is situate.

Sub-section (1) of Section 5-A provides:

"Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality, as the case may be."

Neither Section 4 nor Section 5-A contains any provision for the service of an individual notice on any person interested in the land sought to be acquired by a notification issued under Section 4. However, the relevant part of sub-section (1) of Section 55 of the Act provides:

"The (appropriate Government) shall have power to make rules consistent with this Act for the guidance of officers in all matters connected with its enforcement and may from time to time alter and add to the rules so made."

As appearing from the Manual of Land Acquisition for State of Bombay, written by F. G. Hartnell Anderson and published by the Government of Maharashtra in the edition of 1970, the State Government has framed certain Rules in respect of Section 5-A in exercise of the powers so conferred by Section 55. Rule No. 1 of those Rules provides as under:

"Whenever any notification under Section 4 has been published but the provisions of Section 17 have not been applied; and the Collector has, under Section 4 (1) issued notice to the parties interested; and on or before the last day fixed by the Collector in those notices in this behalf any objection is lodged under Section 5-A (2): Firstly, the Collector shall record the objection in his proceedings; secondly, the Collector shall consider whether the objection is admissible according to these rules."

7. This R. 1 forms part of the statutory Rules made by the State Government in exercise of the statutory power delegated to it under Section 55 (1). The Rules are framed for the guidance of the

officers as stated in Section 55 (1). The Rules, therefore, have the force of law. The provision in the said Rule 1 that "the Collector has under Section 4 (1) issued notices to the parties interested" clearly indicates that for the purpose of giving an adequate opportunity to the owner of land in respect of which a notification under Section 4 (1) has been issued notice must be given to him as a "party interested" in that land. In other words, this provision for giving an individual notice to the owner or other party interested in the land, contained in Rule 1 is by the Rule made an additional mode of publishing the notification under Section 4. It is in addition to the publication in the Official Gazette and the publication by the Collector as required under sub-section (1) of Section 4 and all these three kinds of publications stand on an equal footing. The additional provision of publication as required by R. 1 is obviously required to be made for obvious reasons. Acquisition of land under the Act is for public good and in the public interest and the owner of land even if unwilling to part with it, is compelled by legislation to part with it. It is to provide him a fair opportunity to urge his objections under Section 5-A. Rule 1 provides that an individual notice must be given because a general public notice as provided under Section 4 (1), though it would amount to a constructive notice to the owner, was not thought to be enough or fair as it may not in fact come to the notice of the owner. Mr. Palshikar, the learned counsel for the respondents, did not dispute that this rule does require individual notices to be served on all persons interested in the land covered by the notification under Section 4 at the date of such notification. He, however, contended that this provision is only directory and not mandatory with the result that even if a person interested in the land happens not to have been served with such an individual notice, it would not invalidate the notification under Section 6 issued thereafter. He did not dispute that the non-publication in the Official Gazette and by the Collector as required under sub-section (1) of Section 4 would render the notification under Section 6 invalid. In our view, because the effect of the publication of the notifications under Sections 4 and 6 would be to compulsorily deprive the owner of his land even against his will, the requirement of the Rule of service of individual notice contemplated by the said Rule 1 must stand on the same footing as the other two modes of publication mentioned in sub-sec. (1) of Section 4 and it is, therefore, mandatory and not merely directory. All the said three forms of publishing the noti-

cation under Section 4 are a pre-condition to the issue of a notification under Section 6. The non-service of an individual notice as contemplated by Rule 1 would render the notification issued under Section 6 invalid because it would not give proper opportunity to the person interested to urge his objections as contemplated by Section 5-A.

8. In the case before us, it is common ground that no individual notice as contemplated by Rule 1 was served upon the petitioner before the notification under Section 6 was issued. Considerable time prior to the issue of the notification under Section 4 the purchase-deed in favour of the petitioner was not only registered but a mutation entry was made in the record-of-rights against the land with which we are concerned in this petition. What appears to have happened is that for a considerable time after the mutation entry was effected, it was not brought to the notice of the authority concerned and that for want of inquiry in that behalf the officer who issued the notification under Section 4 did not know that the petitioner had purchased the land. The result was that an individual notice was in fact served as required by Rule 1 but it was served on the vendor who was no longer interested in the land after he effected the sale-deed in favour of the petitioner. As a matter of fact at the date of such service the vendor himself was dead and the notice was accepted by the son of the vendor. But whatever be the reason why such an individual notice was not served on the petitioner, the fact remains that he was not served. Mr. Palshikar pointed out that as a matter of fact, after the notification under Section 6 was issued, the petitioner did come to know of the acquisition proceedings and did urge all his objections including those objections which he could have urged under Section 5-A and that he was heard. In our opinion, the correct stage at which the objections under the provisions of S. 5-A are to be urged is before the notification under S. 6 is issued. The petitioner had no opportunity to do so for want of service of an individual notice upon him. The mere fact that the petitioner did urge those objections and was heard after the notification was issued under Section 6 would not prevent the notification under Section 6 being held invalid. We, therefore, hold that the impugned notification under Section 6 was invalid for want of individual notice contemplated by Rule 1 having been served upon the petitioner before such notification was issued.

9. The last contention of the petitioner is that if the notification under Section 6 is held to be invalid, it must

be declared that the notification under Section 4 has exhausted itself and is not available for the issue of any second or subsequent notification under Section 6 based upon the same notification under Section 4. In this connection, reliance has been placed by Mr. Madkholkar, the learned counsel for the petitioner, on the judgment of the Supreme Court in the State of Madhya Pradesh v. Vishnu Prasad Sharma, AIR 1966 SC 1593. In that case after a notification was issued under Section 4 of the Act, successive notifications were issued from time to time under S. 6 in respect of different pieces of lands covered by that notification under Section 4 and the validity of the notifications under Section 6 subsequent to the first notification under Section 6 was under challenge. The Supreme Court in its judgment considered various relevant provisions of the Act and a majority of the Court held that after the first notification was issued under Section 6, the efficiency of the notification under Section 4 was exhausted and no subsequent notification could be issued under Section 6 in respect of any land although it may fall under the notification issued under Section 4 and that such further and subsequent notifications were invalid. We reproduce below some material portions from that judgment of the majority of the Bench.

"It seems to us clear that once a declaration under Section 6 is made, the notification under Section 4 (1) must be exhausted for it has served its purpose. There is nothing in Sections 4, 5-A and 6 to suggest that Section 4 (1) is a kind of reservoir from which the Government may from time to time draw out land and make declaration with respect to it successively. If that was the intention behind Sections 4, 5-A and 6 we would have found some indication of it in the language used therein. But as we read these three sections together we can only find that the scheme is that Section 4 specifies the locality, then there may be survey and drawing of maps of the land and the consideration whether the land is adopted for the purpose for which it has to be acquired, followed by objections and making up of its mind by the Government what particular land out of that locality it needs. This is followed by a declaration under Section 6 specifying the particular land needed and that in our opinion completes the process and the notification under Section 4(1) cannot be further used thereafter. At the stage of Section 4 the land is not particularised but only the locality is mentioned; at the stage of Section 6 the land in the locality is particularised and thereafter it seems to us that the notification under Section 4(1) having served its purpose exhausts itself. The sequence of events

from a notification of the intention to acquire [Section 4(1)] to the declaration under S. 6 unmistakably leads one to the reasonable conclusion that when once a declaration under Section 6 particularising the area out of the area in the locality specified in the notification under Section 4 (1) is issued, the remaining non-particularised area stands automatically released. In effect the scheme of these three sections is that there should be first a notification under Section 4(1) followed by one notification under Section 6 after the Government has made up its mind which land out of the locality it requires."

In that case it was contended that where the land is required for a small project and the area is not large, the Government may be able to make up its mind once for all what land it needs, but whereas in that case the land was required for a large project requiring large area of land, the Government may not be able to make up its mind all at once and it should, therefore, be held that issuance of successive notification under Section 6 based on the same notification under Section 4 was not invalid. The Supreme Court, however, observed as under:

"It is urged however that where the land is required for a small project and the area is not large the Government may be able to make up its mind once for all what land it needs, but whereas in the present case land is required for a large project requiring a large area of land Government may not be able to make up its mind all at once. Even if it be so there is nothing to prevent the Government from issuing another notification under Section 4 followed by a notification under Section 6. As we have said before, the Government's power to acquire land in a particular locality is not exhausted by issuing one notification under Section 4(1) followed by a notification under Section 6. The interpretation which has commended itself to us therefore does not deprive the Government of the power to acquire more land from the same locality if later on it thinks that more land than what has been declared under Section 6 is needed. It can proceed to do so by a fresh declaration under Section 6. Such a procedure would in our opinion be fair to all concerned; it will be fair to Government where the prices have fallen and it will be fair to those whose land is being acquired where the prices have risen. Therefore as we read these three sections we are of opinion that they are integrally and intimately connected and the intention of the legislature was that one notification under Section 4(1) should be followed by survey under Section 4(2) and objections under Section 5-A and thereafter one declara-

tion under Section 6. There is nothing in Sections 4, 5-A and 6 which supports the construction urged on behalf of the appellant and in any case it seems to us that the construction which commends itself to us and which has been accepted by the High Court is a fair construction keeping in view the background to which we have referred. Even if two constructions were possible, which we think is not so, we would be inclined to the construction which has commended itself to us because that construction does not restrict the power of the Government to acquire land at any time it deems fit to do and at the same time works fairly towards persons whose land is to be acquired compulsorily".

These observations have been made by the Supreme Court in a case which concerns issuance of successive notifications from time to time under Section 6 based upon the same notification under Sec. 4. The judgment is, therefore, of necessity concerning such a state of facts. In the case before us, only one notification under Section 6 was issued based upon the notification under Section 4. We have held the notification under Section 6 to be invalid but the above observations made by the Supreme Court in respect of successive notifications under Section 6 do, in our opinion, apply with equal force to the facts as existing in the case before us because the reasoning and the ratio appearing in this judgment of the Supreme Court can apply to the facts before us. Even an invalid notification under Section 6 would exhaust the efficacy of the notification under Section 4 on which it is based. We, therefore, uphold the petitioner's contention and hold and declare that as the notification under Section 6 had in fact been issued, though it has been held by us to be invalid, the efficacy of the notification under Sec. 4 has been exhausted and no second or further notification can be issued on the basis of the said notification under Section 4. We, however, want to make one thing clear. The notification under Section 6 relates to lands other than the land of the petitioner with which this petition is concerned. Our judgment and declaration is confined only to the land of the petitioner and our judgment and declaration in no way relates to or concerns the other lands mentioned in the said notification under Section 4.

10. We, therefore, declare the notification under Section 6 in so far as it relates to the petitioner's land khasra No. 198/1 of Ballarpur to be illegal and set it aside to that extent. We further declare that the efficacy of the notification under Section 4 in so far as it relates to the petitioner's said land has been exhausted and no further or subsequent

notification under Section 6 can be issued on the basis of the said notification under Section 4. As the costs must follow the event, we order the respondents to pay the petitioner's costs of this petition.

Petition allowed.

AIR 1972 BOMBAY 182 (V 59 C 36)

(AT NAGPUR)

PADHYE, J.

Ratnaprabhabai, Applicant v. Sheshrao Shankarrao Bhore, Opponent.

Civil Revn. Appln. No. 32 of 1968, D/- 15-11-1971, from order of S. R. Phatak, Civil J., Sr. Division, Achalpur, D/- 19-12-1967.

Hindu Marriage Act (1955), S. 9 — Restitution of conjugal rights — Petition for — Burden of proof.

The initial burden to prove the allegation on the basis of which a decree for restitution of conjugal right is sought is on the petitioner who comes to the Court. (Para 4)

If the petitioner were not to lead any evidence, then the petitioner would not be in a position to get any relief from the Court because the Court has to be satisfied of the truth of the statements made in the petition and he cannot be satisfied of the truth of the statements in the petition, unless the petitioner leads some evidence to show that the statements made by him are truthful. Section 23 makes it further clear that the Court has to be satisfied that the ground for granting the relief exists and this is so whether the proceeding is defended or not. (Para 4)

The initial burden thereafter will shift to the opponent who shall have to establish that it was not that party who has withdrawn from the society of the other and that if he or she has so withdrawn, it was for reasonable excuse, which again, may be rebutted by the petitioner. A mere admission by the opponent that he or she is living away from the petitioner would not entitle the petitioner to get a decree straightway, as mere staying away would not amount to withdrawal from the society. (Para 4)

M. S. Choudhary, for Applicant;
R. N. Deshpande, for Opponent.

ORDER:— The opponent had filed a petition in the Lower Court under Section 9 of the Hindu Marriage Act for restitution of conjugal rights alleging that the applicant had without reasonable excuse withdrawn from the society of the opponent. The applicant opposed the said petition and filed her written statement alleging, inter alia, that she was

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treated cruelly by the opponent and was driven out of the house and was deserted. On these pleadings, the learned trial Judge initially framed the following issue:

"Whether the petitioner proves that the respondent has withdrawn from the society of the petitioner without reasonable excuse."

The parties went to trial on this issue and the case was fixed for evidence on 20-12-1967. Before the commencement of the evidence the opponent filed an application for recasting the aforesaid issue and wanted the issue to be framed in these terms:

"Whether the respondent proves that she had reasonable excuse to withdraw from the Society of the petitioner?"

This application was granted by the learned trial Judge, as according to him, the petitioner-opponent could not prove a negative fact and it was for the applicant-respondent to prove a positive fact, namely, that there was reasonable excuse for her for withdrawing herself from the society of the opponent-petitioner. He thus allowed the application of the opponent and directed the applicant-respondent to prove her case. This order is challenged in this revision application.

2. The application for restitution of conjugal rights has to be made under Section 9 of the Hindu Marriage Act, 1955. It enables either the husband or the wife to make an application for restitution of conjugal rights who alleges that the other party without reasonable excuse has withdrawn from the society of the other. On such an application being made, the Court has to be satisfied of the truth of the statements made in such petition and on further finding that there is no legal ground why the application should not be granted, has to make a decree for restitution of conjugal rights. Sub-section (2) of S. 9 limits the defences to be raised by the other side in answer to a petition for restitution of conjugal rights. These defences are limited to the grounds which can be urged for judicial separation under Section 10, or for nullity of marriage under Section 11, or for divorce under Section 13 of the Hindu Marriage Act. Section 23 enjoins on the Court to pass a decree if the Court is satisfied that any of the grounds for granting the relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief and satisfies the other conditions given in Section 23 and it is only in such a case, the Court can decree the claim, whether the proceeding is defended or not.

3. Ordinarily, when a litigant comes to Court with certain allegations and claims a relief on the basis of these allegations, it is for him to substantiate

those allegations, before he can get a decree. Normally, therefore, the initial burden is on the plaintiff or the applicant who initiates the proceedings and the evidence given on behalf of the plaintiff or the applicant has then to be rebutted by the opponent. There may be cases where the burden may lie with respect to certain issues on the opponent and then the plaintiff or applicant will have to rebut the evidence given on behalf of the opponent. There may be other cases where the burden may shift from one party to the other from time to time and there may also be cases where the initial burden, however slight it may be, rests on a particular party and then shifts to the opposite party. To me, the test to find out on whom the burden of proof lies will be to see as to which party would fail if no evidence is let by other party.

4. To me, it appears that this is a case where the initial burden, however slight, rests on the petitioner who comes to Court. If the petitioner were not to lead any evidence, then the petitioner would not be in a position to get any relief from the Court because the Court has to be satisfied of the truth of the statements made in the petition and he cannot be satisfied of the truth of the statements in the petition, unless the petitioner leads some evidence to show that the statements made by him are truthful. Section 23 makes it further clear that the Court has to be satisfied that the ground for granting the relief exists and this is so whether the proceeding is defended or not. We may contemplate a case where the petitioner comes to the Court with the allegation that the other party has without reasonable excuse withdrawn from his or her society and the other party is not represented. In such a case without anything more, no decree could be passed in favour of the petitioner because merely by making the allegations in the petition, the Court will not be able to satisfy itself of the truth of the statement made in such application. Some prima facie evidence will have to be given by the petitioner to show, in the first place, that the other side has withdrawn from the society and in the second place, there was no reasonable excuse for the same. No doubt this initial burden, in the first instance, is light inasmuch as the petitioner has only to show that the other side is not residing with him or her for no fault of his or her and that there was no apparent reason for the other party to withdraw himself or herself from the society of the petitioner. This is the minimum which will have to be established by the petitioner in a case whether the proceeding is defended or not. Unless that is done, there will be no material for the Court to get itself satisfied of the truth of the

statements made in the petition. This is why I say that the initial burden will lie on the petitioner and thereafter it will shift to the opponent who shall have to establish that it was not that party who has withdrawn from the society of the other and that if he or she has so withdrawn, it was for reasonable excuse, which again, may be rebutted by the petitioner. A mere admission by the opponent that he or she is living away from the petitioner would not entitle the petitioner to get a decree straightway, as mere staying away would not amount to withdrawal from the society. In this view the initial burden being on the petitioner, the issue as originally framed putting the initial burden on the petitioner was proper and the learned trial Judge was in error in recasting the issue as proposed by the opponent and throwing the initial burden on the applicant-respondent.

5. The order of the lower Court dated 19-12-1967 is, therefore, set aside and the issue as originally framed will be restored and the trial will proceed as if the initial burden was on the petitioner-opponent to prove his case. The revision thus succeeds and is allowed. The opponent will pay the costs of the applicant.

Revision allowed.

AIR 1972 BOMBAY 184 (V 59 C 37)
VIMADALAL, J.

Narendrakumar Bhogilal Shah, Appellant v. State, Respondent.

Criminal Appeal No. 22 of 1970, D/- 8-4-1971.

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 18(1)(3) — Sub-section (3) is couched in the form of proviso to sub-section (1).

Sub-section (3) of S. 18 is couched in the form of a Proviso to sub-section (1) for, though sub-section (3) does not start with the words "Provided that", it would read perfectly well, if those words are prefixed to it. Those words should be necessarily implied. A proviso to a section is not always an exception to the main part of it. It may be a saving clause or in exceptional cases even a substantive provision itself, as when the substantive provision to which it is appended as a proviso deals with a different subject altogether. AIR 1961 SC 1596 & AIR 1968 SC 59, Followed; (1970) 72 Bom LR 351, Dissented from. (Para 3)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 6 — Words 'Premises let' in S. 6 must be construed as including premises agreed to be let — (X-Ref:— Section 18(3)).

Having regard to the fact that sub-section (3) of S. 18 in terms deals with an agreement to grant a lease, the word 'let' in Section 6 cannot be so construed as to nullify sub-section (3) of S. 18 altogether. The only way to arrive at a harmonious construction of Section 6 and sub-section (3) of S. 18 which occurs in Part II with which Section 6 deals, is to construe the words 'premises let' in Section 6 as including premises agreed to be let for the purposes specified therein.

(Para 4)

(C) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 18(3) — Words 'shall include' in sub-section (3) can be construed as meaning 'shall be incorporated' as a matter of their fair and ordinary meaning.

(Para 6)

(D) Interpretation of Statutes — If the only reasonable way of construing a penal section, without stretching its language is one which goes against the accused, to so construe it will not violate the rule of strict construction of penal Statutes.

(Para 7)

(E) Bombay Rent, Hotel and Lodging House Rates Control Act (57 of 1947), Section 18(3) — Conditions of sub-section (3) are incorporated by operation of law in all construction loan agreements whether oral or in writing — Obiter. (Para 8)

(F) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 18(3) — Provision in sub-section (3) that agreement should be in writing and registered is equally one of the conditions specified in the sub-section. (Para 11)

(G) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 18(3) (4) — Conditions listed in sub-section (4) must be complied with — Breach thereof is offence under sub-section (4) whether agreement is written and registered, written and not registered or oral, unless reasonable excuse for non-compliance is proved. (Para 12)

(H) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 18(3) (4) — Failure to provide for charge on building and on interest in land, in construction loan agreement — No offence under sub-section (4).

(Para 15)

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N. A. Mody with M. A. Upadhyaya,
for Appellant; V. P. Tipnis, Hon. Asst.
Govt. Pleader, for the State.

JUDGMENT:— This is an appeal filed by a former landlord against his conviction under Section 18(4) of the Bombay Rent Act, 1947, for contravention of the provisions of Section 18(3) thereof, though he had been acquitted of the offence under Section 18(1) of the same Act, with which also he had been charged in the trial Court. The facts of the prosecution case are that complainant K. S. Ghaswalla agreed to pay to the accused, through a firm of booking agents employed by the accused, a sum of Rs. 5001/- as and by way of a construction loan in respect of a building proposed to be constructed by the accused at Kandivli in Bombay. Under the said agreement the said Ghaswalla was to be given the tenancy of Flat No. 36 on the first floor of building No. 3 in the housing colony of which the same was a part. The said Ghaswalla paid to the accused various sums aggregating to Rs. 4000/- towards the said sum of Rupees 5001/- payable by him. The agreement between the said Ghaswalla and the accused was reduced into writing, (Exh. F.) and was dated 16th of September 1966, but was not registered as required by Section 18 (3) of the Bombay Rent Act, 1947. Under the said agreement, it was by necessary implication, though not in express terms, provided that the said building was to be completed on or before 30th December 1967, but the said agreement did not contain any provision creating a charge on the said Building No. 3 and the interest of the accused in the land on which the said building was erected as required by sub-section (3) of S. 18 of the Bombay Rent Act, 1947. The said agreement also contained certain other conditions to which, however, it is not necessary to refer, but it may be stated that the said agreement clearly showed that the loan of Rs. 5001/-, which Ghaswalla was to give to the accused, was to be given for the purpose of financing the erection of building No. 3 which was to be constructed by the accused. The prosecution case is that the accused, however, failed to complete the said building

by the stipulated date viz. 30th December 1967 and that he has in fact not yet completed the same and given possession to Ghaswalla of the flat allotted to him. The accused was, therefore, charged under Section 18(1) and Section 18(4) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and was tried for the said offences by the learned Presidency Magistrate, 23rd Court, Esplanade, Bombay, who convicted him of the offence under Section 18(4) of the said Act and sentenced him to a fine of Rs. 500/-, but acquitted him of the offence under Section 18(1) of the said Act in view of the decision of the Supreme Court in the case of Tolaram v. State of Bombay. (56 Bom LR 1206) = (AIR 1954 SC 496). It is from the order convicting him of the offence under Section 18(4), that the accused has preferred the present appeal.

2. Several interesting questions relating to the construction of Section 18 of the Bombay Rent Act, 1947, arise in this appeal and it would, therefore, be convenient at the outset to set out the substance of that section. Sub-section (1) of S. 18 makes it an offence for a landlord to receive any fine, premium or other like sum or deposit or any consideration other than standard rent or the permitted increases in respect of the grant, renewal or continuance of a lease of any premises or for the transfer of a lease". Sub-section (2) of that section provides for the recovery of any fine, premium or other sum or deposit paid by the tenant to the landlord in violation of sub-section (1). Then come sub-sections (3) and (4), with which I am directly concerned in this appeal and I would, therefore, prefer to quote the same verbatim. These sub-sections are in the following terms:

"(3) Nothing in this section shall apply to any payment made under any agreement entered into before the first day of September 1940 or to any payment made by any person to a landlord by way of a loan, for the purpose of financing the erection of the whole or part of a residential building or a residential section of a building on the land held by him as an owner, a lessee or in any other capacity entitling him to build on such land, under an agreement which shall be in writing and shall notwithstanding anything contained in the Indian Registration Act, 1908, be registered. Such agreement shall inter alia include the following conditions, namely:—

(1) that the landlord is to let to such person the whole or part of the building when completed for the use of such person or any member of his family;

(2) that the rate of interest on such loan shall not be less than four per cent., per annum;

(3) that such loan shall be repayable by the landlord within a period of ten years from the date of the execution of the agreement or within a period of six months from the date of the termination of the tenancy by the landlord, whichever period expires earlier;

(4) that the amount of the loan shall be a charge on the entire building and the entire interest of the landlord in the land on which such building is erected; provided that if the loan has been advanced by more than one person, all such persons shall, notwithstanding anything contained in any law for the time being in force, be entitled to a charge on the entire building and the entire interest of the landlord in such land rateably according to the amount of the loan advanced by each of such persons;

(5) that the landlord shall use the amount of the loan for the purpose of erecting the whole or part, as the case may be, of the residential building and for no other purpose; and

(6) (a) that the erection of the building shall be completed within a period of two years from the date of the execution of the agreement or if the agreements executed are more than one, from the date of the execution of the first of such agreements: Provided that the said period of two years may be extended to a further period not exceeding one year with the sanction of the Collector;

(b) that if the erection of the building is not completed within the period of two years or within the extended period specified in the proviso to clause (a) the loan shall be repayable forthwith to the person advancing the same with interest at the rate of four per cent. per annum.

(4) If any landlord who has received a loan under an agreement in accordance with the provisions of sub-section (3), contravenes, without any reasonable excuse any of the conditions specified in sub-section (3), such landlord shall, on conviction, be punished with imprisonment for a term which may extend to six months or with fine or with both".

It is not necessary for me to set the explanation to sub-section (4) of the said section. The prosecution case is that the accused has contravened sub-section (3) of S. 18 of the said Act in three respects, viz. (1) by failing to register the agreement dated 16th September 1966 (Exh. F) (2) by not creating a charge in respect of the said loan on building No. 3 in which the said Ghaswalla was allotted a flat and on the land on which it was to be erected; and (3) by not completing the said building within the period of two years from the date of the execution of the said agreement dated 16th September 1966. Mr. N. A. Mody, who appeared on behalf of the accused, has contended that the

conviction of the accused is erroneous on the following grounds:

(1) As the Supreme Court has now laid in Tolaram's case (56 Bom LR 1206) = (AIR 1954 SC 496) that sub-section (1) of S. 18 does not apply to an agreement to grant a lease, but only applies to a present demise, and as sub-section (3) of that Section is worded only so as to be an exception to sub-section (1) thereof, there is nothing to which sub-section (3) can possibly apply;

(2) Sub-section (3) of Sec. 18 cannot apply to an agreement to grant a lease because of the controlling provisions of Section 6 of the Act that Part II in which Section 18 occurs applies only to premises "let" for the purpose specified therein, which must mean a present demise and not a mere agreement to let, and also because of the definition of the word "landlord" in Section 5 (3) thereof which is to the same effect;

(3) Even if the view taken is that sub-section (3) applies to an agreement to grant a lease, the offence made punishable by sub-section (4) is only for contravention without reasonable excuse of any of the conditions specified in sub-section (3), but no offence is created by sub-section (4), or by any other provision of the said Act, for not including the conditions of sub-section (3) in the agreement under which a construction loan is given to the landlord, or for not reducing that agreement into writing, or for not registering the same.

3. I shall now proceed to consider the first contention of Mr. Mody and, in that connection, I must immediately refer to the decision of the Supreme Court in Tolaram's case, 56 Bom LR 1206 = (AIR 1954 SC 496) referred to above. The facts of that case were that the appellants before the Supreme Court, who were landlords, were charged under Section 18(1) of the Bombay Rent Act, 1947, for receiving a sum of Rs. 2,400/- as premium or Pegree in respect of an agreement of a lease of Block No. 15 in a building under construction. The trial Magistrate found the appellants guilty and sentenced each of them to imprisonment and fine. The appeal by the convicted accused came up before a Division Bench of this Court, which referred it to a Full Bench and the Full Bench (55 Bom LR 366) = (AIR 1953 Bom 347) (FB) took the view that the receipt of consideration for an executory agreement was within the mischief of Section 18 of the Act, and the appeal by the convicted accused was dismissed by the Division Bench in consequence of that view. The accused having filed an appeal to the Supreme Court, the Supreme Court allowed that appeal and held that the language of Section 18 (1) envisaged the existence

of a lease and payment of an amount in respect of that lease, and that the receipt of money by the appellant from the complainant in that case at the time of the oral executory agreement of lease was not made punishable under Section 18 (1) of the Act and was outside its mischief. The conviction of the appellants was, therefore, set aside and they were ordered to be acquitted. In my opinion, sub-sec. (3) of S. 18 is couched in the form of a Proviso to sub-section (1), for, though sub-section (3) does not start with the words "Provided that", it would read perfectly well if those words are prefixed to it. In my opinion, those words should be necessarily implied and must be read into sub-section (3) by reason of the way, in which it has been framed by the legislature. A Proviso to a section, however, is not always an exception to the main part of it. It may be a saving clause or in exceptional cases even a substantive provision itself, as when the substantive provision to which it is appended as a Proviso deals with a different subject altogether. A reference may be made in this connection to two decisions of the Supreme Court in regard to the way in which a Proviso should be construed. The first of them is the decision of the Supreme Court in the case of *S. B. K. Oil Mills v. Subhash Chandra*, (AIR 1961 SC 1596), in which the question of the construction of the Proviso to Section 50 of the Bombay Rent Act itself arose for consideration. The Supreme Court observed (paragraph 9) that the law with regard to provisos was well-settled and well-understood, that, as a general rule, a Proviso was added to an enactment to qualify or create an exception to what was in the enactment, and that, ordinarily, a Proviso was not interpreted as stating a general rule. The Supreme Court, however, proceeded to lay down that Provisos were, however, often added not as an exceptions or qualifications to the main enactment but as saving clauses, in which cases they would not be construed as controlled by the section. After setting out the contentions of either side on this point, the Supreme Court, however, stated that, in the view which they took on another point, it was not necessary for them to pronounce upon the proper construction of Section 50 of the Bombay Rent Act in the said case (para 10). The second decision of the Supreme Court in regard to the construction of Provisos is to be found in the case of *Commr. of Commercial Taxes, Board of Revenue Madras v. R. S. Jhaver*, (AIR 1968 SC 59). The question which arose in that case was in regard to the proper construction of the proviso to sub-section (2) of S. 41 of the Madras General Sales Tax Act, 1959, Sec. 41(2) dealt with inspection of the accounts, registers, records and other documents

maintained by dealers, while the proviso thereto dealt with search of residential accommodation. The Supreme Court in its judgment dealt with an argument very similar to the argument which Mr. Mody has advanced before me on the point I am now considering viz., that a Proviso carves out something which is already contained in the main provision, and that since the main provision in sub-section (2) of S. 41 of the Madras General Sales Tax Act did not provide for search of purely residential accommodation the Proviso was otiose. In regard to that contention, the Supreme Court observed (paragraph 8) that, generally speaking, it was true that a Proviso was an exception to the main part of the section, but it was recognised "that in exceptional cases a Proviso may be substantive provision itself". The Supreme Court in that judgment itself referred to three decisions on the point and stated (paragraph 11) that the said cases showed that "in exceptional circumstances a proviso may not be really a Proviso in accepted sense but may be a substantive provision itself". The Supreme Court then held that the proviso under consideration by it was of that exceptional nature, because the main part of the sub-section did not provide for search of purely residential premises, and that, therefore, when the proviso provided for such search, it was providing for something independent of the main part of the sub-section. Now, if one turns to sub-section (3) of S. 18 of the Bombay Rent Act with which I am concerned in the present case and which in the view taken by me above, is framed in the form of a Proviso to sub-section (1) thereto it is clear that it deals only with a stage prior to the stage of the actual demise with which alone sub-section (1) deals, viz. the stage of an executory agreement to grant a lease and, therefore, deals with a totally different subject-matter. I must construe sub-section (3), which is in the nature of a Proviso to sub-section (1) as already stated above, in the same manner in which the Supreme Court has in the case of AIR 1968 SC 59 construed the Proviso to sub-section (2) of S. 41 of the Madras General Sales Tax Act and held that sub-section (3) is a Proviso of an exceptional nature, in so far as it is not really any Proviso to sub-section (1) in accepted sense, but is a substantive provision itself. This view taken by me is supported by the fact that non-compliance with the provisions of sub-sec. (3) has been provided for, independently of sub-section (1) as an offence in sub-section (4) of S. 18. It appears that sub-section (3) has been framed in the form of a proviso to sub-section (i) *ex majore cautela* for the purpose of clarification as indicated by the Supreme Court itself in *Tolaram's case* (at p. 1210) (of 56 Bom

LR 1206) = (AIR 1954 SC 496) or is in the nature of an explanation and is not an exception as held by Bal. J. in the case of *Sulochana Ganpat v. Madan Dattatraya*, (72 Bom LR 351 at p. 356). There is, therefore, no substance in the first contention advanced before me by Mr. Mody and the same must be rejected.

4. As far as the second contention of Mr. Mody is concerned, in my opinion, having regard to the fact that sub-section (3) of S. 18 in terms deals with an agreement to grant a lease, the word 'let' in Section 6 of the Act cannot be so construed as to nullify sub-section (3) of S. 18 altogether. The only way of arriving at a harmonious construction of Section 6, and sub-section (3) of S. 18 which occurs in Part II with which Section 6 deals, is to construe the words 'premises let' in Section 6 as including premises agreed to be let for the purposes specified therein. In fact, the object of Section 6 appears to be to designate the purposes for which the premises must have been let or agreed to be let in order to make the provisions of Part II of the Act applicable. As far as the definition of the term 'landlord' in Section 5(3) of the Act is concerned, the said section starts with the words "Unless there is anything repugnant to the subject or context" and, in my opinion, there cannot be the least doubt that sub-section (3) of S. 18 of the Act is in terms repugnant to giving to the terms 'landlord' used therein a meaning which would restrict it to a person who has created a present demise. Moreover, the words 'or who would so receive the rent' in Section 5(3) in my opinion, clearly include a person who has agreed to let the premises and receive the rent in respect thereof. The second contention of Mr. Mody must, therefore, also be rejected.

5. That brings me to the third contention of Mr. Mody on behalf of the accused. The same raises the following three questions: (a) Does sub-section (4) apply to breach of the conditions specified in sub-section (3) only when they are in fact included in a construction loan agreement or the conditions of sub-section (3) incorporated by operation of law in all construction loan agreements by reason of sub-section (3)? (b) Does the term 'conditions' in sub-sec. (4) connote only those which are listed as (i) to (vi) in sub-section (3) or also the provision in the substantive part of sub-section (3) that the agreement should be in writing and registered? And (c) Do the conditions listed as (i) to (vi) in sub-section (3) apply (i) only if the agreement is in writing and registered; (ii) if the agreement is in writing, but is not registered; (iii) even if the agreement is oral?

6. Mr. Mody has contended that sub-section (4) of Section 18 applies to breach of the conditions specified in sub-section (3) only when they are in fact included in a construction loan agreement, because that, according to him is the only meaning of the plain terms of sub-section (3) which should be construed as it stands without adding words to it so as to read 'shall be deemed to include.' Alternatively, he has contended that, even if the view taken is that the words 'shall include' in sub-sec. (3) are capable of two constructions the one which is more favourable to the accused should be adopted. In support of these contentions, Mr. Mody has relied upon the dictionary meanings of the word 'include' as being comprise as a part, and of the word 'comprise' as being contain (*Chambers's Dictionary*), and that is also the meaning to be found in the *Shorter Oxford English Dictionary* (Third Edition). Mr. Mody has also relied upon a passage in *Maxwell on the Interpretation of Statutes*, 12th Edition, page 239, that, in a penal Statute, the Court must always see that the person to be penalised comes fairly and squarely within the plain words of the enactment, and that it is not enough that what he has done comes substantially within the mischief aimed at by the statute. Two of the main dictionary meanings of the word 'incorporate', however, are 'to include in the body of something else' or 'to include as a part or parts of itself' (*Shorter Oxford English Dictionary*, Third Edition). Even as a matter of plain language, therefore, the words 'include' and 'incorporate' are interchangeable as far as their meaning goes, depending of course on the context. In my opinion, the words 'shall include' in sub-sec. (3) are capable of being construed as meaning 'shall be incorporated' without adding any words, merely as a matter of their fair and ordinary meaning, and the passage from *Maxwell* relied upon by Mr. Mody is, therefore, of no avail to him. The first limb of the argument of Mr. Mody is, therefore, of no avail to him. The first limb of the argument of Mr. Mody on the point I am now considering must be rejected.

7. As far as the second and alternative limb of his argument is concerned, Mr. Mody has relied upon another rule of construction stated in *Maxwell* (also at page 239) that if there are two reasonable constructions the Court must give the more lenient one which will avoid the penalty in any particular case. That rule of construction does not, however, lay down that if any two constructions are possible in regard to a penal statute, the more lenient one must be adopted, but what it lays down is that if the words of a statute are capable of

two reasonable constructions, the Court must adopt the more lenient one which will avoid the penalty. That, indeed, is the rule of construction which the Supreme Court itself has formulated and adopted in regard to the construction of Section 18 of the Bombay Rent Act itself in Tolaram's case already cited above. The Supreme Court has stated (at page 1209):—

"It may be here observed that the provisions of Section 18 (1) are penal in nature, and it is a well settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature."

In Maxwell on the Interpretation of Statutes it is, however, stated (at p. 45) that if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, the Court should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that the legislature would legislate only for the purpose of bringing about an effective result. Maxwell states that there are many examples of words in penal statutes being given a wide construction (page 247). Maxwell also cites another rule of construction (at page 137), and it is, that to carry out effectually the object of statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined. Several decisions of English Courts are cited by Maxwell in support of that rule, including a decision in a criminal case in which that rule has been applied (p. 139). The same rule has been cited in another way by Maxwell (p. 199) when it is stated that where to apply words literally would defeat the obvious intention of the legislation and produce a wholly unreasonable result, the Court must do some violence to the words and so achieve that obvious intention and produce a rational construction. These, in my opinion, are merely different facets of the rule of construction based on futility mentioned earlier in the judgment. It was, however, sought to be contended by Mr. Mody that the argument of futility which is based upon the decision of the House of Lords in the case of Nokes v. Doncaster Amalgamated Collieries Ltd. (1940 AC 1014 at p. 1022) has been rejected by the Full Bench of this Court

in Tolaram's case in regard to the construction of penal statutes (55 Bom LR 366 at p. 376) — (AIR 1953 Bom 347 FB). In the judgment of the Supreme Court on appeal from the Full Bench judgment in the said case, however, I do not find any express rejection of that rule of construction by the Supreme Court, or even a reference to Nokes' case though there can be no doubt that the Supreme Court has (at p. 1209) based its own judgment primarily on the observations of Lord Macmillan in the case of London and North Eastern Railway Co. v. Berriman, (1946 AC 278 at p. 295). Even if one were to disregard the rule of construction based on futility, the position in regard to the construction of a penal section is that if the only reasonable way of construing such a section, without stretching its language, is one which goes against the accused, to so construe it would not violate the rule of strict construction of penal statutes.

8. Proceeding to examine sub-sections (3) and (4) of Section 18 in the light of these principles, the words, "shall include" in sub-section (3) are, no doubt, theoretically capable of two constructions, viz. (a) that the conditions specified in sub-section (3) must, in fact, be included in the construction loan agreement in question; or (b) that they must be incorporated in all construction loan agreements by operation of law. As a matter of plain language, both are equally correct without any stretching of language or addition of words. However, though these two constructions are possible in a theoretical sense, the only construction which in my opinion is reasonable is the second one, because I fail to see how the legislature could have intended merely to say "you must include these conditions in your agreement," without providing for the consequences of or penalty for their non-inclusion. The manifest objects of the legislation embodied in the Bombay Rent Act, 1947, are to be found stated in the preamble to that Act, and have also been stated by Bal. J. in the course of his judgment in the case of (72 Bom LR 351 at pp. 353-354). These objects are, to provide protection to tenants against exorbitant charges by landlords and against eviction except on proof of certain specified circumstances. To give to the words 'shall include' in sub-section (3) of Section 18 the narrower construction of physical inclusion in the construction loan agreement in question would not merely fail to achieve those objects, but would totally defeat them; for a landlord would only have to omit those terms from his written agreement and do with impunity what the law intended to forbid. That could never have been the intention of the legislature and, in my

opinion, therefore, that would not be a reasonable construction of those words at all. In this connection, it is also important to bear in mind that the conditions of sub-section (3) have not been made 'subject to contract to the contrary', which would indicate that the legislature intended them to be included in all construction loan agreements of the nature contemplated by that sub-section. I hold that the conditions of sub-section (3) of Section 18 of the Bombay Rent Act, 1947, are incorporated by operation of law in all construction loan agreements, whether they be oral or in writing.

9. It was, however, sought to be contended by Mr. Mody that the view which I am taking on this point is in conflict with the judgment of Bal J. in *Sulochana Ganpat's case* (1970) 72 Bom. LR 351 to which I have already referred in another context, in so far as that very argument was advanced before that learned Judge and rejected by him (at page 357). The observations of Bal J. in regard to the point of incorporation by operation of law, which I am now considering, are clearly obiter dicta, for the simple reason that the view which he took was (at p. 357) that S. 49 of the Registration Act only provides for the consequences of non-registration of a document required to be registered either under Section 17 of the Registration Act or under any provision of the Transfer of Property Act. He, therefore, held that non-registration of a loan agreement, though it may amount to non-compliance by the landlord with the requirement of Section 18 (3) will not make the document inadmissible in evidence. His decision on the question of the admissibility of the document before him would have been the same, whichever view he took in regard to the argument that the conditions laid down in sub-section (3) are to be incorporated in every construction loan agreement. The observations of Bal J. on the point which I am now considering being obiter dicta, I do not consider myself bound to follow the view taken by him in regard to the same. It may be mentioned that the decision of the Supreme Court in *Tolaram's case*, 56 Bom LR 1206 = (AIR 1954 SC 496) does not appear to have been cited before Bal J. in the said case.

10. It was next sought to be contended by Mr. Mody that the view which I am taking on this point is also in conflict with an unreported judgment of Patel J., D/- 7-9-1960 in A. O. No. 170 of 1959 (Bom). The question before the learned Judge in that case was whether the rights created by the construction loan agreement before him could be said to be rights arising out of the Bombay Rent Act, or de hors the Bombay Rent Act.

Patel J. took the view that Section 18 (3) created "an exception in favour of validity provided the terms of contract were as those mentioned", that Section 18 (3) does not purport to create any right either in the tenant or in the landlord, and that "the rights would be the creation of the agreement between the parties de hors the Rent Act and cannot be said to arise out of the Act." The sentence last quoted has been relied upon strongly by Mr. Mody as negating the view that the legislature intended to incorporate the conditions mentioned in sub-section (3) in all construction loan agreements. With respect to the learned Judge, in proceeding on the basis that Section 18 (3) is an exception to Section 18 (1), he has proceeded on a basis which cannot stand in view of the decision of the Supreme Court in *Tolaram's case* which does not appear to have been cited before him holding that Section 18 (1) applied only to cases of a present demise. In view of the said decision of the Supreme Court, I do not consider myself bound by the view taken by Patel J. in regard to the interpretation of the provisions of Section 18(3).

11. I now turn to the second question which arises for my consideration, viz. whether the word 'conditions' in sub-section (4) of Section 18 connotes only those conditions which are listed as (i) to (vi) in sub-section (3) or includes also the provision therein that the agreement should be in writing and registered. In my opinion, the provision that is to be found in sub-section (3) that the agreement should be in writing and registered is equally one of the conditions specified in sub-section (3) as there is no reason for excluding the same from the natural meaning of the term 'conditions'. The condition in regard to writing and registration is stated separately only because from its very nature and as a matter of plain grammatical construction it could not have been included in the conditions which are to be found listed as (i) to (vi) in that very sub-section.

12. That brings me to the third question that arises, viz. whether the conditions listed as (i) to (vi) in sub-section (3) apply (i) only if the agreement is in writing and registered; (ii) if the agreement is in writing but is not registered; (iii) even if the agreement is oral. From the view taken by me in the preceding paragraphs it does not follow that because the conditions in regard to writing and registration are separately stated in the substantive part of sub-section (3), the other conditions which are to be found listed in the sub-section need not be complied with if the agreement is not in writing or is not registered. The requirement of the agreement being in writing and being registered is

as much a conditions as the other conditions listed in sub-section (3), no more and no less. If, therefore, the agreement under which a construction loan is taken by a landlord is not in writing, or is in writing but is not registered, the landlord commits an offence under sub-section (4), unless of course he can make out 'any reasonable excuse' for not reducing the agreement into writing or not registering the same, in which case, as the language of sub-section (4) clearly shows, he commits no offence. However, even if the landlord has a reasonable excuse for the agreement not being in writing or not being registered, he would still commit an offence if he committed breach of any of the conditions that are to be found listed as (i) to (vi) in sub-section (3), unless he can prove a reasonable excuse for breach of such listed condition also. I, therefore, take the view that the conditions listed in sub-section (3) must be complied with and breach thereof is an offence under sub-section (4) of Section 18, in all the three cases mentioned above unless of course reasonable excuse for non-compliance be proved.

13. I will now turn to the facts of the present case in the light of the construction which I have placed on sub-sections (3) and (4) of the Bombay Rent Act, 1947. The prosecution case is that the accused has committed breach of sub-section (3) of Section 18 by (1) not registering the agreement dated 16th September 1966 (Ex. F); (2) by not completing the building within the period of two years from the date of execution of that agreement; and (3) by not providing in the said agreement that the amount of the loan is to be a charge on the said building and the entire interest of the accused in the land on which that building was to be erected. In his evidence, the complainant Ghaswalla has deposed that the agreement (Ex. F) has not been registered, though it was intended to be registered immediately after it was executed. The accused has not elicited or led any evidence, nor has he, either in his statement under Section 342 of the Criminal Procedure Code or in the written statement which he has filed in the trial court, said anything which would show that he had any reasonable excuse for not registering that agreement as required by the provisions of sub-section (3) of Section 18 of the Bombay Rent Act. I, therefore, hold that the accused has committed an offence under sub-section (4) of the said Section 18 and has rightly been convicted of the same by the learned Magistrate. In that view of the matter, it is not really necessary for me to consider whether the accused has committed breach of any of the other conditions specified in sub-section (3) of the said Sec-

tion 18. Since, however, the matter has been argued at great length before me, I feel I must also deal with the alleged breach of the other two conditions mentioned above.

14. The complainant Ghaswalla has deposed in clear terms that the construction of the building in question "is yet not complete" which must mean that it had not been completed at the date when he gave evidence in the trial court, by which time the statutory period of two years from the date of execution of the agreement dated 16th September 1966 (Ex. F) had long since expired. He has stated later on in his evidence once again that the flat allotted to him had not been completed at the time when he gave evidence in the trial court. It is true that the said agreement (Ex. F), by clear implication, provides for the completion of the building on or before 30th December 1967. However having regard to the provisions of clause (vi) (a) of sub-section (3) of Section 18, even if the building is not completed by the said date the accused would not, in my opinion, commit the offence under sub-section (4) of Section 18 unless the erection of the building transgresses the statutory period of two years provided in clause (vi) (a) of sub-section (3) of that section. It was sought to be contended by Mr. Mody that this evidence should not be accepted in view of the fact that Ghaswalla has stated at another place in his evidence that the last time he went to the site was only in June, 1967, with the result that the statements made earlier by him were not based on his own personal knowledge but were in the nature of hearsay evidence. The record of the proceedings in the trial court, however, shows that no objection has been taken at any time to the admissibility of the statements made by Ghaswalla and, under those circumstances, it is now too late in the day to raise that objection in the appellate Court. Moreover, that is not the only evidence on the point. Witness A. S. Narayan has also deposed in clear terms that the flat in question which it appears, has been re-allotted by the accused to the said Narayan from whom the accused has taken another construction loan, was not ready at the date when he gave evidence in the trial court, which was the 24th of Nov. 1969, and that he had not been able to get possession of the same. There is, therefore, no need to remand the case to the trial Court for taking evidence on the point as to whether or not the building has been completed within the statutory period of two years from the date of agreement (Ex. F), as Mr. Mody sought to urge before me. There was definite and clear evidence before the trial court on which it has arrived at its finding and I have no hesitation in com-

ing to the conclusion that that finding is correct. Here again, the accused has not elicited or led any evidence, nor has he made any statement either under Section 342 of the Criminal Procedure Code or in the written statement filed by him in the trial court, which would make out any reasonable excuse for not completing the building within the statutory period of two years from the date of the agreement. In the course of his arguments, Mr. Mody has relied on a statement that is to be found in the evidence of the complainant Ghaswalla himself that one Edulji, who was the President of the Tenants' Association of the said building, and was authorized to act on behalf of the tenants in the matter of the formation of a society, has signed the agreements dated 31-5-1969 and 23-5-1969 under which the rights and liabilities of the accused were taken over by the society. I am afraid that fact, however, cannot be of any assistance to the accused in making out a reasonable excuse for non-completion of the building in question, for the simple reason that by the time the said agreements were executed, the statutory period of two years from the date of the agreement (Ex. F) had already expired on the 16th of September 1968 and the offence under sub-section (4) was already complete as far as the accused was concerned, and no subsequent act of the accused could possibly wipe out that offence. I, therefore, hold that the accused has also rightly been convicted under sub-section (4) of Section 18 for breach of the condition in regard to the non-completion of the said building within the statutory period of two years.

15. In the view which I have taken above, viz. that the conditions set out in sub-section (3) of Section 18 of the Bombay Rent Act are statutorily incorporated in every construction loan agreement, an accused person, in my opinion, does not commit any offence merely by failing to provide expressly in the agreement under which a construction loan is taken for a charge on the building and on his interest in the land. The view taken by the trial Magistrate that the accused has also committed an offence under sub-section (4) of Section 18 of the Bombay Rent Act in regard to the same is, therefore, not correct.

16. In the result, I hold that the accused has rightly been convicted by the trial court of the offence under sub-section (4) of Section 18 of the Bombay Rent Act, 1947, by reason of his having failed to register the agreement dated 16th September 1966 (Ex. F), and by reason of his having failed to complete the erection of the building within the statutory period of two years from the

date of execution of that agreement. This appeal must, therefore, be dismissed.

17. As far as sentence is concerned, the trial court has passed a sentence of fine of Rs. 500/- and has ordered that, in default of payment of the fine, the accused should undergo rigorous imprisonment for four months. It has been pointed to me that the complainant Ghaswalla has, in fact, not suffered the loss of a single rupee, and it has been contended that the offence is, therefore, a technical one. It was stated to me that the complainant Ghaswalla has agreed to treat the amount of Rupees 4000/- paid by him as transferred to the credit of the Society which has already been formed in respect of the building in question, and to take the same flat from that Society on what is popularly known as ownership basis. In view of these facts I do not think the accused deserves any substantial sentence by way of fine. I, therefore, order that the sentence passed upon the accused be reduced to a fine of Rupees 100/- in default of payment of which, the accused should suffer simple imprisonment for one month. The surplus fine, if paid, should be refunded to the accused.

Appeal dismissed.

AIR 1972 BOMBAY 192 (V 59 C 33)

K. K. DESAI, J.

Gulabchand Hiralal, Applicant v. Hakimchand Chothmal and others, Opponents.

Civil Revn. Appln. No. 948 of 1963, D/- 18-3-1971, to set aside order passed by N. A. Athalye, Dist. J., at Jalgaon. D/- 31-12-1962.

Provincial Insolvency Act (1920), Section 43 (1) — Annulment of adjudication — Creditor cannot apply to the court under section against deceased insolvent.

An application for annulment of an adjudication order can never be made against a deceased insolvent. In law the right to apply for annulment of an adjudication order cannot survive against the heirs of a deceased insolvent.

(Para 4)

The right to apply for and obtain discharge is for personal benefit of the insolvent and has no relation whatever with the heirs of a deceased insolvent. The compulsion for application for discharge as contained in Section 41 is a personal liability inflicted against an insolvent debtor and has no relevance to the heirs surviving him upon his death.

The penalty of annulment of adjudication order is visited on an insolvent debtor under Section 43 (1) upon his failure to apply for discharge. This penalty and/or liability is also intended by the Legislature to be personal and has nothing to do with the heirs of a deceased insolvent. (Para 4)

V. B. Patwardhan and V. V. Divekar for Applicant, K. J. Abhyankar for Opponents 1 to 3, 4 (1) and 4 (2) and 5 and 6.

ORDER:— This is a revisional application on behalf of the original petitioner in application Ex. 413 in Insolvency Petitions Nos. 12 and 14 of 1935. The petitioner had obtained a decree for Rupees 27,000/- in Special Suit No. 349 of 1930 against Chhaganlal Hardee in February, 1935. He then filed Insolvency Petition No. 12 of 1935 on March 14, 1935, for adjudication of the judgment-debtor Chhaganlal Hardee. Another Insolvency Petition No. 14 of 1935 was filed by other two creditors of Chhaganlal. The petitions were consolidated and by an order of adjudication dated July 30, 1936, Chhaganlal was adjudicated an insolvent. The order of adjudication provided that Chhaganlal should make an application for his discharge from insolvency within one year. This time expired on July 30, 1937. Chhaganlal's appeals against the order of adjudication were dismissed in 1938. Chhaganlal died in December 1942 without making an application for his discharge. Several intervening litigations are referred to in the judgment of the trial Court and the District Court with which I am not concerned in this revision application. About 18/20 years after the death of Chhaganlal the petitioner filed the above application Ex. 413 for annulment of adjudication of Chhaganlal under the provisions of Sec. 43 (1) of the Provincial Insolvency Act (hereinafter referred to as "the Act"). Now, this section, inter alia, provides that if the debtor does not apply for an order of discharge within the period specified by the Court, the Court may annul the order of adjudication or make such order as it may think fit, and if the adjudication is so annulled, the provisions of Section 37 shall apply. The petitioner's case was that since Chhaganlal had failed to make any application within the time fixed by the above order and/or otherwise, the adjudication order must be set aside (annulled). The trial Court held that this was a fit case in which the order of adjudication was liable to be annulled and thus granted the petition of the petitioner. Whilst annulling the adjudication it directed that the properties of the insolvent comprised in Municipal No. 2412 do vest under Section 37 in the receivers-trustees for three of the proving creditors.

2. Some of the creditors of Chhaganlal who had not proved the debts due to them by Chhaganlal in the above insolvency filed Civil Appeal No. 1 of 1962 and the District Judge, Jalgaon, by his appellate order of remand dated December 31, 1962, set aside the order of the trial Court and directed that the application Ex. 13 in the appellate Court made on behalf of the receivers in insolvency on July 21, 1962, for leave to receivers to apply for discharge should be considered by the trial Court. The District Judge remanded the whole matter once again for further consideration by the trial Court. Whilst making the above order, the learned District Judge negatived the submission made on behalf of the petitioner that the creditors who had not proved their claims in insolvency had no locus standi in preferring the appeal. The learned Judge was of the view that it was open to the receivers to have the time for applying for discharge extended.

3. Mr. Divekar for the petitioner has submitted that the learned Judge should have held that the receivers had no right to apply for extension of time to make an application for discharge and further that the appellants (in the District Court) had no locus standi to institute the appeal, because they had not proved their claims for debts in insolvency. He, therefore, submitted that the learned Judge's order should be set aside in this revisional application.

4. Whilst Mr. Divekar made the above arguments, I called upon him to explain to me how the provisions in Section 43(1) were applicable to the facts of the present case. I asked him to satisfy me that the liability to make an application for discharge survived against the heirs of the insolvent Chhaganlal on his death in 1942. I asked him to explain to me how the failure of a deceased insolvent to apply for discharge can entitle his creditors to have the insolvency annulled. Mr. Divekar has pointed out to me that he has not found any such case in the books. But he insists that a creditor of an insolvent is given a right under Section 43 (1) of the Act to have insolvency of a debtor annulled upon proof that the debtor had failed to make an application for discharge within the time fixed for the purpose. It appears to me that the application for annulment of adjudication order can never be made against a deceased insolvent. In law the right to apply for annulment of an adjudication order cannot survive against the heirs of a deceased insolvent. Now, in this connection, it is important to notice that ordinarily an order of adjudication is made in connection with a debtor and his estate for the protection of his creditors and the society. Ordinarily, the order of ad-

judication is made, at the instance of one or more creditors. The purpose and effect of the law of insolvency is to have the estate of insolvents delivered in possession of representatives of Court and to have it distributed pro rata amongst the ordinary creditors. The disability that is inflicted against an insolvent under this law is that he cannot freely trade during the continuance of his insolvency until he obtains an order of discharge as is provided under Section 41. A debtor is compelled to apply for an order of discharge from insolvency so that the circumstances in which he involved himself in debts are made evident to the Insolvency Court. A debtor who might have incurred unreasonable speculative debts and/or unreasonable commercial debts can be held to be unworthy of discharge and the discharge order may be refused from time to time for a considerable number of years. The refusal to grant an order of discharge is for the purpose of continuing disabilities of an insolvent from trading freely and/or otherwise so as to cause injury and harm to unwary dealers and the society. When an insolvent debtor obtains an order of discharge, he becomes free from his previous debts and free from his disabilities which he incurs under the Act and thus is free to trade once again without any restrictions and disabilities. The right to apply for and obtain discharge is thus for personal benefit of the insolvent and has no relation whatsoever with the heirs of a deceased insolvent. The compulsion for application for discharge as contained in Section 41 is a personal liability inflicted against an insolvent debtor and has no relevance to the heirs surviving him upon his death. The penalty of annulment of adjudication order is visited on an insolvent debtor under Section 43(1) upon his failure to apply for discharge. This penalty and/or liability is also intended by the Legislature to be personal and has nothing to do with the heirs of a deceased insolvent. Now, it is a well recognised and established maxim of law "Actio personallis moritur cum persona" that personal causes of action and/or personal liabilities die with a deceased person. In my view, the right to apply for discharge is a personal right of an insolvent debtor which cannot survive in favour of any one upon his death. Similarly, the punishment of annulment of order of adjudication upon failure of application for discharge under Section 43(1) cannot be inflicted on the receivers in insolvency and/or creditors and/or heirs of a deceased insolvent. The right to inflict this penalty does not survive against any of these parties. Having regard to the above situation, in my view, the application Ex. 413 instituted by the petitioner in Insolvency Court was entirely miscon-

ceived and not maintainable. The order of adjudication made against Chhaganlal was not liable to be annulled by the trial Court for the reasons mentioned above.

5. As I have come to the above conclusion, I do not find it necessary to deal with the contentions made by Mr. Divekar relating to the locus standi of the creditors who had not proved their debts to institute the Civil Appeal No. 1 of 1962 in the District Court. Now, it requires to be stated that the application made by the receivers in the appellate Court for extension of time to apply for discharge was also entirely misconceived. Receivers in insolvency and/or heirs of a deceased insolvent can have no right of any kind to make an application for order of discharge under Section 41. The application Exh. 13 was also misconceived.

6. Under the circumstances, the petition for annulment of adjudication order being Ex. 413 in Insolvency Nos. 12 and 14 of 1935 that was originally filed by the petitioner is dismissed. There will be no order as to costs throughout. Receivers will be entitled to recover costs from the estate.

Application dismissed.

AIR 1972 BOMBAY 194 (V 59 C 39)

K. K. DESAI AND DESHPANDE, JJ.

Purnabai w/o Babu Jawale and others, Petitioners v. The State of Maharashtra and another, Opponents.

Special Civil Appln. No. 1695 of 1968, D/- 3-3-1971, to set aside the order passed by Addl. Commr., Poona Division at Poona, D/- 20-3-1968.

Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), S. 19 — Resumption of land under, whether permissible.

The Ceiling Act does not provide for and/or prescribe any ceiling as to the area which could be restored in possession of the landlord. The Ceiling Act in fact is not enacted for restoration of possession of lands let out by him to a landlord. The ceiling of area for restoration of possession to the landlord must be found in and in fact is as prescribed by the Tenancy Act. This is so in spite of the phrase "notwithstanding anything contained in that tenancy law" as appearing in the last part of Section 19.

(Para 6)

Dr. B. R. Naik, for Petitioners; S. C. Pratap, Asst. Govt. Pleader, for Opponents Nos. 1 and 2.

DESHPANDE, J.:— Two lands bearing Survey Nos. 139 and 140 measuring in all 33 acres 11 gunthas of village

CP/CP/B566/72/SSG

Chandekasare belonged to Bapu and Pandu, nephew and uncle respectively. Major portions of these lands were irrigated and were in possession of one Bahiru Zagade as tenant. In the course of inquiry in the holdings of the said tenant under Section 14 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, hereinafter referred to as "the Ceiling Act", the tenant was found to be a surplus landholder. Before, however, his surplus lands were finally delimited, both Bapu and Pandu, appeared before the Deputy Collector in response to notices under Section 20 to claim resumption of these lands under Section 19 for personal cultivation. Bapu alone claimed entire two lands, alleging that on partition with Pandu in the year 1955-56 these lands were given to Bapu and he was entitled to claim so much more area of land as would make up the total of 108 acres which is the ceiling area for his Taluka under the Ceiling Act. Pandu supported Bapu's claim of partition and alternately claimed resumption of his share for himself. The Deputy Collector, by his order dated 30-9-1965 rejected their case of partition for want of any evidence and held that Bapu and Pandu had each eight annas shares in the lands. Pandu himself was already declared a surplus landholder, and as such was found disentitled to claim resumption of any area out of these lands. Bapu was found already to have been in possession of 37 acres 38 gunthas of Jirayat land. The Deputy Collector ordered restoration of land in favour of Pandu to the extent of 2 acres 20 gunthas out of his eight annas share in survey No. 140. This area of 2 acres 20 gunthas is perennially irrigated land and the same is admittedly equivalent to 10 acres 2 gunthas of Jirayat land. Upon restoration of land as ordered, the total area possessed by Bapu for personal cultivation came to 48 acres of Jirayat land which is the prescribed ceiling area under Section 5 of the Bombay Tenancy and Agricultural Land Act of 1948 hereinafter referred to as "the Tenancy Act". Claim of Bapu to resume land to the extent of ceiling of 108 acres fixed by the Ceiling Act was rejected on the ground that the same would be contrary to the ceiling of 48 acres fixed under the Tenancy Act. Bapu having died, his four heirs and Pandu challenged this order in revision to the Commissioner but without success. The petitioners Nos. 1 to 4 being the heirs of Bapu, and petitioner No. 5 Pandu challenge the validity and the legality of the order of the Additional Commissioner, Poona, dated 20-3-1968, in this special Civil Application under Art. 227 of the Constitution.

2. Dr. B. R. Naik, the learned advocate appearing for the petitioners, relies on the non obstante clause in Sec-

tion 19(b) of the Ceiling Act and contends that the provisions in the Tenancy Act fixing the ceiling for the area that could be resumed by a landlord are irrelevant in the matter of resumption of land by a landlord under the Ceilings Act. Relevant parts of Section 19 may be conveniently quoted here:—

"Where, during any inquiry into the holding of any person x x x x x under the last preceding section, it appears that—

(a) the whole or any part of the surplus land delimited under the foregoing provisions, is held by that person from a landlord, and

(b) the landlord has a right of resumption for personal cultivation in respect of that land (or a part thereof) under the relevant tenancy law applicable to such land,

the Collector shall x x x notwithstanding anything containing in that tenancy law restore possession to the landlord of so much only of the surplus land, as he is entitled to resume; and the balance, if any, shall be surplus land".

3. Towards ascertaining the true meaning and effect of the above provisions, it is convenient to notice the following.

4. As appears from the preamble, the other scheme and particularly Section 3 thereof, the Ceiling Act was enacted for securing equitable distribution of agricultural lands to landless persons for personal cultivation and the ceiling and/or the maximum area to be continued in possession of the holders—whether landlords or tenants—was fixed, so that the surplus land held by the holders could be acquired and distributed. Apparently, the main scheme of this law was not for enacting any provisions for resumption of lands from tenants-holders for redistribution thereof amongst any landlords. Towards fulfilment of the above purpose, ceiling area was fixed under Sections 4 to 7 and inquiries were directed to be held against landholders, whether landlords or tenants in respect of the lands in their possession and under Section 27 a scheme for distribution of the surplus land amongst parties mentioned therein in order of, the priority fixed thereby was enacted. Under subsection (2) of S. 27, land resumed by a landlord under the Tenancy Act was directed to be redistributed amongst his tenants. The ceiling area fixed under this Act was entirely irrelevant to the purpose and object of the Tenancy Act. As appears from the preamble and different sections thereof, the Tenancy Act was enacted with the main purpose of improving the economic and social conditions of peasants and in that connection to assume management of estates held by land-

holders. Towards that object, provisions relating to ceiling area and economic holding were enacted in Sections 5 to 7. The normal rights of landlord to terminate tenancy were curtailed by provisions in Sections 14 and 15. Right of pre-emption was conferred on tenant under Section 31. Under Section 32, from appointed day, the protected tenants were deemed to have purchased the lands in their possession. The Chapter III enacted provisions conferring special rights and privileges of tenants, and for distribution of land for personal cultivation. It requires to be noticed that apart from certain special provisions in Chapter III-A and Chapter III-AA, the Sections in Chapter III are the only sections providing for the rights of a landlord for resumption of lands let to tenants for personal cultivation by landlords. Apparently, the provisions in this Chapter III are the only permanent provisions that the Legislature intended to enact for conditions on and in which landlords should be entitled to resume possession of lands let out to an agriculturist tenant. One of the conditions mentioned in S. 31-A(b) is "x x x, the landlord shall be entitled to take possession of so much area of the land leased as will be sufficient to make up the area in his possession to the extent of a ceiling area". The substance of the contention made by the petitioners is that the provisions in Section 19 of the Ceiling Act have rendered the above condition in Section 31-A(b) of the Tenancy Act nugatory. Some of the other conditions prescribed by Chapter III are: The landlord must require the land in question for cultivating personally. Notice of termination should have been given before December 31, 1956. At the date of the above notice, the landlord should not be in possession of lands to the extent of the prescribed ceiling area. The income by cultivation must be the principal source of income for a landlord's maintenance. Under Section 32, in cases in which notice of termination of tenancy was not served under Section 31, which must be before December 31, 1956, the tenant became deemed purchaser of lands in his possession. Under Section 32-P, in cases in which purchase of any land by tenant became ineffective, the Tribunal prescribed was empowered to resume the land and dispose of the same in accordance with the scheme of priorities prescribed in sub-section (2). It is significant that lands were not allowed to be resumed by and/or to continue in ownership of the landlord and were directed to be distributed amongst third parties mentioned in the section. It is essential to remember what is discussed above whilst reading the provisions of Section 19 of the Ceilings Act on which reliance is placed by the petitioners.

5. In connection with the inquiries for resumption of surplus land under Section 18 of the Ceilings Act, the Collector is directed to consider matters mentioned in clauses (a) to (l) of the section. The clauses (h) and (k) run as follows:—

"(h) whether any land is held by the person as tenant, and if so, whether, his landlord has a subsisting right of resumption of the land for personal cultivation, under the relevant tenancy law, applicable thereto?"

"(k) which particular lands out of the total land held by him, should be delimited as surplus land?"

6. The clause (a) of sub-section (3) of S. 20 runs as follows:—

"(3) x x x, the Collector shall, after hearing the landlord or his agent and any other person interested in the surplus land x x x, ascertain—

(a) whether the landlord is entitled to restoration of the possession of the whole or any part of such surplus land, and if so, the area and other particulars of such lands; and

x x x x x x"

Apparently, the contents of clause (h) in Section 18 and clause (a) of sub-sec. (3) of S. 20 have reference to the right of resumption of land by the landlord that is referred to in Section 19. In that connection, under the above clause (h), the inquiry is directed to ascertain if the right of resumption which must be for personal cultivation is subsisting under the Tenancy Act. The result of that inquiry must be declared in the order to be passed in accordance with the contents of clause (a) of sub-section (3) of S. 20. All that is discussed above throws considerable light for ascertaining the true meaning of the provisions in Section 19. For the Collector to exercise power under the last part of Section 19 for restoration of possession of any surplus delimited land to the original owner landlord, the first essential finding required in Cl. (h) of Section 19 is that "the landlord has a right of resumption for personal cultivation in respect of that land (or a part thereof) under the relevant tenancy law x x x". If an affirmative finding can be made as regards the above matter, the second part of the section provides that "the Collector shall x x x notwithstanding anything contained in that tenancy law x x x, restore possession to the landlord of so much only of the surplus land, as he is entitled to resume; and the balance, if any, shall be surplus land". The language in the above part of the section is unambiguous and clear. The landlord is entitled to restoration of possession of so much of the land as he is entitled to resume. The question is, under what law and/or in what right?

The limitation is apparently as regards the area. That is clarified by the use of the phrase "so much". The Ceiling Act does not provide for and/or prescribe any ceiling as to the area which could be restored in possession of the landlord. The Ceiling Act in fact is not enacted for restoration of possession of lands let out by him to a landlord. It is absolutely clear that the ceiling of area for restoration of possession to the landlord must be found in and in fact is as prescribed by the Tenancy Act. This is so in spite of the phrase "notwithstanding anything contained in that tenancy law" as appearing in the last part of Section 19.

7. It is not in this connection necessary for us exhaustively to find out why the non obstante clause is included in Section 19. Possibly, this clause has the effect of nullifying some of the conditions necessary to be fulfilled for granting restoration of possession to the landlord of his land under the scheme of Chapter III of the Tenancy Act contained in Sections 31 to 43 as also in Chapters III-A, III-AA and III-B. We do not find it necessary to ascertain and/or specify the conditions which were intended to be nullified.

7-A. The contentions of Dr. Naik thus fail.

8. Rule is, therefore, discharged. In the circumstances of the case, there will be no order as to costs.

Rule discharged.

AIR 1972 BOMBAY 197 (V 59 C 40)

VIMADALAL, J.

Jaysing Ratilal Kotak, Appellant v. Municipal Commissioner for Greater Bombay and another, Respondents.

A. F. O. D. No. 274 of 1967. D/- 1-3-1971, from order of N. M. Shah, Chief Judge, Sm. C. C., Bombay in Appeal No. M/229 of 1966.

Bombay Municipal Corporation Act (3 of 1888), S. 217(1) and (2) — Appeal against valuation — Appeal is maintainable not only against fixation of rateable value under the Act but also against the rejection of representation under S. 167 — (X-Ref:— Section 167).

(Paras 2, 3, 4)

When a representation made to the Commissioner under Section 167 for reducing the amount of rateable value is wholly rejected by him, in effect, he fixes the rateable value at the same figure as that at which it is entered in the Assessment Book. (Para 4)

Sub-section (2) of S. 217 cannot limit the right of appeal conferred by sub-section

(1) of S. 217. Sub-section (2) only provides that the appeal is not to be 'heard' by the Chief Judge unless certain conditions specified therein are fulfilled. If those conditions, or the appropriate condition, is not fulfilled, the remedy may be postponed or even barred, but the right of appeal conferred by sub-sec. (1) of S. 217 is not taken away thereby. Merely because a particular case may not fall under one or other of the clauses of sub-section (2) of S. 217, or under S. 218 which is consequential thereto, one is not led to the conclusion that no appeal would lie to the Chief Judge of the court of small causes in such a case.

(Para 2)

The use of the expression "conclusive evidence" in sub-section (2) of Section 166 cannot have any bearing on the question as to whether an appeal is or is not maintainable under Section 217 of the Act, but has a bearing only on the question of proof of rateable value as and when it arises. (Para 3)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 151 (V 50) =
(1963) 2 SCR 774, Smt. Somawanti v. State of Punjab 3

C. V. Sheth, for Appellant; K. K. Singhavi with K. K. Desai i/b M/s. A. M. Desai, Attorneys, for Respondents.

JUDGMENT:— This is an appeal against an order of Mr. N. M. Shah, Chief Judge of the Court of Small Causes, dated 28th January 1967 dismissing an appeal filed before him under Section 217 of the Bombay Municipal Corporation Act, 1888, (hereinafter referred to as the Act) on the ground that the same fell outside the purview of the said section and was, therefore, not maintainable. The appellant who purchased a flat on ownership basis some time in June 1966 made a representation to the Municipal Commissioner under Section 167 of the Act for reducing the amount of rateable value in respect of the said flat. The Municipal Commissioner, however, rejected that representation, and it is from that rejection that the present appellant sought to file an appeal to the Chief Judge of the Court of Small Causes under Section 217 of the Act. The learned Chief Judge took the view that as under clause (c) of sub-section (2) of S. 217 an appeal against any amendment made in the Assessment Book under Section 167 during final year could not be heard unless a complaint made by the aggrieved person within 15 days after he first received the notice of the amendment had been disposed of, an appeal was competent only if the Assessment Book was amended during an official year. He held that as in the present case such an amendment was not made, but had been refused, no appeal lay from the same. The learned Judge also relied

on clauses (a) and (d) of sub-clause (2) of S. 217, as well as on Section 218, and came to the conclusion that the appeal filed before him in the present case fell outside the purview of Section 217 and was not maintainable and he, therefore, dismissed the same. It is from that order that the present appeal has been preferred under S. 218-D(1)(b) of the Act.

2. I do not agree with the way in which Section 217 of the Act has been construed by the learned Chief Judge. In my opinion, sub-section (2) cannot limit the right of appeal conferred by sub-section (1) of S. 217 of the Act. Sub-section (2) only provides that the appeal is not to be 'heard' by the Chief Judge unless certain conditions specified therein are fulfilled. If those conditions, or the appropriate condition, is not fulfilled, the remedy may be postponed or even barred, but the right of appeal conferred by sub-section (1) of S. 217 is not taken away thereby. To take just one illustration, if clause (d) of sub-clause (2) of Sec. 217 is not fulfilled by reason of the fact that that deposit required thereby is not made by the appellant with the Commissioner, the appeal cannot be heard till that deposit is made, but that has nothing to do with the maintainability of the appeal as such, nor does it constitute a limitation on the right of appeal conferred by sub-section (1) of S. 217. It follows that merely because a particular case may not fall under one or other of the clauses of sub-section (2) of S. 217, or under Section 218 which is consequential thereto, one is not led to the conclusion that no appeal would lie to the Chief Judge of the Court of Small Causes in such a case. If the facts of a particular case do not bring it within one or other of the clauses of sub-section (2) of Section 217, or within S. 218, the only result would be that the right of appeal conferred by Section 217 would stand unfettered by any condition or limitation. I am, therefore, unable to agree with the reasoning of the learned Chief Judge, and under the circumstances, the conclusion at which he has arrived must be held to be erroneous.

3. Mr. Singavi on behalf of the Corporation has attempted to support the order of the learned Chief Judge on two new grounds which are not to be found in that Order, and he is entitled to do so. The first ground is that under sub-section (2) of S. 166 an entry in regard to rateable value in the Assessment Book is stated to be "conclusive evidence" in regard to the same, subject to "such alterations" as may be made on a representation made under Section 167 of the Act. Mr. Singavi has, therefore, contended that when, on a representation made under Section 167, no alteration is made

in regard to the rateable value entered in the Assessment Book, that rateable value becomes conclusive and no appeal lies from the same to the Chief Judge under Section 217 of the Act. I am unable to accept that argument of Mr. Singavi. The expression "conclusive evidence" has been construed by the Supreme Court in the case of *Smt. Somavanti v. State of Punjab*, (AIR 1963 SC 151 para 19). In that judgment, the Supreme Court has laid down that there is no difference between the expressions "conclusive evidence" and "conclusive proof". The Supreme Court has further laid down that once the law says that certain evidence is conclusive, it shuts out any other evidence which would detract from the conclusiveness of that evidence and the aim in such a case is to give finality to the establishment of the existence of a fact from the proof of another fact. It is, therefore, clear that the use of the expression "conclusive evidence" in sub-section (2) of S. 166 only means that no other evidence can be led to detract from the finality of the evidence in regard to rateable value that is to be found in the Assessment Book. It cannot however, mean that the rateable value so entered in the Assessment Book cannot be changed by appropriate procedure as provided in the Act. In other words, the use of the expression "conclusive evidence" in sub-section (2) of S. 166 cannot have any bearing on the question as to whether an appeal is or is not maintainable under Section 217 of the Act, but has a bearing only on the question of proof of rateable value as and when it arises. The argument of Mr. Singavi based on sub-section (2) of Section 166 must, therefore, be rejected.

4. The second ground on which Mr. Singavi sought to support the Order of the learned Chief Judge was that sub-section (1) of S. 217 provides for an appeal only against any rateable value "fixed or charged" under the Act, and that when a representation under Sec. 167 of the Act is rejected by the Commissioner, it cannot be said that he fixes any rateable value under that section. Mr. Singavi has rightly contended that the word "charge" has no application to the present case. The only question, therefore, is whether the word "fixed" as used in sub-section (1) of S. 217 should be construed in the manner contended for by Mr. Singavi. First and foremost, it must be pointed out that though Section 217 uses the word "fixed" in sub-section (1) thereof, that word does not occur in the earlier provisions relating to rateable value, except in Section 154 of the Act. The statutory provisions relating to the procedure for disputing the rateable value entered in the Assessment Book by the filing of a complaint under Section 162

do not use the word "fixed" in regard to the result of the proceeding that ensues upon such a complaint. If Mr. Singhavi's contention were to be right, the result would, therefore, be that even when such an application is dismissed, no appeal would lie from that dismissal under Section 217 of the Act. The result of placing this construction would be that the right of appeal conferred by Section 217 would be limited to the very few cases in which, on such a complaint being filed, the complaint is not wholly dismissed but the rateable value is reduced to a figure which is higher than that which the complainant had prayed for. I do not think there is any reason to place such a limited construction on Section 217 which confers the right of appeal. On principle, there is no reason why, if an appeal should lie from an alteration of a single rupee in the rateable value by the Commissioner acting on a representation made to him under Section 167 of the Act, no appeal should lie from a total rejection of that representation by the Commissioner. If any alteration effected by the Commissioner upon a representation made to him under Section 167 amounts to "fixing" of rateable value, I see no reason why the rejection of that representation by him should not amount to fixing the rateable value at the very figure at which it stands in the Assessment Book. I, therefore, hold that when a representation made to the Commissioner under Sec. 167 is wholly rejected by him, in effect, he fixes the rateable value at the same figure as that at which it is entered in the Assessment Book. Any other construction would unduly restrict the right of appeal conferred by sub-section (1) of S. 217 of the Act and lead to unreasonable results.

5. I, therefore, allow this appeal, set aside the order of the learned Chief Judge of the Court of Small Causes and remand the matter back to him to be disposed of in accordance with law. Costs of the appeal will be costs in the cause.

Appeal allowed.

[AIR 1972 BOMBAY 199 (V 59 C 41)]

GATNE, J.

Mrs. Jankibai Prahladraji Briflaji Seksaria, Applicant v. Kashinath Raghunath Kelkar and others, Opponents.

Civil Revn. Appln. No. 297 of 1970, D/- 21-1-1971 to set aside order of A. R. Shimpli Judge City Civil Court, Bombay, D/- 16-2-1970.

(A) Bombay Public Trusts Act (29 of 1950), Ss. 79 and 80 — Effect of — Jurisdiction of Civil Court — Exclusion of.

CP/CP/B564/72/KSB

Section 79 is mandatory and the question whether particular property is trust property must be decided by the Charity Commissioner or his assistants and their decision is made final and conclusive. The jurisdiction of civil court to determine that question is barred by Section 80 unless the jurisdiction is saved by any other provision of the Act.

(Para 9)

(B) Bombay Public Trusts Act (29 of 1950), S. 50 — Essential condition for maintainability of suit under S. 50 — Suit property must be property belonging to or registered in name of trust.

While construing Section 50 the mandatory provisions of Section 79(1) cannot be lost sight of. The suit permitted under Section 50 must necessarily be a suit where it is not left to the Court to decide whether a particular property does or does not belong to a public charitable trust. It is only when the Charity Commissioner or his Assistants discharge their obligation of deciding the question as enjoined by Section 79 that a suit could be instituted by the Charity Commissioner or by two or more persons having an interest in the trust for the recovery of possession of such property or the proceeds thereof. The essential important condition for maintainability of suit under Section 50 is that the property in respect of which the suit is instituted must be a property belonging to a public trust. A mere allegation that the property belongs to a public trust would not be sufficient to sustain the suit.

(Para 10)

A suit by the trustees of a public trust registered under the Act, for a declaration that the suit properties belonged to the trust and for possession of the same with mesne profits even though instituted in pursuance of a direction of the charity Commissioner who refused to inquire into ownership of the trust property under Sec. 22-A, is not competent under Section 50. But in view of the fact that the suit was pending for the last 10 years, the High Court did not dismiss it in view of the bar under Section 80 but stayed it until declaration under S. 22-A that the properties belonged to the trust was obtained by the plaintiffs from the charity Commissioner.

(Para 17)

(C) Bombay Public Trusts Act (29 of 1950), S. 22-A — Provisions of Ss. 19 to 22 apply to inquiry under S. 22-A — Question whether property belongs to trust — Charity authorities cannot refuse to determine it and refer trustee to a civil suit.

The provisions of Sections 19, 20, 21 and 22 are applicable to the inquiry under Section 22-A also. It may be that the Deputy or Assistant Charity Commis-

sioner has a discretion to inquire into certain particulars in regard to the Trust, but those particulars clearly must not be particulars about the inquiry of which an imperative duty has been cast under Sections 18 and 19. Under Section 19(ii) an imperative duty has been cast on the Charity authorities to determine whether any property is the property of such trust, and whenever an inquiry for this purpose is sought, it is certainly not open to the Charity authorities to avoid their responsibility and to say that the matter is too complicated and the parties could, therefore, seek their relief in a regular suit. (Para 14)

(D) Bombay Public Trusts Act (29 of 1950), S. 31(1) — Bar under is not to institution of suit but to its being heard and decided. (Para 17)

(E) Civil P. C. (1908), O. 2, R. 4 — Leave of Court — Suit for possession and mesne profits — Claim for recovery of money received by defendant by wrongful sale of some property cannot properly be joined under O. 2, R. 4 unless leave of court is obtained — It cannot also be justified under O. 1, R. 3 or O. 2, R. 3 — Leave was granted at stage of revision to get over the bar of technical objection — (X-Ref:— O. 1, R. 3 and O. 2, R. 3). (Para 18)

Cases Referred:	Chronological	Paras
(1969) AIR 1969 SC 884 (V 56) = (1969) 3 SCR 83, Sugra Bibi v. Haji Kummur		16
(1967) AIR 1967 Bom 86 (V 54) = 67 Bom LR 49, Shri Adinath Tirthankar Jain Mandir v. Shantappa		15
(1967) 69 Bom LR 472 = 1967 Mah LJ 799, Rajgopal Raghunathdas v. Ramchandra		13
(1962) First Appeal No. 353 of 1959, D/- 19-11-1962 (Bom)		15
(1961) 1961-2 Guj LR 564 = (1961) 2 Guj HCR 223, Kuberbai v. Purshottamdas		12
(1957) AIR 1957 Bom 42 (V 44) = 57 Bom LR 1069, Taraben Baldevdas v. Charity Commr.		11

C. N. Daji and B. N. Shroff 1/b M/s. Ambubhai and Diwanji Attorneys, for Applicant; S. A. Desai and J. V. Coelho 1/b M/s. V. A. Phadke & Co. Attorneys for Opponents 1 and 2. V. H. Gumaste Govt. Pleader, for Respondent No. 14.

ORDER:— This civil revision application has been directed against the judgment and order passed by the learned Judge of the City Civil Court at Bombay on 16-2-1970 in Suit No. 1362 of 1960 on his file.

2. The suit in question was filed by two plaintiffs, who happen to be the trustees of the Bhagoji Balooji Keer Public Religious and Charitable Trust.

This trust was created under a Deed of Trust made by Bhagoji Balooji Keer on 15-5-1930. This Trust has been duly registered under the provisions of the Bombay Public Trusts Act, 1950. The properties included in this Trust admittedly include the property bearing Cadastral City Survey No. 657 situate at Mahim. Shortly after this Trust was made—in fact within seven days thereafter Bhagoji Keer acquired another property bearing Cadastral City Survey No. 656. This property is adjacent to the property bearing Cadastral City Survey No. 657 and some structures have been constructed thereon. One of them is "Dnyan Mandir" now known as Shree Cinema. It appears that this structure has been constructed on 922 sq. yds. out of City Survey No. 657 and partly on a portion of Cadastral City Survey No. 656.

3. Under the Deed of Trust, Bhagoji Balooji Keer and two others were the trustees. After Bhagoji's death on 24-2-1944 his son Bhalchandra (defendant No. 1) came to be appointed as a trustee in place of his deceased father along with the two other trustees appointed under the Trust. On 23-5-1946 this Bhalchandra was adjudicated insolvent with the result that his estate vested in the Official Assignee and his place as a trustee was taken by Bhagoji's other son Anant (Defendant No. 3). In 1947, the Official Assignee filed a suit for the administration of the personal estate belonging to Bhagoji in which insolvent Bhalchandra was entitled to a share. That suit was Suit No. 807 of 1947 and the same was filed in the High Court. In that suit, the Court Receiver was appointed as a Receiver of the property on 16-6-1947. The Official Assignee, in due course took possession of Bhalchandra's personal property. On 27-4-1954, new trustees were appointed in the proceeding of Civil Suit No. 625 of 1949 and some time thereafter the two plaintiffs along with defendant No. 3 came to be appointed as the trustees of the Trust. Under orders of the Court passed in the administration suit, the property known as Shree Cinema came to be sold by auction and was purchased by defendant No. 12 on 1-10-1958. Bhalchandra, it appears, had mortgaged his share in all the suit properties in favour of defendant No. 9 and his right, title and interest in those properties were subsequently purchased by defendant No. 9.

4. In 1958, the trustees moved the Charity Commissioner to include some more properties, which form the subject-matter of this suit, as properties belonging to the Trust. That apparently was done under Section 22-A of the Bombay Public Trusts Act 1950 but the Charity Commissioner by his order dated 29-9-

1958, held that the inquiry involved complicated questions of law and fact and the matter was, therefore, one which ought to be decided by a competent Civil Court. He, therefore, directed that the trustees may, after obtaining the Charity Commissioner's sanction under Section 51, institute the necessary suit under the provisions of Section 50 of the Bombay Public Trusts Act. The plaintiffs thereafter moved the Charity Commissioner for the necessary sanction under Section 51 and that sanction was accorded on 20-4-1959. Thereafter the suit giving rise to this litigation was instituted by the two plaintiffs on 30-1-1960. In this suit the plaintiffs claimed a declaration that the suit properties belonged to the Trust made by Bhagoji Keer on 15-5-1930. They further claimed possession of those properties, including the properties purchased by defendants 9 and 12. Certain other reliefs, like mesne profits, etc., were also claimed in the suit.

5. As has already been mentioned, defendant No. 3 happens to be one of the trustees appointed along with the two plaintiffs, but on account of his refusal to join as a plaintiff, he was impleaded as defendant No. 3. Bhalchandra, who was impleaded as defendant No. 1 died during the pendency of the suit and defendants 5 to 8 happen to be his heirs. Defendant No. 2 happens to be the widow of Bhagoji and defendant No. 4 happens to be her daughter. The Official Assignee was impleaded in the suit as defendant No. 10 and the Court Receiver as defendant No. 11 and the Charity Commissioner as defendant No. 13.

6. The suit was resisted by the defendants and on a perusal of the pleadings the following issues were framed and heard as preliminary issues:—

(1) "Whether this Court has pecuniary jurisdiction to try this suit.

(2) Whether this Court has no jurisdiction and the Charity Commissioner alone has jurisdiction to determine whether the property in question is a Public Charity Trust.

(3) Whether the plaint discloses any cause of action against the defendants.

(4) Whether the suit, as framed is maintainable without leave of the Court in view of the provisions of O. 2, R. 4 of the Code of Civil Procedure.

(5) Whether the suit as framed is not maintainable for reasons mentioned in paragraph 5 or 7 of the written statement of defendant No. 12.

(6) Whether the plaintiffs have given valid and proper notices under Section 80 of the Civil P. C. and whether proper notices have been served on defendants 10 and 11.

(7) If the answer to the preceding issue be in the negative whether the plaintiffs are entitled to maintain the suit.

(8) Whether the suit as framed is bad for multifariousness as alleged in para 8 of the written statement of defendant No. 12".

On the first issue, the finding of the learned Judge was in the affirmative, on the second he held that the Court had jurisdiction; on the 3rd and 4th issues also he found in the affirmative and on the 5th he held that the suit was maintainable. Finding on issue No. 6 also was recorded in the affirmative and hence on issue No. 7, it was held that the plaintiffs were entitled to maintain the suit. Finding on issue No. 8 was recorded in the negative. After recording these findings, the suit was directed to be proceeded with for further hearing on the remaining issues and was fixed for hearing on 16-3-1970. Defendant No. 12 feeling aggrieved by these findings and the order directing the suit to proceed for hearing on the remaining issues, has come up to this court in revision.

7. In the course of the arguments at the Bar, only two points, were canvassed for my decision. The first is whether the learned Judge was right in taking the view that he had jurisdiction to entertain the present suit and the second is whether the suit is defective for want of the necessary permission of the Court under Order 2, Rule 4 of the Civil P. C. So far as the first point is concerned, the submission of Mr. Daji, appearing on behalf of defendant No. 12, was that the question whether a particular property belongs to a Public Trust is a question which the Charity Commissioner or his Assistant alone was empowered to decide under the provisions of the Bombay Public Trusts Act and the jurisdiction of the Civil Court to decide that question is, therefore, expressly barred by the provisions of Section 80 of the Act. In support of this submission my attention was drawn to the provisions of Sections 18, 19, 79 and 80 of the Bombay Public Trusts Act.

8. Section 18 deals with registration of public trusts. Sub-section (1) of S. 18 provides that it shall be the duty of the trustee of a public trust to which this Act has been applied to make an application for the registration of the public trust. Sub-section (2) says that such application shall be made to the Deputy or Assistant Charity Commissioner of the region or sub-region within the limits of which the trustee has an office for the administration of the trust or the trust property or substantial portion of the trust property is situate. Sub-section (4) prescribes the time limit for making such an application and sub-section (5) pro-

vides the particulars which have to be furnished in the application in question. Sub-section (6) provides that every application made under sub-section (1) shall be signed and verified in the prescribed manner by the trustee or his agent specially authorised by him in this behalf and shall be accompanied by a copy of an instrument of trust. Section 19 provides for inquiry for registration of the trust. It says that on the receipt of an application under Section 18, or upon an application made by any person having interest in a public trust or on his own motion, the Deputy or Assistant Charity Commissioner shall make an inquiry in the prescribed manner and the facts to be ascertained have been enumerated thereafter. The first fact to be ascertained is whether a trust exists and whether such trust is a public trust and the second fact is whether any property is the property of such trust. It is not necessary to enumerate the remaining facts for the purpose of this proceeding. The order passed by the Charity Commissioner or his Assistants is subject to appeals as provided in the Act. Then comes Section 79 and it lays down:—

"79(1) Any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act.

(2) The decision of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal, as the case may be, shall, unless set aside by the decision of the court on application or of the High Court, in appeal, be final and conclusive".

Section 80, which follows provides that save as expressly provided in the Act, no Civil Court shall have jurisdiction to decide or deal with any question which is by or under the Act to be decided or dealt with by any officer or authority under the Act, or in respect of which the decision or order of such officer or authority has been made final and conclusive.

9. The combined effect of Sections 79 and 80 is that if a particular question is under Section 79 to be decided by the Charity Commissioner or his Assistant or by the Courts in appeal, the jurisdiction of a civil court to decide that question is expressly ousted by Section 80, unless there is a provision to the contrary contained in the Bombay Public Trusts Act. From the provisions of Section 79 it is clear that the question whether a particular property is the property of the trust is required to be decided by the Charity Commissioner or his Assistants. The words used are "shall be decided by" and the provision con-

tained in Section 79 is, therefore clearly mandatory. Now if under the mandatory provision of Section 79 the question whether a particular property is a trust property is required to be decided by the Charity Commissioner or his Assistants, Section 80 would clearly preclude the civil court from deciding that question, unless the plaintiffs are in a position to show that the jurisdiction of the civil court is saved by any other provisions contained in the Bombay Public Trusts Act.

10. On the side of the plaintiffs an attempt was made to say that the suit in question would fall within the purview of Section 50 of the Bombay Public Trusts Act, 1950 and that being a provision to the contrary, the bar under Section 80 could not possibly arise. The question therefore is whether the present suit could properly be regarded as a suit falling within the purview of Section 50. Section 50, in so far as is material for this proceeding, provides:—

"In any case—

(i)

(ii) where a direction is required to recover possession of a property belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from any person including a person holding adversely to the public trust, or

(iii)

The Charity Commissioner after making such enquiry as he thinks necessary or two or more persons having an interest in the trust and having obtained the consent in writing of the Charity Commissioner as provided in Section 51, may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate, to obtain a decree for any of the following reliefs:—

(a) an order for the recovery of the possession of such property or proceeds thereof".

There are certain provisos to Section 50, but with those provisos we are not concerned in this proceeding. From the provisions quoted above, it is clear that a suit for the recovery of possession of property or proceeds thereof can be filed by the Charity Commissioner or two or more persons having an interest in the trust after having obtained the Charity Commissioner's consent in writing as provided in Section 51, but the important condition is that the suit must be a suit where a direction is required to recover possession of a property belonging to a public trust or the proceeds thereof, that is to say, that the property in respect of which the suit is instituted must be a property belonging to a public trust. A

mere allegation that the property belongs to a public trust would not be sufficient to sustain the suit. The suit must in effect be a suit for the recovery of possession of a property which is shown to belong to a public trust. The submission that the provisions of this section should be liberally construed so as not to defeat the suit of the trustees ignores the plain fact that while construing Section 50 the mandatory provisions of Section 79 cannot possibly be lost sight of and Section 79(1), as I have already indicated, clearly provides that any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act and sub-section (2) makes it clear that the decision of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal, as the case may be shall unless set aside by the decision of the Court on application or of the High Court, in appeal be final and conclusive. Since it is made obligatory on the part of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal to decide whether a particular property is the property of a public charitable trust and since such decision is under sub-section (2) made final and conclusive, it is plain that the suit permitted under Section 50 must necessarily be a suit where it is not left to the court to decide whether a particular property does or does not belong to a public charitable trust. It is only when the Charity Commissioner or his Assistants discharge their obligation of deciding the question as enjoined by Section 79 that a suit could be instituted by the Charity Commissioner or by two or more persons having an interest in the trust for the recovery of possession of such property. On the side of the plaintiffs, it is argued that to adopt such a construction would drive the plaintiffs to multiplicity of proceedings. They would in the first place, be required to approach the Deputy Charity Commr. or the Charity Commissioner, as the case may be for the purpose of obtaining a finding that the properties in dispute belong to the public charitable trust in this case and thereafter they would be allowed to proceed with this suit. But it is difficult to see how such a course can be avoided in the face of the plain provisions to which a reference has been made.

11. In *Taraben Baldevdas v. Charity Commr.*, (1955) 57 Bom. LR 1069 = (AIR 1957 Bom 42) the facts were that the plaintiff filed a suit in a civil court against the defendants for a declaration that she was the owner of a certain sum of money lying in deposit

with the defendants and no one else had any right, title and interest in that sum. In that suit a preliminary issue was raised whether the suit was barred by the Bombay Public Trusts Act, 1950. During the pendency of the suit the defendants submitted an application before the Deputy Charity Commissioner under Section 19 of the Act inter alia to make inquiries and determine whether the sum lying in deposit with them constituted a trust and whether the trust was a public trust within the meaning of the Act. A preliminary contention raised by the plaintiff that the Deputy Charity Commissioner had no jurisdiction to entertain the application as the question relating to the existence of a trust was involved in the suit, was rejected. Thereafter the plaintiff applied for stay of the proceedings before the Deputy Charity Commissioner under Section 10 of the Civil P. C., 1908 contending that as the same issues fell to be determined in two different proceedings before two different tribunals simultaneously, and the suit instituted by the plaintiff was prior to the institution of the application by the defendants, the proceedings before the Deputy Charity Commissioner were liable to be stayed. On these facts, the Division Bench of this Court held that under the Bombay Public Trusts Act the Civil Court had no jurisdiction to decide the question whether the sum in the hands of the defendant was the property of a public trust and the application before the Deputy Charity Commissioner could not be stayed. This decision does, therefore, support the view that the question whether a particular property belongs to a public trust is within the exclusive jurisdiction of the charity authorities and the Civil Court has no jurisdiction to decide that question. On the side of the plaintiffs reliance was sought to be placed on the observations appearing at page 1073 of the Report. The observations are to the following effect:—

"It was submitted that if jurisdiction of the civil court to decide, whether a particular property is the property of a public trust, is excluded the civil court would have no jurisdiction, even at the instance of the charity Commissioner, or two or more persons who have obtained his consent in writing, to entertain a suit for declaration that a particular property belongs to a public trust and for consequential reliefs. But it has to be noted that the exclusion of jurisdiction of the civil court is made subject to any provision expressly made, and Section 50 being such a provision, jurisdiction of the Civil Court to entertain suits which fall within the description of suits mentioned therein may not be regarded as excluded".

These observations only support the conclusion that if a suit properly falls with-

In the purview of Section 50, it is saved from the bar arising under Section 80, but, for reasons already indicated the present suit cannot properly be regarded as a suit falling within the purview of Section 50. These observations cannot, therefore, further the case of the plaintiffs.

12. In *Kuberbfai v. Purshottamdas*, (1961) 2 Guj LR 564, the facts were that on 6-8-1952 the 1st defendant applied to the Assistant Charity Commissioner for registration of the trust pertaining to the temple of Shri Ramji at Detroj, of which the 1st defendant claimed to be the Mahant. The Assistant Charity Commissioner held an inquiry and ascertained that the 1st defendant was the Mahant and manager of the temple and made an entry in the register kept under Section 17 of the Bombay Public Trusts Act 1950, of the name of the 1st defendant as the Mahant and manager and also an entry to the effect that the mode of succession to the office of the Mahant was from the Guru to the Chela. Against these findings, the plaintiffs filed an application before the Deputy Charity Commissioner who rejected that application. Aggrieved by the order of the Deputy Charity Commissioner, the plaintiffs preferred an appeal before the Charity Commissioner but that appeal also met with the same fate and the appeal was dismissed on 17-9-1955. The plaintiffs did not challenge that order under Section 72 of the Act which entitles any person aggrieved by the decision of the Charity Commissioner inter alia under Sec. 70 to apply to set aside the said decision. The entries made by the Assistant Charity Commr. and confirmed by the Deputy Charity Commissioner and the Charity Commissioner consequently became final and conclusive. The plaintiffs thereafter filed the suit after obtaining the sanction of the Charity Commissioner as provided by Section 51 of the Act. The plaintiffs asked for a declaration that the three houses and the plot in suit and other movable properties belonged to the public trust, that Survey No. 141 of Detroj also belonged to the trust and that its alienation by the 1st defendant was void. The plaintiffs also prayed for possession of those properties and the question was whether the Court had jurisdiction to decide whether the particular properties did or did not belong to a public trust. Shelat, J. as he then was ruled that a complete Code is provided in the Bombay Public Trusts Act for dealing with matters set out in Sections 18 and 19 and recourse must be had to the procedure laid down in the Act. The provisions of Section 80 of the Act bar the jurisdiction of a Civil Court in the two categories of matters, viz. (1) those questions left under the Act to be decided by the Assistant

or the Deputy Charity Commissioner under Sections 18 and 19 and (2) those which the Act has made final and conclusive under Section 79(1) and S. 21(2) of the Act. It was further ruled that the plaintiffs having had recourse to Section 70 and not having followed up their remedy under Section 72 are bound by the decision of the Charity Commissioner in their appeal before him. This decision also is therefore another authority in support of the view that the Civil Court is by Section 80 precluded from deciding the questions which it is the duty and function of the Charity Authorities to decide under the provisions of Section 79. On the side of the plaintiffs, an attempt was made to distinguish the decision by pointing out that the plaintiffs in that case had already appeared before the charity authorities. That, however, does not make any difference in principle. What is important is that the High Court of Gujarat has come to the conclusion that the duty and function to decide whether a particular property does or does not belong to a public trust are by Section 79 entrusted to the Charity authorities and the decision of those authorities is made final under sub-section (2) of S. 79 and the Civil Court is consequently precluded from deciding that question under Section 80 of the Act.

13. In *Rajgopal Raghunathdas v. Ramchandra*, (1967) 69 Bom LR 472 a Division Bench of this Court consisting of the Hon'ble the Chief Justice and Mr. Justice Bal was dealing with a case where plaintiffs in their capacity as trustees had sued a trespasser for possession of property belonging to the trust and the contention was that the suit under Section 50 of the Bombay Public Trusts Act was not maintainable for want of the Charity Commissioner's sanction. That contention was overruled by the Division Bench, and the learned Chief Justice, speaking for the Division Bench, pointed out that the trustee who is in the position of a legal owner of property can sue to recover the property from persons, who are without any right, title or interest in themselves, without obtaining any previous sanction of the Charity Commissioner. In that case, the property was already declared to be a property belonging to the trust and it was therefore, held that the trustees without recourse to Section 50 could institute a suit in their own right. In that very case it has been pointed out that Section 50 of the Bombay Public Trusts Act, 1950 is not restrictive but cumulative in its effect. It only enables persons having an interest to sue and does not prohibit any suits being filed by trustees of public trusts. Relying on these observations, Mr. Desai appearing on behalf of the plaintiffs, submitted that right to bring a suit under Sec. 50

was only one of the rights available to a trustee and that did not take away his ordinary right to file a suit for possession of trust property independently of Section 50. This no doubt is so, but the point is that the suit in the aforesaid case was a suit in respect of property which was already declared to be a property belonging to a trust and therefore, whether a suit was brought under Section 50 or whether it was brought independently of Section 50, the Civil Court was not going to decide the question which by Section 79 is required to be decided by the Charity authorities. Therefore merely by pointing out that Sec. 50 is not restrictive but cumulative, the plaintiffs cannot get over the provisions of Section 79 and say that their suit as prayed is maintainable under Section 50.

14. On the side of the plaintiffs, it was pointed out that they had in fact approached the charity authorities for getting an order that the properties in dispute are properties belonging to the trust but the Deputy Charity Commissioner by his order dated 29-9-1958 held that the matter was too complicated for him to decide and the best course, therefore, was to refer the parties to a suit under Section 50 after obtaining the Charity Commissioner's sanction under Section 51. The submission was that in passing such an order the Deputy Charity Commissioner was within his own rights, because while the words used in Sections 18 and 19 are "shall" the word used in Section 22-A is "may". But if Section 22-A is read as a whole it is abundantly clear that the provisions of Sections 19, 20 and 21 and 22 are applicable to the inquiry under Section 22-A also. It may be that the Deputy or Assistant Charity Commissioner has a discretion to inquire into certain particulars in regard to the Trust, but those particulars clearly must not be particulars about the inquiry of which an imperative duty has been cast under Sections 18 and 19. As I have already pointed out, under Section 19(ii) an imperative duty has been cast on the Charity authorities to determine whether any property is the property of such trust, and whenever an inquiry for this purpose is sought, it is certainly not open to the Charity authorities to avoid their responsibility and to say that the matter is too complicated and the parties could, therefore, seek their relief in a regular suit.

15. The ruling in *Shri Adinath Tirthankar Jain Mandir v. Shantappa*, 67 Bom LR 49 = (AIR 1967 Bom 86), to which a reference was made by Mr. Desai in the course of his submissions at the Bar cannot possibly make any difference to the view I am taking. In that case, the facts were that a person, who was

not a party to the proceedings under the Bombay Public Trusts Act, 1950, found that his property had been registered as trust property pursuant to the said proceedings and it was held that he was not precluded under Sections 79 and 80 of the Act from filing a suit for declaration of his title to such property in a Civil Court. In taking that view the learned Judge seems to have relied on the following observations of a Division Bench of this Court consisting of Patel and K. K. Desai, JJ. made in First Appeal No. 353 of 1959 decided on 19-11-1962 (Bom). Those observations are to the following effect:—

"..... It is difficult, however, to assert that the Charity Commissioners have got exclusive jurisdiction where titles of third parties may be involved. While requiring them to decide statutory issues, if finality were to be attached to certain matters, we would be permitting them indirectly to decide very complicated and important questions of facts of heredity and legitimacy as well, which in all probability, in view of the wording of Section 19, may not have been intended. Even apart from this, the procedure prescribed is also a summary procedure, which is highly unsuited to any inquiry about the titles of third persons....."

These observations cannot, however, have any application to the facts of the present case. We are not here dealing with a case where a person, who was not a party to the proceedings under the Bombay Public Trusts Act, 1950 finds that his property is registered as trust property pursuant to the said proceedings. We are dealing with a suit instituted by the trustees themselves and the trustees at any rate cannot say that it was not necessary for them to approach the charity authorities in accordance with the provisions of Sections 18, 19 and 79. Section 18(2) enjoins that it shall be the duty of the trustees of a public trust to which this act has been applied to make an application for the registration of the public trust and once this imperative obligation is required to be discharged, it naturally follows that they must also take care to get all the trust properties entered in the register of trusts. If they do so, the charity authorities naturally have got to discharge their own obligations imposed by Section 79 and once they pass their order, that order is made final and conclusive and a civil court is by Section 80 clearly precluded from deciding those questions.

16. Mr. Desai, appearing on behalf of the plaintiffs, made a final attempt to save the situation by pointing out that in any case, one of the trust properties was involved in this suit. He pointed out that the property "Dnyan Mandir" alias Shree Cinema purchased at the Court auction by defendant No. 12 has in fact

been constructed partly on Cadastral City Survey No. 657, although a part of it is constructed on the adjoining plot bearing Cadastral City Survey No. 656 also. The argument, therefore, was that the plot bearing Cadastral City Survey No. 657 at any rate is a property belonging to the Trust and if that is the position there is no reason why the plaintiffs cannot come to Court under Section 50. But while the plaintiffs could come to Court for relief in respect of Cadastral City Survey No. 657, which is already declared to be a trust property, they could not possibly claim any relief in respect of the other property bearing Cadastral City Survey No. 656, which is not yet declared to be a property belonging to the trust. The decision of the Supreme Court in *Sugra Bibi v. Haji Kummur*, AIR 1969 SC 884, to which a reference was made by Mr. Desai can possibly have no application to the facts of this case. What has been held there is that where in a Wakf deed there were certain provisions in favour of the family members of the founder along with some other provisions in favour of the public and the suit was brought for removal of Mutwalli and appointment of plaintiff's son in his place, the mere fact that there were certain provisions in favour of the family members of the founder along with some other provisions in favour of the public, would not take the case out of the provisions of Sec. 92 of the Civil P. C. as there was a substantial portion of the income of the Wakf properties to be spent for purposes of charitable and religious nature. These observations cannot certainly support the submission that the trustees can come to Court under Section 50 even in respect of property which is not held by the charity authorities to be a property belonging to the trust.

17. In the view I have taken, the learned Judge was in error in taking the view that the suit of the plaintiffs did fall within the purview of Section 50 and the bar under Section 80 of the Bombay Public Trusts Act could not consequently arise. But even though I have taken the view that the suit under Section 50 is not competent, it seems to me that it would hardly be in the interest of justice to throw away the suit on the basis of this finding. The suit has been instituted by the trustees in respect of property alleged to be of the ownership of the Trust as far back as 30-1-1960 and now in 1971 it would hardly be fair to dismiss the suit and drive the plaintiffs to a separate proceeding under Sections 18, 19 and 22 of the Bombay Public Trusts Act. The fairest course in this case would, I think be to direct that the proceedings of this suit shall be stayed and in the meantime the plaintiffs would approach the charity authorities to obtain

a declaration under Section 22-A that the properties in suit belong to the Trust made by the late Bhagoji Keer. In this connection, it may be useful to note the provisions of Section 31(1) of the Bombay Public Trusts Act, 1950. That sub-section only says:—

"No suit to enforce a right on behalf of a public trust which has not been registered under this Act shall be heard or decided in any Court".

The bar, therefore, is to the suit being heard and decided and not to the suit being instituted. In the present case so far as certain properties are concerned, they are not registered as properties belonging to the Trust and as soon as that defect is overcome, the bar under Section 31(1) would no longer arise. It is to be hoped that after the plaintiffs approach the charity authorities they would deal with the matter as expeditiously as possible.

18. That leaves the other contention of Mr. Daji that the suit is bad for want of the necessary leave to the Court under the provisions of O. 2, R. 4 of the Code of Civil Procedure. That Rule provides:—

"No cause of action shall unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof.

(b) claims for damages for breach of any contract under which the property or any part thereof is held.

(c) claims in which the relief sought is based on the same cause of action.

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property".

The submission founded on this Rule was that the only causes of action which could be joined without the leave of the Court were the three enumerated in Rule 4, but in the present case, besides claiming mesne profits, the plaintiffs had also made certain prayers not covered by Rule 4. In that connection, my attention was particularly drawn to the relief claimed in clause H of paragraph 22 of the plaint. That clause says that defendants 1 to 8 and 10 and 11 or any of them may be ordered to pay to the plaintiffs Rs. 4,973.80 p. or any other sum being the price of 125 sq. yds. wrongfully sold out of Trust C. S. No. 657 and received by the said defendants or any of them by sale of plot No. 1 & Plot No. 2 mentioned in particulars and conditions of sale in suit No. 807 of 1947. It must, I think be conceded that this is not a claim which could pro-

perly be joined in a suit for possession without the leave of the Court in the face of the express provisions of O. 2, R. 4 of the Civil P. C. Order 2, Rule 3, to which the learned Judge has referred, merely says which causes of action could be joined. That Rule says:—

"Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit".

This Rule cannot, however, justify the inclusion of the relief claimed in clause H of paragraph 22 of the plaint. The learned Judge has further referred to Order 1, Rule 3 of the Civil P. C. What that rule provides is that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons, any common question of law or fact would arise. While this Rule may enable the plaintiffs to get over the objection of multifariousness, it cannot certainly enable them to successfully meet the objection founded on R. 4 of O. 2, but the objection in this behalf is at best a technical objection and the same can, I think be without any difficulty removed by granting to the plaintiffs the necessary leave as contemplated by the Rule. I am told that such a request was made in the trial Court itself, but there was no occasion for that Court to grant that prayer because of the view that the joinder of causes of action was held not to offend the provisions of O. 2, R. 4. Although I have taken the view that it does offend the provisions of Order 2, Rule 4 of the Civil P. C. I propose to get over the objection by granting to the plaintiffs the leave in question at this stage. The second objection does not therefore, survive.

19. In the view I have taken, the Civil revision application is partly allowed and the suit shall be returned to the trial Court for being proceeded with and disposed of according to law in the light of this judgment. The costs of this Civil Revision Application shall abide and follow the final result of the suit.

Revision partly allowed.

AIR 1972 BOMBAY 207 (V 59 C 42)

FULL BENCH

KOTVAL C. J., MODY AND

KANTAWALA, JJ.

Vishnu Shantaram Desai, Petitioner v. Smt. Indira Anant Patkar and another, Opponents.

Special Civil Applns. Nos. 2198 of 1966, 1916 of 1965 and 2137 of 1967, D/- 19-3-1971 to set aside order of Maharashtra Revenue Tribunal, at Kolhapur, D/- 27-7-1966.

Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 32-F — Scope and interpretation of — Section 32-F does not create any independent right to purchase land in a tenant apart from S. 32 — Section 32 is subject to S. 32-F which prescribes a special procedure for exercise of such right — (X-Ref:— Ss. 32 to 32-F and Ss. 32-G to 32-R) — (X-Ref:— Interpretation of Statutes—Marginal note to section).

Section 32 provides for automatic statutory transfer of ownership to the tenant by operation of law on the tillers' day or on the postponed date. The right of a tenant to be deemed to have purchased land under Section 32(1) is, however, subject to the other provisions of this section and the provisions of the next succeeding sections including S. 32-F.

(Paras 13, 14)

Section 32-F, Cl. (a) deals with a case where the landlord is under a disability and Cl. (b) deals with a case where the tenant is under a disability. Each of these clauses is complete by itself and can apply independently of each other. A case may, however, arise when both a landlord and a tenant are simultaneously under disability. In such a case, if the period during which the landlord's right to terminate the tenancy under Sec. 31 has expired before a tenant's right to purchase land may be exercised, right of the tenant to purchase land has to be exercised in accordance with the provisions of clause (b) within the time therein specified. If, however, the period during which such a landlord is entitled to terminate the tenancy under Section 31 has not expired when a tenant under such disability has become entitled to exercise his right of purchase under clause (b), the provisions of clause (a) will prevail over those of clause (b) because clause (b) inter alia contains the words "subject to the provisions of clause (a)".

(Paras 18, 19)

A marginal note may sometimes be an aid to interpretation but the use of the word "etc." in the marginal note to Section 32-F does not restrict the operation of Section 32-F only to a case where a landlord is under disability. (Para 20)

Sections 32 and 32-F do not confer independent rights or opportunities to purchase land upon a tenant. Section 32-F prescribes a special procedure for exercise of a right to purchase land conferred upon a tenant by Section 32 when either a landlord or a tenant or both of them are under disability. Such a tenant has only one right to purchase. He has to give an intimation under S. 32-F (1) (a) and then the provisions of Ss. 32 to 32-F (both inclusive) and 32-G to 32-R (both inclusive) apply to such purchase. The mere use of the word "any" is insufficient to conclude that Section 32-F (1) (b) gives an additional rights. (1969) 71 Bom LR 402 (407, 408). Overruled. Case law discussed.

(Paras 25, 28, 29, 37)

The cumulative effect of the provisions of Section 32-F read with those of Section 32-P is that in a case where a landlord or a tenant or both of them are under disability a tenant shall be deemed to be a purchaser of the land held by him as a tenant only if he gives an intimation of his desire to purchase land to the landlord and the Tribunal in the manner prescribed and within the time specified in Section 32-F. (Para 26)

Cases Referred: Chronological Paras

- (1969) 71 Bom LR 402 = 1969 Mah LJ 789, *Bapu Dnyanu v. Sadashiv Ramchandra* 30
 (1965) Ten. A. No. 904 of 1964, D/- 27-1-1965 (Mah. Rev. Tri.), *Yeshwant Balram Owalekar v. Smt. S. H. Patil* 22, 23
 AIR 1959 SC 459 = 61 Bom LR 811, *Sriram Ram Narain v. State of Bombay* 15
 (1959) 61 Bom LR 1475 = 1959 Nag LJ 530, *Bai Jiviben v. Bombay Revenue Tribunal* 10, 29
 13 Tenancy LR 133 (Mah. Rev. Tri.), *Banubai Naru Chaugule v. Manoramabai Yeshwant* 21, 22

In Spl. C. A. No. 2198 of 1966:—

G. R. Rege for R. G. Samant, for Petitioner; A. A. Rizvi, for Opponent No. 1.

In Spl. C. A. No. 1916 of 1965:—

V. N. Ganpule for B. N. Shetri, for Petitioner; K. J. Abhyankar, for Opponent No. 1.

In Spl. C. A. No. 2137 of 1967:—

M. A. Garud, for Petitioner; G. M. Bhokarikar, for Opponent No. 1.

The Judgment of the Full Bench was delivered by KANTAWALA, J.:— These three special civil applications are referred to a Full Bench as they involve a question as to proper construction of the provisions of Section 32-F of the Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act No. LXVII of 1948)

(hereinafter referred to as "the Act"). The petitioner in each of these applications is either a landlord or a tenant belonging to the category specified in the said Section 32-F.

2. In Special Civil Application No. 2198 of 1966 proceedings under Section 32-G of the Act were initiated by the Additional Mahalkari and Agricultural Lands Tribunal No. IV, Kudal, for determining the price payable by the tenant in respect of Survey No. 5, Pot Hissa No. 3, admeasuring 25½ gunthas situate at Village Pat, Mahal Kudal, on the Tillers' Day i.e. on April 1, 1957 respondent No. 1 Shrimati Indira Anant Patkar and her two minor sons were the tenants of the land. Landlord Vishnu Shantaram Desai contended before the Tribunal that the tenant was not entitled to purchase the land held by her as she was a widow. The Tribunal took the view that in case of tenants under disability they had to exercise the right of purchase after their disability ceased but law did not forbid them from becoming owners on the tillers' day if they did not wish to postpone the purchase in their favour to any future date. The Tribunal accordingly held that the widow was entitled to purchase the land held by her as a tenant on the tillers' day. The order of the Tribunal also made a reference to one of the minor sons who had become major before the proceedings were commenced. Such a minor son, after attaining majority had not given any intimation expressing his desire to exercise his right to purchase land under S. 32, within one year of his attaining majority. The Tribunal, however, took the view that as proceedings were not initiated till then under Section 32-G failure to give such intimation by such a son after attaining majority did not debar the widow from exercising her right to purchase. The Tribunal also fixed the price that was payable by the tenant to the landlord and directed it to be paid by two annual instalments. These findings of the Agricultural Lands Tribunal were confirmed in appeal by the District Deputy Collector, Savantwadi, and in revision by the President, Maharashtra Revenue Tribunal, Bombay. The Maharashtra Revenue Tribunal in its order inter alia observed that the provisions of Section 32-F related only to a case where a landlord is a disabled person; there was nothing in Section 32 to suggest that a tenant, who is disabled, is prevented from becoming a statutory purchaser either on 1st April 1957, i.e. the tillers' day or on the postponed date. Landlord Vishnu has filed Special Civil Application under Art. 227 of the Constitution to challenge the validity of this order passed by the Maharashtra Revenue Tribunal, Bombay.

3. In Special Civil Application No. 1916 of 1965 Survey No. 56 admeasuring 18 acres (and 5 acres 10 gunthas Pot Kharab) situate at Village Kaudane, Taluka Karjat, belonged to Lahanubai Maruti Gangarde, a widow, on the tillers' day. She died on April 30, 1959. One Ganu Rama Khore was a tenant of this land on the tillers' day. He too died in the year 1960, leaving his two sons, Rangnath and Babu, who cultivated the land as tenants thereafter. Disputes existed as regards the claim as successor-in-title of widow Lahanubai between Ganpat Saradu Gangarde and one Yeshwant Kondiba. Ultimately, the name of Ganpat Gangarde was entered in the record of rights on October 9, 1961, as a successor-in-title of widow Lahanubai. On October 14, 1961, Ganpat Gangarde gave a notice to Rangnath and Babu terminating their tenancy on the ground that he required the land for personal cultivation and ultimately made an application through his constituted attorney Namdeo on December 18, 1961, for possession under Section 29 of the Act. In these proceedings, ignoring the objections of the tenants, the Tenancy Aval Karkun passed an order for delivery of possession of half the survey number in favour of the landlord. An appeal preferred by the tenants Rangnath and Babu was allowed by the Assistant Collector, Parner, on the ground that the application made on behalf of the landlord was barred by limitation. The decision of the Assistant Collector was confirmed in Revision by the Maharashtra Revenue Tribunal on November 29, 1962. In the year 1964, proceedings were initiated under Section 32-G read with Section 32-F of the Act for determination of the price payable by the tenants. The tenants, however, had not given any notice as provided by S. 32-F intimating their desire to exercise their right to purchase the land. The Agricultural Lands Tribunal took the view that as no such intimation was given by the tenants, the purchase of the tenants became ineffective. This decision was confirmed in appeal by the Assistant Collector, Parner, and in revision by the Maharashtra Revenue Tribunal, Poona. The tenants, Rangnath and Babu have filed this Special Civil Application under Art. 227 of the Constitution to challenge the validity of these orders.

4. In Special Civil Application No. 2137 of 1967 Survey No. 74 admeasuring 8 acres 25 gunthas situate at Mouze Rotvad, Taluka Jamner, District Jalgaon was owned by two brothers, Waman and Jagannath and their widowed mother Shrimati Parvatibai. On the tillers' day, respondent No. 1, Adhar Chango Padgham was a tenant, but he was then a minor, he having been born on February 23, 1945. Proceedings initiated by landlord

Waman under Section 29 read with Section 31 of the Act for possession of this survey number on the ground that he required the same for personal cultivation, were ultimately dismissed by the Prant Officer, in the year 1959. Proceedings adopted by landlord Waman for an Exemption Certificate under S. 88-C of the Act were ultimately dismissed by the Maharashtra Revenue Tribunal in June 1960 and similar proceedings adopted by landlords Jagannath and Shrimati Parvatibai for exemption certificate were ultimately dismissed by the High Court in January 1964. After attaining majority on July 30, 1964 the tenant Adhar made an application to the Mamlatdar and the Agricultural Lands Tribunal for fixation of price to be paid by him. On October 3, 1964 he gave an intimation to landlord Waman and Agricultural Lands Tribunal in respect of his desire to exercise the right of purchase conferred by Section 32. The Tribunal took the view that as the tenant had failed to give intimation in respect of his desire to exercise the right to purchase within the time specified by Section 32-F, he had no right then to purchase the land and that the land had to be disposed of in accordance with the provisions of Section 32-P. In an appeal by the tenant, this finding of the Agricultural Lands Tribunal was confirmed by the District Deputy Collector, Chalisgaon. He, however, took the view that as one of the landlords was a widow, it was necessary to inquire whether the share of any of the petitioners was separated by metes and bounds as contemplated in proviso to clause (a) of subsection (1) of S. 32-F. To make this enquiry, he passed an order of remand. In a revision application by the landlords, the President of the Maharashtra Revenue Tribunal took the view that Section 32-F had no application; that the case was governed by Section 32 of the Act; that the tenant had become the purchaser under Section 32 of the Act and the Agricultural Lands Tribunal should determine the purchase price payable by the tenant. The landlords have filed this Special Civil Application under Art. 227 of the Constitution against the decision of the Maharashtra Revenue Tribunal.

5. For sake of brevity and convenience, a landlord who is a minor or a widow or a person subject to any mental or physical disability is hereinafter referred to as "a disabled landlord" or "a landlord under disability", and a tenant who is a minor or a widow or a person subject to any mental or physical disability or a serving member of the armed forces is hereinafter referred to as "a disabled tenant" or "a tenant under disability".

6. The contention on behalf of the landlord in these applications is that when

either a landlord or a tenant is under disability, or when both of them are under disability, a tenant has a right to purchase the land by him as tenant only in the manner and within the time prescribed by Section 32-F of the Act; that in such a case there is no statutory transfer of ownership under Section 32 of the land held by the tenant on the tillers' day or on the postponed date; that in such a case, the tenant has to exercise the right to purchase the said land by giving an intimation in that behalf to the landlord and the Agricultural Lands Tribunal in the prescribed manner within the time specified in Section 32-F; that in default of such intimation within the time specified or in the manner prescribed, the tenant is not deemed to be a purchaser of the land held by him as the tenant and the land may be disposed of by the Agricultural Lands Tribunal as provided in Section 32-P of the Act. On behalf of the tenants in these applications, arguments were presented in two different ways. It was said that S. 32-F of the Act is only an enabling provision; that a tenant under disability has not only a right of statutory purchase under Section 32 but he has also an additional right to purchase land held by him as tenant within the time specified in Section 32-F; that Section 32-F does not curtail the right given to every tenant including a disabled tenant to become a deemed statutory purchaser under Section 32. This line of submission was presented on the footing that Section 32-F is attracted where either a landlord or a tenant or both of them are under disability.

7. Mr. Warke, who intervened on behalf of one of the tenants, on the other hand, contended that Section 32-F applies only when a landlord is under disability but a tenant may or may not be under disability; where a landlord is not under any disability, but a tenant alone is under disability, Section 32-F is not at all attracted and the case is then governed by Section 32 only.

8. Substantial modifications in respect of the rights of a landlord and a tenant in relation to agricultural land were effected by amendments made in the Act by Bombay Act No. XIII of 1956 and by subsequent amending Acts. Chapter III of the Act after these amendments deals with special rights and privileges of tenants and provisions for distribution of land for personal cultivation. This Chapter is divided into four parts. The first part thereof deals with termination of tenancy for personal cultivation and non-agricultural use and is comprised of Sections 31 and 31-A to Section 31-D. The second part thereof deals with purchase of land by tenants and is comprised of

Sections 32, S. 32-A to S. 32-R and S. 33. Part IIA deals with termination of tenancy by landlords and purchase by tenants of lands to which Section 88-C applies. It is comprised of Sections 33-A to 33-C. Part III thereof provides for restrictions upon holding land in excess of ceiling area.

9. The general right of a landlord to terminate the tenancy of any land on the ground of bona fide personal cultivation or for any non-agricultural purpose is laid down in sub-sections (1) and (2) of S. 31. He is required to give a notice terminating the tenancy and stating the purpose for which the land is required. This notice is required to be served on the tenant on or before 31st Day of December 1956 and a copy of such notice is required to be forwarded to the Mamlatdar. An application for possession under Section 29 is thereafter to be made to the Mamlatdar on or before March 31, 1957. In case of landlords under disability, the time for giving such notice for termination of tenancy and making an application for possession under Section 29 is extended by sub-section (3) of S. 31. It is as under:—

"31. (3) Where a landlord is a minor, or a widow, or a person subject to mental or physical disability then such notice may be given and an application for possession under Section 29 may be made,

(i) by the minor within one year from the date on which he attains majority;

(ii) by the successor-in-title of a widow within one year from the date on which her interest in the land ceases to exist;

(iii) within one year from the date on which mental or physical disability ceases to exist;

Provided that where a person of such category is a member of a joint family, the provisions of this sub-section shall not apply if at least one member of the joint family is outside the categories mentioned in this sub-section unless before the 31st Day of March 1958 the share of such person in the joint family has been separated by metes and bounds and the Mamlatdar on enquiry is satisfied that the share of such person in the land is separated having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property, and not in a larger proportion."

10. In *Bai Jiviben v. Bombay Revenue Tribunal* (1959) 61 Bom LR 1475 the Division Bench of this Court has taken the view that under Section 31 of the Act, a widow can terminate the tenancy of her land and can apply for possession of the land under Section 29 of the Act. The object of sub-section (3) of

S. 31 is to protect the rights of the successor-in-title of the widow and to ensure that he does not suffer owing to negligence or inaction on the part of the widow. There are no words either in sub-section (3) or any other part of the section which deprive a widow of the right conferred upon every landlord under sub-section (1). It could not have been the intention of the legislature that even though the widow may require additional income from her land for her maintenance, she shall not be able to obtain possession of the land throughout her life time and that this right should be available to her successor-in-title.

11. Section 31-A to S. 31-D relate to other conditions, terms and consequences of termination of tenancy.

12. Section 32 of the Act provides that the tenant shall be deemed to have purchased the land on tillers' day. The material part of this section is as under:

"32(1). On the first day of April 1957 (hereinafter referred to as "the tillers' day") every tenant shall subject to the other provisions of this section and the provisions of the next succeeding sections, be deemed to have purchased from his landlord, free of all encumbrances subsisting thereon on the said day, the land held by him as tenant, if

(a) such tenant is a permanent tenant thereof and cultivates land personally;

(b) such tenant is not a permanent tenant but cultivates the land leased personally; and

(i) the landlord has not given notice of termination of the tenancy under Section 31; or

(ii) notice has been given under Section 31, but the landlord has not applied to the Mamlatdar on or before the 31st day of March 1957 under Section 29 for obtaining possession of the land; or

(iii) the landlord has not terminated this tenancy on any of the grounds specified in Section 14, or has so terminated the tenancy but has not applied to the Mamlatdar on or before the 31st day of March 1957 under Section 29 for obtaining possession of the lands;

Provided that if an application made by the landlord under Section 29 for obtaining possession of the land has been rejected by the Mamlatdar or by the Collector in appeal or in revision by the Maharashtra Revenue Tribunal under the provisions of this Act, the tenant shall be deemed to have purchased the land on the date on which the final order of rejection is passed. The date on which the final order of rejection is passed is hereinafter referred to as "the postponed date":

Provided further that the tenant of a landlord who is entitled to the benefit of the proviso to sub-section (3) of Section 31 shall be deemed to have purchas-

ed the land on the 1st day of April 1958, if no separation of his share has been effected before the date mentioned in that proviso.

.....
.....
.....

(3) In respect of the land deemed to have been purchased by a tenant under sub-section (1)(a) the tenant-purchaser shall be liable to pay to the former landlord compensation for the use and occupation of the land, a sum equal to the rent of such land every year, and (b) the former landlord shall continue to be liable to pay to the State Government the dues, if any, referred to in clauses (a), (b), (c) and (d) of sub-section (1) of S. 10-A, where the tenant-purchaser is not liable to pay such dues under sub-section (3) of that section, until the amount of the purchase price payable by the tenant-purchaser to the former landlord is determined under Section 32-H.

....."

(The other sub-sections are not very relevant for the present purpose).

13. Section 32 provides for automatic statutory transfer of ownership to the tenant by operation of law on the tillers' day or on the postponed date. Under this section, a tenant is deemed to have purchased from his landlord land held by him as tenant if the conditions of this section are fulfilled. Such a tenant is not required to do any act or to give any intimation before he is deemed to have purchased such land. To achieve this result, neither the consent of the landlord nor of the tenant is required or contemplated. It is by a deeming provision that such a tenant is made a statutory purchaser of the land held by him as a tenant.

14. The right of a tenant to be deemed to have purchased land under Section 32(1) is, however, "subject to the other provisions of this section and the provisions of the next succeeding sections". Section 32-G prescribes the procedure to be followed for determining the price of land to be paid by the tenants. Under sub-section (1) thereof, as soon as may be after the tillers' day, the Agricultural Lands Tribunal shall publish or cause to be published a public notice in the prescribed form in each village within its jurisdiction calling upon (a) all tenants who under Section 32 are deemed to have purchased the lands; (b) all landlords of such lands and (c) all other persons interested therein to appear before it on the date specified in the notice. The Tribunal is enjoined to record in a prescribed manner the statement of the tenant whether he is or is not willing to purchase the land held by him as a tenant. Consequences of failure to appear by the tenant or of his unwillingness to

purchase the land are provided in sub-section (3) thereof. Under that sub-section where any tenant fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective. A proviso to this sub-section provides that if such order is passed in default of the appearance of any party, the Tribunal shall communicate such order to the parties and any party on whose default the order was passed, may within 60 days from the date, on which the order was communicated to him, apply for the review of the same. Sub-section (4) provides for determination of the purchase price payable by a tenant after holding an enquiry when a tenant is willing to purchase. Sub-section (5) requires that in the case of a tenant, who is deemed to have purchased the land on the postponed date, the Tribunal shall as soon as may be, after such date determine the price of the land. Under Section 32-K(3) arrears of instalments of purchase price are recoverable by the Tribunal as an arrear of land revenue. Section 32-M of the Act inter alia makes the purchase to be ineffective on tenant-purchaser's failure to pay purchase price. Under sub-section (1) thereof, a tenant who has paid the price in a lump sum or the last instalment of such price, is entitled to a certificate of purchase in the prescribed form. Such a certificate is made conclusive evidence of his purchase. This sub-section further provides that in the event of failure of recovery of purchase price as arrears of land revenue, the purchase shall be ineffective and the land shall be at the disposal of the Tribunal under Section 32-P and any amount deposited by such tenant-purchaser towards the price of the land shall be refunded to him. It is implicit in the scheme of Sections 32, 32-G and 32-M that in a case governed by Section 32 a tenant is deemed to have purchased the land on the tillers' day or on the postponed date. If, however, later on he fails to appear before the Tribunal when a notice is served upon him under Section 32-G or if he expresses his unwillingness to purchase the land or if the purchase price is not recovered from him as provided under Section 32-K read with Section 32 then the purchase becomes ineffective. Under Section 32-P when the purchase of a land by a tenant becomes ineffective inter alia under Section 32-G or 32-M, the Tribunal may after holding a formal enquiry, direct that the land shall be disposed of in the manner prescribed in sub-section (2). Under sub-section (2) such a direction may inter alia provide for the summary eviction of the tenant or for the surrender of the land to the former landlord.

15. The effect of these provisions is generally summed up by the Supreme Court in *Sri Ram Ram Narain v. State of Bombay*, (1959) 61 Bom LR 811 at p. 824 = (AIR 1959 SC 459) as under:

"The title of the landlord to the land passes immediately to the tenant on the tillers' day and there is a completed purchase or sale thereof as between the landlord and the tenant. The tenant is no doubt given a locus penitentie and an option of declaring whether he is or is not willing to purchase the land held by him as a tenant. If he fails to appear or makes a statement that he is not willing to purchase the land the Tribunal shall, by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective. It is only by such a declaration by the tribunal that the purchase becomes ineffective. If no such declaration is made by the Tribunal, the purchase would stand as statutorily effected on the tillers' day and will continue to be operative, the only obligation on the tenant then being the payment of price in the mode determined by the Tribunal. If the tenant commits default in the payment of such price either in lump or by instalments as determined by the Tribunal, Section 32-M declares the purchase to be ineffective, but in that event the land shall then be at the disposal of the Collector to be disposed of by him in the manner provided therein. Here also the purchase continues to be effective as from the tillers' day until such default is committed and there is no question of a conditional purchase or sale, taking place between the landlord and tenant. The title to the land, which was vested originally in the landlord, passes to the tenant on the tillers' day or the alternative period prescribed in that behalf. This title is defeasible only in the event of the tenant failing to appear or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the Tribunal. The tenant gets a vested interest in the land defeasible only in either of those cases and it cannot, therefore, be said that the title of landlord to the land is suspended for any period definite or indefinite".

16. The right of a tenant to be deemed to have purchased the land under Section 32 is also subject to Section 32-F. That section is as under:—

"32-F. (1) Notwithstanding anything contained in the preceding sections—

(a) where the landlord is a minor, or a widow, or a person subject to any mental or physical disability the tenant shall have the right to purchase land under Section 32 within one year from the expiry of the period during which such

landlord is entitled to terminate the tenancy under Section 31 and for enabling the tenant to exercise the right of purchase, the landlord shall send an intimation to the tenant of the fact that he has attained majority before the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31:

Provided that where a person of such category is a member of a joint family, the provisions of this sub-section shall not apply if at least one member of the joint family is outside the categories mentioned in this sub-section unless before the 31st day of March 1958 the share of such person in the joint family has been separated by metes and bounds and the Mamlatdar on inquiry is satisfied that the share of such person in the land is separated, having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property and not in a larger proportion;

(b) where the tenant is a minor, or a widow or a person subject to any mental or physical disability or a serving member of the armed forces, then subject to the provisions of Cl. (a) the right to purchase land under Sec. 32 may be exercised:—

(i) by the minor within one year from the date on which he attained majority;

(ii) by the successor-in-title of the widow within one year from the date on which her interest in the land ceases to exist;

(iii) within one year from the date on which the mental or physical disability of the tenant ceases to exist;

(iv) within one year from the date on which the tenant ceases to be a serving member of the armed forces:

Provided that where a person of such category is a member of a joint family, the provisions of this sub-section shall not apply if at least one member of the joint family is outside the categories mentioned in this sub-section unless before the 31st day of March 1958 the share of such person in the joint family has been separated by metes and bounds and the Mamlatdar on inquiry is satisfied that the share of such person in the land is separated having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property and not in a larger proportion.

(1A) A tenant desirous of exercising the right conferred on him under sub-section (1) shall give an intimation in that behalf to the landlord and the Tribunal in the prescribed manner within the period specified in that sub-section:

Provided that, if a tenant holding land from a landlord (who was a minor and has attained majority before the commencement of the Tenancy and Agricultural Lands Laws (Amendment) Act, 1969) has not given intimation as required by this sub-section but being in possession of the land on such commencement is desirous of exercising the right conferred upon him under sub-section (1), he may give such intimation within a period of two years from the commencement of that Act.

(2) The provisions of Ss. 32 to 32-E (both inclusive) and Ss. 32-G to 32-R (both inclusive) shall so far as may be applicable, apply to such purchase”.

17. In view of the rival contentions, question arises when are the provisions of this section attracted? Do they apply when either a landlord or a tenant or both of them are under disability or whether its provisions cannot be attracted unless at least a landlord is under disability, but a tenant may or may not be under such disability?

18. Sub-section (1) of this section starts with a non-obstante clause “Notwithstanding anything contained in the preceding sections”. After this non-obstante clause, follow two clauses, namely, clause (a) and clause (b). The non-obstante clause is common for both these clauses. In between these two clauses (a) and (b) there is neither a conjunction “and” nor “or”. The clauses are separated by a mere semicolon. The place where the non-obstante clause appears, shows that it goes with each of the clauses (a) and (b). Clause (a) deals with a case where the landlord is under disability, namely, where the landlord is a minor or a widow or a person subject to any mental or physical disability. In such a case, the tenant shall have the right to purchase such land within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31. Proviso to this clause makes a special provision when such a landlord is a member of a joint family. Under this proviso, where a person of such category is a member of a joint family, the provisions of this clause (a) shall not apply if at least one member of the joint family is outside the categories mentioned in the sub-section, unless before 31st day of March 1958 the share of such person in the joint family has been separated by metes and bounds in accordance with and subject to the terms of the proviso. This clause, therefore, specifies the period within which a tenant has to exercise his right to purchase the land under Section 32 when a landlord is under disability. The provisions thereof are complete by themselves.

19. Clause (b) of this sub-section prescribes the period within which a tenant under disability has to exercise his right to purchase land under Section 32. The right to purchase land under Section 32 under this clause has to be exercised by the minor within one year from the date on which he attains majority, by the successor-in-title of the widow within one year from the date on which her interest in the land ceases to exist, by a person subject to any mental or physical disability within one year from the date on which the mental or physical disability of the tenant ceases to exist and by a serving member of the armed forces within one year from the date on which the tenant ceases to be a serving member of the armed forces. This clause contains a proviso which is similar to the one under clause (a). Clause (b) is also complete by itself. There is nothing in the language of Cl. (b) to suggest that it is in the nature of a proviso to clause (a). It is an independent provision which can apply even when the tenant alone is under disability. It is not possible to take the view that its provisions will not be attracted unless a landlord is also under disability. Each of clauses (a) and (b) is complete by itself and can apply independently of each other. A case may, however, arise when both a landlord and a tenant are simultaneously under disability. In such a case, if the period during which the landlord's right to terminate the tenancy under Section 31 has expired before a tenant's right to purchase land may be exercised, right of the tenant to purchase land has to be exercised in accordance with the provisions of clause (b) within the time therein specified. If, however, the period during which such a landlord is entitled to terminate the tenancy under Section 31 has not expired when a tenant under such disability has become entitled to exercise his right of purchase under clause (b) the provisions of Cl. (a) will prevail over those of clause (b) because clause (b) *inter alia* contains the words "subject to the provisions of clause (a)".

20. Reliance was placed by Mr. Warke upon the marginal note of Section 32-F. It contains the words "right of tenant to purchase where landlord is minor, etc." A marginal note may sometimes be an aid to interpretation but the use of the word "etc." does not restrict the operation of Section 32-F only to a case where a landlord is under disability. On a plain reading of clauses (a) and (b) of sub-section (1), the provisions thereof will apply when either a landlord or a tenant is under disability or when both of them are under such disability.

21. In the order of the Maharashtra Revenue Tribunal, which is chal-

lenged in Special Civil Application No. 2198 of 1966, the President of the Tribunal has observed that "the provisions of Section 32-F relate only to a case where a landlord is a disabled person. There certain procedure is provided for to enable the tenant to purchase the land. It is entirely wrong to contend that sub-section (1)(b) of S. 32-F of the Bombay Tenancy and Agricultural Lands Act, 1948 should be read as an independent provision qualifying the provisions of S. 32-F and is not restricted to a case where the landlord himself is a disabled person falling under sub-section (1) of S. 32-F of the Act. Similar view has been taken by the Tribunal in Tenancy Appeal No. 1769 of 1964 decided on February 1, 1965, *Banubai Naru Chaugule v. Manorama-bai Yeshwant*, 13 Tenancy LR 133".

22. In *Banubai's* case relied upon by the Tribunal, the point that arose for decision was whether a tenant who is a widow is entitled to become a statutory purchaser. The Tribunal pointed out that in Section 32-F(1)(b) the Legislature has used the word "may" and that clearly showed that the right which the tenant got under S. 32 or sub-section (1) of S. 31 was not in any way affected. The provisions in clause (b) of S. 32-F(1) is an enabling provision and this is in accordance with the interpretation put by the High Court in regard to Section 31 of the Act. Later on the Tribunal observed that the provision contained in clause (b) of Section 32-F(1) is merely an enabling provision and it does not affect the right of a tenant who may be a minor or a widow, to exercise the right of purchase, which is given to it by Section 32 and also recognised by clause (a) of S. 32-F(1). This Tribunal has recently taken the above view in *Ten. A. 904 of 1964* decided on 27-1-1965 in *Yestwant Baram Owalekar v. Smt. S. H. Patil*. Consequently the Tribunal took the view that a widow who is a tenant is entitled to purchase land.

23. It is clear from the above decision of the Maharashtra Revenue Tribunal in the case of 13 Tenancy LR 133 that there is no observation, much less a finding, to the effect that to attract the provisions of Section 32-F of the Act, the landlord must in any event be a disabled person. Nor is such a view taken in *Ten. A. No. 904 of 1964*. In that case, the only question that arose for consideration was whether a widow who is a tenant is entitled to purchase land under Section 32 or whether the right to purchase land in her case was only given to a successor-in-title. The view taken was that there was no reason why a widow when she was a tenant, was not entitled to purchase the land. It was said that if she chose to continue to be a tenant her successor would be entitled after her death to purchase land but that did not

mean that she was not entitled to purchase the land under Section 32-F(1).

24. Our attention has not been invited to any other decision of the Maharashtra Revenue Tribunal where clearly the view taken is that the provisions of Section 32-F will be attracted only if a landlord is at least a person under disability. We are also unable to concur with the view taken by the Maharashtra Revenue Tribunal about the right of a widow as a tenant to purchase the land.

25. Section 32-F does create a right to purchase land in a tenant independently of the provisions of Section 32. It is explicit from the language of Cls. (a) and (b) of sub-section (1) that it provides for the period within which a tenant has to exercise his right to purchase conferred upon him by Section 32. Clause (a) inter alia states: "The tenant shall have the right to purchase such land under Section 32, ..." Clause (b) inter alia states "..... the right to purchase land under Section 32 may be exercised" In a case covered by Section 32-F there also results a statutory transfer of ownership in favour of a tenant, but such transfer of ownership is not automatic. Sub-section (1-A) of this section enjoins upon a tenant desirous of exercising the right conferred on him under sub-section (1) to give an intimation in that behalf to a landlord and the Tribunal in the prescribed manner within the period specified in that sub-section. A proviso has been added to this sub-section by the Maharashtra Act No. 49 of 1969, but it is unnecessary to refer to the same. This sub-section, therefore, prescribes the time within which and the manner in which a tenant desirous of exercising his right to purchase has to give an intimation. When such an intimation is given, he is deemed to have purchased the land because by sub-section (2) thereof, provisions of Sections 32 to 32-E (both inclusive) and Sections 32-G to 32-R (both inclusive) shall, so far as may be applicable, apply to such purchase. The words "such purchase" connote a purchase by a tenant who has given an intimation in respect of his desire to purchase land within the time specified and in the manner prescribed by this section.

26. Consequences of failure on the part of a tenant to give intimation of his desire to purchase land within the time specified or in the manner prescribed by Section 32-F are provided in Sec. 32-P. That section inter alia states that where a tenant fails to exercise the right to purchase the land held by him within the specified period under Section 32-F, the Tribunal may after holding a formal enquiry direct that the land shall be disposed of in the manner provided in sub-section (2). The cumulative effect of the

provisions of Section 32-F read with those of Section 32-P is that in a case where a landlord or a tenant or both of them are under disability a tenant shall be deemed to be a purchaser of the land held by him as a tenant only if he gives an intimation of his desire to purchase land to the landlord and the Tribunal in the manner prescribed and within the time specified in Section 32-F.

27. Provisions of the Act which provide for automatic statutory transfer of ownership in favour of the tenant may be contrasted with those where the statutory transfer takes effect upon some act being done or intimation being given by the tenant. Section 32 and S. 33-C(1) of the Act provide for automatic statutory transfer of ownership in favour of the tenant. Under these sections respectively, a tenant and an excluded tenant shall be deemed to have purchased from landlord land held by him as tenant. Under Section 32 such a statutory purchase is generally effected on the tillers' day or on the postponed date. While under Section 33-C(1) it is effected on April 1, 1962. In these cases, the statutory purchase in favour of the tenant is automatic. It does not require any act to be done or any intimation to be given by the tenant. These provisions have to be contrasted with those of Section 32-F sub-sections (3) and (4) of S. 33-C and Section 43-1D. In each of these cases, a tenant has to give an intimation or a notice to the landlord and Tribunal as therein respectively provided. It is only on giving such an intimation or a notice within the time specified in the prescribed manner that a statutory purchase becomes effective in favour of the tenant.

28. Question then arises whether Section 32-F confers a right to purchase the land upon a tenant in addition to the right conferred by Section 32. Such a question has to be answered in the negative. When conditions laid down in Section 32-F exist, there is no automatic statutory purchase of land by a tenant under Section 32. Under Section 32 a tenant is deemed to have purchased from the landlord the land held by him as a tenant without giving him any intimation or doing any other act. Where a tenant is under disability if he is deemed to have purchased land under Section 32 on the tillers' day or on the postponed date, then a question of exercise of a right by a tenant to purchase land under Section 32-F cannot possibly arise. There is no question of exercising a right to purchase land by a tenant under Section 32-F, if he is already deemed to have purchased the land under Section 32. But in a case covered by Section 32-F, provisions of Section 32 apply only after an intimation is given as contemplated by Section 32-F(1A) and this is evident from

the language of sub-section (2) of the said section.

29. The argument on behalf of the tenant then was that just as under Section 31 a landlord under disability has two opportunities to terminate the tenancy, so also a tenant under disability has two opportunities to exercise the right to purchase land held by him as a tenant—one under Section 32 and the other under Section 32-F. To support this contention emphasis was laid upon the use of the word "may" in Section 32-F(1)(b) which states "the right to purchase land under Section 32 may be exercised....." and upon the decision of this Court in Bai Jiviben's case, (1959) 61 Bom LR 1475. As pointed out earlier in Bai Jiviben's case, this Court has taken the view that under Section 31 of the Act, a widow can terminate the tenancy of a land and can apply for possession under Section 29. But the provisions of Sections 31 and 32 are not in pari materia. Even by analogy such a decision cannot be helpful in interpreting the provisions of Section 32 read with those of Section 32-F. Under Section 32(1) the right to purchase land is generally given to every tenant. But its provisions are made subject to the other provisions of the section and the provisions of the next succeeding sections. Section 32-F(1) which is one of the next succeeding sections starts with a non-obstante clause — "notwithstanding anything contained in the preceding sections." The effect of these two provisions therefore is that the right conferred upon a tenant under Section 32 is subject to the provisions of Section 32-F. The two sections do not confer independent rights or opportunities to purchase land upon a tenant. Section 32-F prescribes a special procedure for exercise of a right to purchase land conferred upon a tenant by Section 32 when either a landlord or a tenant or both of them are under disability. Such a tenant has only one right to purchase. He has to give an intimation under Section 32-F (1A) and then the provisions of Sections 32 to 32-E (both inclusive) and 32-G to 32-R (both inclusive) apply to such purchase. The mere use of the word "may" is insufficient to conclude that Section 32-F(1)(b) gives an additional right.

30. There are four classes of tenants under disability considered under Section 32-F(1)(b). These are a widow, a minor, a person subject to any mental or physical disability or a serving member of the armed forces. If by reason of the provisions of Section 32 such a tenant is deemed to have purchased the land, the question of exercising his right to purchase the land under Section 32-F can never arise. But Section 32-F prescribes procedure for exercise of right to purchase the land by tenant under Sec. 32.

It is therefore implicit that but for such exercise of right by a tenant under Section 32-F he is not deemed to be a purchaser under Section 32. In *Bapu Dnyanu v. Sadashiv Ramchandra*, (1969) 71 Bom LR 402 at pp. 407-408 while considering the scheme of Sections 32 and 32-F of the Act, this Court overlooked the fact that Section 32-F prescribes the manner in which and the time within which a right to purchase under Section 32 has to be exercised by a tenant when a landlord or a tenant or both of them are under disability, and that Section 32-F does not create any independent right to purchase land in a tenant apart from that conferred by Section 32.

31. In Special Civil Application No. 2198 of 1966, on the tillers' day the tenants of the land were a widow and two minor sons, but none of the sons is made a party to the proceedings. Counsel on behalf of the Petitioner and respondent No. 1 under the circumstances wanted the matter to be decided on the footing that a widow alone is a tenant and that this decision should not affect the right, if any, of any of the two sons. Such a case is governed by Section 32-F(1)(b) as the tenant is a widow. In view of the provisions of clause (b) the right to purchase under Section 32 can be exercised by the successor-in-title of the widow within one year from the date on which her interest in the land ceases to exist. In such a case, a tenant-widow cannot be deemed to have purchased the land under Section 32. Under the circumstances, Special Civil Application No. 2198 of 1966 is allowed, the rule is made absolute and the order passed by the Maharashtra Revenue Tribunal, District Deputy Collector, Savantwadi and the Additional Mamlatdar and the Agricultural Lands Tribunal No. IV, Kudal, declaring respondent No. 1 to be a purchaser is set aside. The proceedings initiated by the Agricultural Lands Tribunal under Section 32-G of the Act for determining the purchase price payable by respondent No. 1 are quashed.

32. In Special Civil Application 1916 of 1965 widow Lahanubai (landlord) died in the year 1960. Her successor-in-title could have terminated the tenancy under Section 31 of the Act before the expiry of the period of one year from the date of her death. The period so prescribed for termination of tenancy by the successor-in-title cannot be extended merely because there existed a dispute as regards who is her successor-in-title. Under sub-section (1-A) read with Section 32-F(1)(a) it was obligatory upon Rangnath and Babu (sons of deceased tenant Ganu) to give intimation of their desire to purchase land to the landlord and the Tribunal within a period of one year from the expiry of the period during

which the successor-in-title of widow Lahanubai could have terminated the tenancy under Section 31. Such an intimation they failed to give and they thus failed to exercise their right to purchase. The Agricultural Lands Tribunal, the Assistant Collector and the Maharashtra Revenue Tribunal were, therefore, right in taking the view that the tenants failed to exercise their right to purchase and the land had to be disposed of in accordance with the provisions of Section 32-P of the Act. In the result, Special Civil Application No. 1916 of 1965 is dismissed and the rule is discharged.

33. In Special Civil Application No. 2137 of 1967 the tenant was under disability, being a minor on the tillers' day. The Maharashtra Revenue Tribunal was in error in taking the view that Section 32-F did not apply in this case and that under Section 32 the tenant, though a minor, had become the owner of the land and the price payable by him had to be determined. It was obligatory upon the tenant to give intimation as prescribed by Section 32-F (1-A). As the tenant had not given such an intimation within the time prescribed, he had failed to exercise his right to purchase the land held by him as a tenant. In the result, Special Civil Application No. 2137 of 1967 is allowed and the rule is made absolute. The order passed by the Maharashtra Revenue Tribunal is set aside. It is unnecessary in the present case to remand the matter to the Agricultural Lands Tribunal as directed by the District Deputy Collector, Chalisgaon, as the tenant has failed to exercise his right to purchase under Section 32-F and the land has to be disposed of in accordance with the provisions of Section 32-P as directed by the Agricultural Lands Tribunal.

34. In the circumstances of these cases, we order that each party will bear its costs of these Special Civil Applications.

Ordered accordingly.

AIR 1972 BOMBAY 217 (V 59 C 43)

DESHMUKH AND DESHPANDE, JJ.

Mohammad Akil Khan, Appellant v. Premraj Jawanmal Surana and another, Respondents.

A. F. O. D. No. 209 of 1969, D/- 27-9-1971 against order of M. R. Ektare, Civil J. Sr. Division at Aurangabad in Land Ref. Case No. 2 of 1966.

Land Acquisition Act (1894). Ss. 30, 3(b), 9(1), 23 — Contract for sale of land frustrated due to acquisition of the land by State — Nature of buyer's right in the land — Extent of buyer's claim in the

compensation payable under the Act — (X-Ref:— T. P. Act (1882), S. 55(6)(b).

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. When the seller and buyer are both willing to perform their respective parts of the contract but the specific performance of the contract has become impossible by the unexpected interference by the State in acquiring the property, the buyer will be entitled to recover from the seller any purchase money properly paid together with interest and also earnest with interest and to that extent he would have had under Section 55(6)(b) of T. P. Act a charge on the land. However, as the land is no more available to the parties as the State has acquired it and by deciding its compensation has converted the property into a sum certain, the buyer would be entitled to claim from the compensation amount, which represents the converted form of property, his purchase money and earnest together with interest. It is in this sense that the buyer whose contract is frustrated has a claim or share in the compensation which becomes payable to the owner of the property by reason of the acquisition thereof.

Section 3(b) does not require that a person for being interested, must have an interest in the compensation which has become payable on account of the acquisition of the land. Under the definition of Section 3(b) such buyer would be undoubtedly a person interested as he can claim the amount advanced by him together with interest from the land and in the absence of the land, from the money which represents the converted value of that land. When Section 9 calls upon all person to put in claims to compensation for all interests in such land, an interest of the type held by buyer is also intended to be covered. There need not be a transfer of immovable property in favour of a person before he could be described as a person entitled to claim for an interest in the land. The language of Section 9(1) of the Land Acquisition Act appears to be broad enough to include interest and claim for charge on land which would amount to an interest in the land for the purpose of S. 9(1).

However such buyer who has only contracted to purchase the property and whose contract is frustrated cannot claim any share in the solatium payable under sub-section (2) of S. 23. His interest is a limited interest as indicated by S. 55(6)(b) of the T. P. Act—to the extent of a definite amount, as what is acquired is the land and not the interest of such claimant separately as such. This right is a limited one to recover a sum certain

and nothing beyond. This right which arises as a result of the compulsory acquisition cannot be considered to be an interest in the land which is acquired as such by the State. Fifteen per cent. solatium payable under sub-section (2) of Section 23 represents the payment for compulsory acquisition of land and as there is no compulsory acquisition of the interest of buyer at all he cannot resort to the provisions of sub-section (2) of S. 23 for claiming any additional amount. (Paras 15, 16, 24)

Cases Referred: Chronological Paras
 (1958) 60 Bom LR 1208, Dossibai
 Nanabhoy v. P. M. Bharucha 14, 24
 AIR 1917 Lah 40 = 1917 Pun Re
 18, Chuttan Lal v. Mul Chand 14

F. G. Vaishnav, for Appellant; M. V. Paranjpe with A. N. Dabir (for No. 1) and V. T. Gambhirwalla, Asst. Govt. Pleader (for No. 2), for Respondents.

DESHMUKH, J.:—This appeal raises a question of some importance relating to the apportionment of compensation on compulsory acquisition of land between the intending vendor and the intending vendee whose contract has been frustrated by the act of acquisition by the State.

2. The facts of this litigation are not in dispute except for the amount which has flowed from the purchaser to the buyer. We will give appropriate direction in respect of that dispute in due course. The undisputed position is that claimant No. 1 Mohammad Akil Khan was the owner of S. No. 4 measuring 34 Acres 35 Gunthas situate at village Garkheda in Aurangabad. He executed an agreement of sale relating to 30 acres out of this land in favour of claimant No. 2 Premraj Jawanmal Surana, who is respondent No. 1 in the present appeal. Under this agreement of sale, Ex. 57, admittedly Rs. 10,000/- have been received by the vendor-claimant No. 1. Under the contract the price fixed was Rupees 4,000/- per acre totalling upto Rupees 1,20,000/- for the 30 acres agreed to be sold. The balance amount of Rs. 1,10,000/- was to be paid at the time of the execution of the sale-deed. It is the case of claimant No. 2 that he has advanced a further sum of Rs. 14,000/- from time to time towards the purchase price of the land. However, no dates are specified either in the claim before the Collector or in the claim statement before the Civil Court when reference under Section 30 of the Land Acquisition Act came to be made. As we have indicated above, specific directions will be given in due course regarding the alleged payment of Rs. 14,000/-. It is admitted that a third person named Gesudarey Khan had filed a Civil Suit against the vendor claimant No. 1 in respect of S. No. 4. The agreement, Ex. 57, recites that this was a suit

without any substance whatsoever and was sure to be dismissed. An important term of the contract is that after the disposal of that Civil Suit the sale-deed was to be executed within four months. The agreement of sale also states that possession was temporarily being transferred to the purchaser-claimant No. 2 and at the time of the execution of the sale-deed he will have the final possession as the owner of the land.

3. While the Civil Suit filed by the third person was pending, both the parties, it appears, were willing to perform their respective part of the contract. However, Government notified S. No. 4 for acquisition for what is known as Jayakwadi Project by its notification under Section 4(1) of the Land Acquisition Act dated March 25, 1965. This was followed by another notification under Section 6 dated April 6, 1965. Urgency clause under Section 17 was applied and possession was taken by the State of Maharashtra on October 9, 1965. It may be noted that the Civil Suit filed by the third person came to be dismissed on November 3, 1965. In view of the terms of the agreement the sale-deed was executable on payment of the balance of the amount on or before March 3, 1966. However, even before the Civil Suit came to be dismissed and even before the third of four months contemplated by the parties for executing the sale-deed commenced, the State stepped in and acquired the land for a public purpose. All private ownership came to an end free from all encumbrances, if any, on the 9th of October 1965 when the State claimed and recovered possession under Section 17 of the Land Acquisition Act.

4. When this happened and when the Collector issued notice under Sec. 9 of the Land Acquisition Act requiring the parties to put in their claims to compensation for all interests in the land acquired. Claimant No. 1 appeared and put in his claim for the entire compensation. He claimed amount at the rate of Rs. 4,000/- per acre and further added that he had not lost his title at all, though a contract of sale was executed in favour of claimant No. 2. He was still the owner of the land and as such entitled to the entire compensation that may be determined by the Land Acquisition Officer. In the same proceedings, claimant No. 2 who had the contract of sale in his favour and which was frustrated due to the acquisition appeared and put in a claim to the entire compensation amount. According to him, not only there was a contract in his favour for the sale of the property acquired but he was put in possession thereof in part performance of the contract. He was ready and willing to perform his part of the contract. In the circumstances his possession was protected

under Section 53-A of the Transfer of Property Act and the vendor could not displace him from the property. This right of possession together with the right to obtain the sale-deed should be considered as amounting to almost full title and as such the entire amount of compensation should be paid to him.

5. So far as the Inquiry under Section 9 of the Land Acquisition Act and the further making up of the award under Section 11 were concerned, the Land Acquisition Officer heard the parties and declared the true area of the land acquired and the total compensation which in his opinion was allowable for the land in terms of the provisions of Section 23. So far as the apportionment was concerned, as there was dispute between the claimants and the Land Acquisition Officer had no option but to refer the dispute to the court under Section 30 of the Act. He accordingly made a reference.

6. In the reference before the Civil Court, the two claimants who are now appellants and respondent No. 1 put in their claims in writing. They urged the same grounds which we have summarised above. Each one of them claimed the entire amount of compensation. It also appears that an application for reference under Section 18 was also made by claimant No. 1 before the Collector. We were told that the Collector rejected the application for reference under Section 18 made by claimant No. 1 on the ground that it was a belated application which was barred by limitation. We were also told that a revision application has been filed by claimant No. 1 in this Court against that order and that the matter is still pending. If at all that revision application succeeds and a reference under Section 18 is directed to be made to the Civil Court, the only result will be enhancement of compensation, if any. However, the apportionment of compensation under Section 30 is a distinct and different matter and need not wait till the disposal of the reference under Section 18. The principle which will be laid down in this application and the method of apportionment that would be proposed between the parties would govern not only the amount of compensation which is now awarded but also the additional amount, if any, which may be in due course awarded by the Civil Court.

7. The learned trial Judge after hearing the parties came to the conclusion that claimant No. 2 is 'a person interested' under Section 3(b) of the Land Acquisition Act and was entitled to make an application under Section 9 for compensation. The learned trial Judge further assumed, which we are told is an

error, that claimant No. 2 had filed a suit for specific performance of the contract covered by Exh. 57 in the Civil Court at Aurangabad and that that suit was pending. On that assumption the learned trial Judge concluded that claimant No. 2 must be deemed to be as if an owner, if not an actual owner of the property. On that footing the entire amount of compensation is directed to be paid to claimant No. 2 alone. Being aggrieved by this order of apportionment passed by the trial Court, claimant No. 1 has filed this appeal.

8. The first point that was raised before us by Mr. Vaishnav on behalf of claimant No. 1 was that this was a case of contingent contract and would give no right whatsoever to claimant No. 2. He based his argument on the wording of the agreement, Ex. 57. He also argued that not only this was a contingent contract but possession was not delivered to claimant No. 2 in part performance of the contract. Since claimant No. 1 as vendor had obtained an amount of Rs. 10,000/- which would be locked up for quite some time in view of the pending litigation instituted by Gesudarey Khan, possession was delivered to cover the interest that claimant No. 2 might have otherwise earned on this amount. He, therefore, argued that this was not a completed contract where possession was delivered in part performance of the contract. We find no substance in both these points.

9. Having gone through the entire wording of the contract, Ex. 57, in its original we find that the contracting parties have first described the property that was agreed to be sold together with its boundaries. The price is then indicated as being Rs. 4,000/- per acre totalling upto Rs. 1,20,000/-. The pertinent wording relating to the contract is that the vendor having agreed to sell the property at Rs. 4,000/- per acre has received under this contract Rs. 10,000/- as earnest money. It then recites that after the frivolous litigation of Gasudarey Khan comes to an end the sale-deed will be executed and the balance amount will be paid before the Sub-Registrar. At that stage claimant No. 2 will be not only made owner of the property but will be placed in possession thereof as such. The further recital shows that an advance of Rs. 10,000/- has been made to claimant No. 1 by claimant No. 2 and that the amount was likely to be locked up for some time. In order that the purchaser may not be put to loss in pursuance of this contract, possession is being handed over to claimant No. 2 for the time being. These are all the relevant recitals so far as the questions raised before us are concerned. A plain reading of this contract does not indicate that the agreement it-

self depended upon the successful termination of the litigation started by Gasudarey Khan. A contract was made forthwith with all the terms being settled, but the execution of the document was postponed till the termination of that litigation. Simply because the time for performance of the contract is deferred, it does not make it a contingent contract. In the same manner even though the intention is to cover up the loss which may be occasioned to claimant No. 2 by payment of Rs. 10,000/- the recitals show that the possession was handed over in pursuance of this document Ex. 57. There is therefore no doubt that the description of the possession is a temporary possession or possession for the time being. The other recitals show that at the time of the execution of the contract, the possession was to be converted on the basis of full ownership. In a contract of sale, even though possession is delivered in part performance it does not become possession of an owner, as the contract by itself does not create any right in the land. We are, therefore, of the view that neither of the points raised by Mr. Vaishnav has any substance.

10. The next point argued before us is that if this is a complete contract and possession has been transferred to claimant No. 2 under this contract, then the rights of the parties should be determined, in view of the provisions of Section 53-A of the Transfer of Property Act. Possession of claimant No. 2 would be protected under the principles of part performance incorporated in Section 53-A of the Transfer of Property Act. Mr. Vaishnav added that this is a peculiar case when both the sides were willing to perform its part of the contract. Claimant No. 1 was willing to accept the price at the rate of Rs. 4,000/- per acre and deliver possession as well as execute a registered document in due course as provided by the agreement. They are now prevented by the intervention of the State which has acquired the entire property. If the claimant No. 1 was a willing seller and claimant No. 2 was a willing buyer, but their contract cannot proceed to the execution of the document for no fault of either of them, both of them must be made to share the effects of the acquisition by the State in proportion to their respective rights. What is argued is that the price privately fixed was Rs. 1,20,000/- and the compensation awarded by the Land Acquisition Officer is only Rs. 34,500/-. Out of the agreed price of Rs. 1,20,000/- only Rs. 10,000/- have been advanced by claimant No. 2 to claimant No. 1. This amount bears the proportion of 1/12th to the total price. That being so, the interest of the purchaser-claimant No. 2 would be 1/12th in the compensation amount and that of the

vendor 11/12th. We are unable to appreciate the logic of this argument.

11. Provisions of Section 54 of the Transfer of Property Act provide that a mere contract of sale does not of itself create any interest in or charge on such property. What has happened between the parties is that a contract of sale was executed and Rs. 10,000/- were advanced as earnest under this contract. What is the effect of payment of earnest amount will be separately considered. However, mere execution of contract of sale does not of itself create any right, interest or charge in the property proposed to be demised. We cannot therefore treat claimants Nos. 1 and 2 as if they are sharers in losses and gains as if co-owners of the property. The ownership continued to vest in claimant No. 1 alone until all private rights were extinguished by the process of acquisition. That being so, the procedure suggested and the calculations made by Shri Vaishnav do not appear to be logical. We would therefore reject them.

12. Third alternate argument of Mr. Vaishnav was that the contract between the parties has now been frustrated and it has become impossible of performance by either side because of fortuitous circumstances of acquisition by the State. He therefore wishes to draw upon the principle incorporated in Section 65 of the Contract Act. According to him, the agreement is now discovered to be void or has now become void for no fault of either of the party. In the circumstances a person who has received any advance on agreement or contract is bound to restore or make compensation for it to the person from whom he received it. In this view, he says that claimant No. 2 may at best be paid Rs. 10,000/- which he has advanced and the rest of the compensation amount should be paid to claimant No. 1. The result which is proposed by Mr. Vaishnav is acceptable to us but it does not appear that the reasoning on which he has based his claim can be accepted.

13. The trial Court has assumed that claimant No. 2 has filed a suit for specific performance of the contract, viz. Ex. 57, itself. It is admitted before us that this was an erroneous assumption and no such suit has been filed by claimant No. 2. There is undoubtedly some other litigation between claimant No. 1 and claimant No. 2 but that does not relate to S. No. 4, which was the subject-matter of acquisition. On the assumption that claimant No. 2 being ready and willing to perform his part of the contract and further assumption that he has filed a suit for specific performance of the contract, which it is further assumed might result in a decree for specific performance

of the contract, the trial Court has treated claimant No. 2 as entitled to recover the entire amount of compensation. Since this conclusion is based on erroneous assumption of facts it must at once be set aside.

14. The learned trial Judge has further relied upon a judgment of this Court in *Dossibai Nanabhoy v. P. M. Bharucha*, (1958) 60 Bom LR 1208. We are of the view that the reasoning in that report and the conclusions drawn by the learned Judges are of very limited assistance to us in deciding the disputed question before us. In that case claimant No. 2 had in his favour an agreement to lease of certain plots of land for a period of 99 years at a certain rent per annum with option to renew the lease for a further period of 99 years. There were two such contracts. Though the lease money varied the period for which the leases were contemplated were the same, viz. 99 years in the first instance with an option to renew for a further period of 99 years. Out of the two properties separately demised, one was further agreed to be leased by claimant No. 2 to claimant No. 3 for the purpose of co-operative housing. There were written agreements to lease. They were not registered nor any registered lease-deed executed. However, claimant No. 2 the lessee from the original owner was handed over possession in pursuance of the agreement to lease. Claimant Nos. 2 and 3 put in claims before the Collector along with the original owner lessor, who was claimant No. 1. One of the questions raised was that claimants Nos. 2 and 3 had no right to apply either under Section 9 of the Land Acquisition Act and had no further right to claim any share in the compensation. The learned Judges have examined several reported cases and have come to the conclusion that so far as the lease is concerned where it is accompanied by delivery of possession and the period for which the lease was to be executed was a very long period like 99 years with an option for further 99 years, the possession of the intending lessee must be treated as if it was a possession of the lessee. It is on that reasoning that the learned Judges accepted the right of claimants Nos. 2 and 3 to apply under Section 9 read with Section 3(b) of the Land Acquisition Act. The interest of claimants Nos. 2 and 3 was treated as interest in the land and apportionment was made on a certain basis. In the course of their discussion reference was made to judgment of the Punjab High Court in *Chuttan Lal v. Mul Chand*, AIR 1917 Lah 40. That was a case where an agreement to sell was executed but was not yet rescinded when acquisition took place. Mr. Justice Shadilal who delivered the judgment of the Bench of the Court observed that the expression 'per-

son interested' has been defined in Section 3(b) of the Land Acquisition Act as including all persons claiming interest in compensation awarded on account of the acquisition of land under the Act and this definition in their opinion was wide enough to include the equitable interest that Mulchand claimed in that case. It may be pointed out that the judgment of the Punjab High Court was delivered where the Transfer of Property Act was not applicable. The learned trial Judge has been influenced by this judgment to hold that the case of an intending purchaser could be equated with the case of a person having a contract of lease for a long period in his favour which contract is accompanied by possession. We are of the view that it would not be possible to equate the rights and liabilities of a vendor and vendee under an agreement of sale with those of intending lessor and lessee, as their rights and liabilities are governed by different statutory provisions of the Transfer of Property Act. Where specific statutory provisions exist they must be given effect to when the rights and liabilities of the parties are to be determined. We would therefore prefer to consider the relevant provisions which govern the rights and liabilities of vendors and vendees when their contract is unable to reach fulfilment without there being any fault of either of them. We would also then examine the provisions of the Land Acquisition Act for the purpose of determining whether there is any specific provision to settle such rights of vendors and vendees when their contract has become impossible of performance due to a fortuitous circumstance like acquisition of land by the State.

15. We have hardly any doubt that it must be assumed in the present case that the vendor and the vendee, viz. claimant Nos. 1 and 2 were willing to perform their respective part. Before, however, occasion arose to proceed further with the agreement, the State notified the property for acquisition on March 25, 1965. Not only that but after completing all formalities the possession was obtained on October 9, 1965. This determines all the private rights and completes the vesting of the property in the State for a public purpose. We have already pointed out earlier that the Civil Suit which was then pending came to a successful termination on November 3, 1965, whereby the rights to execute the sale-deed was exercisable within four months thereafter upto March 3, 1966. All this became impossible because the private ownership of the land came to be terminated on October 10, 1965. Undoubtedly, therefore, the contract of sale has been frustrated as it became impossible of performance. We have already pointed out that a contract for the sale of immovable

property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Claimant No. 2 had while making this contract of sale also advanced a sum of Rs. 10,000/- by way of earnest. When the contract became frustrated due to the acquisition by the State, a situation arose where the mutual rights of the parties must be determined and settled. In our view, to a situation like this the provisions of Section 55 and more particularly sub-section (6) Cl. (b) would be attracted. Claimant No. 2 is undoubtedly a buyer and the expression 'buyer' as used in sub-section (6) of Section 55 also includes a person who has agreed to buy. So far as the buyer is concerned, sub-section (6) conceives of both the positions where the ownership is transferred to a buyer and where the ownership is yet to be transferred to him. Sub-clause (a) deals with a situation where the ownership of the property is passed to a buyer. As soon as that happens that buyer is entitled to the benefit of any improvement in, or increase in value of the property, and to the rents and profits thereof. In other words, he is entitled to all the attributes of full ownership of the property. However, where the agreement is yet to culminate into transfer of ownership but where the buyer is willing to perform his part of the contract, his rights are indicated in sub-clause (b) of sub-section (6) of S. 55. The relevant sub-clause is as follows:—

"55 (6) (b): Unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission".

The clause quoted above, contemplated a case that a buyer shall not decline to accept delivery improperly. If he is willing to accept delivery of the property then he is entitled to charge on the property as against the seller and all persons claiming against him to the extent of seller's interest in the property for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount. Where, however, there is good ground why the buyer should deliver (decline?) to accept delivery, he is also entitled for the earnest (if any) and for the costs (if any) awarded to him of a suit compel

(sic) specific performance of the contract or to obtain a decree for its rescission. This statutory charge is created as soon as the buyer advances any part of the sale price or earnest to the seller. This charge is against the seller and all persons claiming under him to the extent of the interests of the seller in the property and also for the amount of purchase money properly paid. The property and the interest of the seller therein is in the nature of security for the purchase money properly paid, as also for the earnest amount. In the circumstances indicated in the above specific clause, the extent of the charge is not only confined to the purchase money properly paid and the earnest but also extends to the interest upon this amount. What is the nature of this charge and how will it operate when the subject-matter of the contract has been acquired by the State and is no more available for going ahead with the contract? It appears that when the seller and buyer are both willing to perform their respective parts of the contract but the specific performance of the contract has become impossible by the unexpected interference by the State in acquiring the property, the relative rights between the parties would continue to be the same as under the T. P. Act. In other words due to the impossibility of the performance of the contract, the buyer will be entitled to recover from the seller any purchase money properly paid together with interest and also earnest with interest and to that extent he would have had under the statutory provisions quoted above a charge on the land. However, the land or the property is no more available to the parties as the State has acquired it and by deciding its compensation has converted the property into a sum certain. The property is in a sense transformed into the sum certain and the rights of respective parties would continue to be the same, in respect of this sum or the amount of compensation, which they had or which they would have had against the property. In other words the buyer would be entitled to claim from the compensation amount, which represents the converted form of property, his purchase money and earnest together with interest. It is in this sense that the buyer whose contract is now frustrated appears to have a claim or share in the compensation which becomes payable to the owner of the property by reason of the acquisition thereof.

16. At this stage we may consider the provisions of the Land Acquisition Act for the purposes of finding out whether the buyer of this type, whose contract is frustrated, is in a position to make a claim before the Land Acquisition Officer. The first definition in this behalf that must be seen is that 'person

interested' contained in Section 3 (b) of the Land Acquisition Act. According to this definition, 'person interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act, and it further provides that a person shall be deemed to be interested in land if he is interested in an easement affecting the land. In this inclusive definition a person interested includes a person claiming an interest in compensation. This claim to an interest in the compensation, must arise out of acquisition of the land. A plain reading of the wording of Section 3 (b) does not require that a person for being interested, must have an interest in the land which is acquired as such. It is enough that he has an interest in the compensation which has become payable on account of the acquisition of the land. In other words the occasion for claiming the interest in the compensation is the acquisition of the land. The claim or interest in compensation made is not necessarily dependent upon the interest in the land itself. Under Section 9 of the Land Acquisition Act, the Land Acquisition Officer or Collector has to issue notice that the Government intends to take possession of the land and that claims to compensation for all interests in such land may be made to him. A question arises for consideration as to whether a claimant like claimant No. 2 who is undoubtedly interested in the compensation payable for the acquisition of the land, could be described as a person having claim to compensation for any interest in the land. A charge extending to the recovery of the purchase money and earnest paid together with interest would not be described as an interest in the land in the sense of right in the immovable property. According to Section 100 of the Transfer of Property Act, where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The difference between a mortgage and a charge is that in a charge there is no transfer of an interest in the property but the creation of a right of payment out of the property is specified, and as such it cannot be enforced against a bona fide purchaser for value. A broad distinction between the two would be that whereas a charge only gives right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immov-

able property. Even though therefore a buyer like claimant No. 2 may have charge for the recovery of certain amount, he would not be said to be a transferee of an interest in the immovable property. However, the intention of the Land Acquisition Act is to acquire property for a public purpose by extinguishing all private rights, by awarding compensation at the same time for all interests in the land, which are required to be reckoned with at the time of the acquisition. We have already pointed out that under the definition of Section 3 (b) a buyer like claimant No. 2 would be undoubtedly a person interested as he can claim the amount advanced by him together with interest from the land and in the absence of the land from the money, which represents the converted value of that land. When Section 9 calls upon all person to put in claims to compensation for all interests in such land, we are of the view that an interest of the present type held by claimant No. 2 is also intended to be covered. There need not be a transfer of immovable property in favour of a person before he could be described as a person entitled to claim for an interest in the land. The language of Section 9 (1) of the Land Acquisition Act appears to us to be broad enough to include interest and claim for charge on land which would amount to an interest in the land for the purpose of Section 9 (1). This being so claimant No. 2 had undoubtedly right to apply under the Land Acquisition Act to the Collector for apportionment of the compensation amount.

17. Once it is held that claimant No. 2 was entitled to apply and a dispute has arisen between the two rival claims, the Collector and the Land Acquisition Officer had no option but to refer that dispute to a Court under Section 30 of the Land Acquisition Act. Shri Paranjpe, appearing for claimant No. 2 made a claim only on the basis of Section 55 (6) (b) of the Transfer of Property Act. He, however, added that the amount for which his client makes claim is not only Rs. 10,000/- but the disputed payment of Rs. 14,000/- together with interest on both these amounts. He further argued that not only these two amounts together with interest must be paid to claimant No. 2 but he is also entitled to claim solatium at the rate of 15% on these two items of Rs. 10,000/- and Rs. 14,000/- under the provisions of sub-section (2) of Section 23. So far as the claim of Rs. 14,000/- is concerned, an issue was also framed in the trial Court. Unfortunately it was deleted and the parties were not permitted to lead evidence on the same. Shri Vaishnav attacked that claim on the ground that no dates of payment have been mentioned in the claim

before the Collector as also in the claim petition before the Civil Court. Since no evidence has been permitted to be led it would not be possible to express any view on the disputed alleged payment. It will be enough to point out that in the claim petition put in by claimant No. 2 before the Civil Court he has alleged in para 2 that Rs. 10,000/- were advanced as earnest under the agreement dated 7-4-1964. Thereafter subsequently from time to time claimant No. 2 has paid an amount of Rs. 14,000/- towards the sale consideration of the property agreed to be purchased. Since this is the pleading of claimant No. 2 he must be permitted to prove whether he really advanced Rs. 14,000/- from time to time as pleaded towards the consideration of the property. Not only he will be entitled to this amount but from the date of payment of the various items which go to make Rs. 14,000/- he will be entitled to claim interest. To the extent of deciding that dispute whether Rs. 14,000/- were really advanced at all and whether they were towards the consideration of the property the matter will have to be remanded to the trial Court for disposal according to law in the light of the directions which we propose to give in this judgment. For the present we are disposing of this appeal on the footing that Rs. 10,000/- have been paid as earnest at the time of the execution of the agreement of sale.

18. Since we are taking the view that claim of claimant No. 2 is awardable to him under the provisions of Section 55 (6) (b) of the Transfer of Property Act, we would agree with Mr. Paranjpe that his client will be entitled to claim reasonable interest. We think that interest should be allowed at the rate of 6 per cent. We will also indicate a little ahead as to how we made calculations and what the trial Court need do, if it finds that Rs. 14,000/- or any portion thereof are found to have been advanced towards the purchase money. In this regard Shri Vaishnav also argued that it should be open to his client to press all points of fact as well as law against the alleged payment before the trial Court. For instance, he argues, that the notification under Section 4(1) was issued on March 25, 1965. From that date onwards the performance of the contract became impossible. Claimant No. 2 has not given any dates in his pleadings as to when he advanced Rs. 14,000/- or the various items which go to make up Rs. 14,000/- Shri Vaishnav argued that as soon as notification under Section 4(1) was published, it became known to the parties that the contract was impossible of performance. If any advances are made by claimant No. 2 to claimant No. 1 after that date it would be for the Court to see whether

it could be purchase money and if so whether it was properly paid by the buyer as contemplated by S. 55(6)(b). He suggested that this is one of the points which claimant No. 1 would be taking up and if advised he might resist the claim on such other grounds as are available in fact and in law. So far as the claim for Rs. 14,000/- is concerned, nothing at all is yet decided and the entire matter is at large for being decided by the trial Court. It would be open to both the sides to lead further evidence to prove and disprove the payment as also to urge all points of law in support of or against the claim. It is for the trial Court to find out whether Rs. 14,000/- or any part thereof are really advanced to claimant No. 1 by claimant No. 2 towards the purchase price. Since that issue was not dealt at all by the trial Court and all the grounds that both the sides may be inclined to urge before the trial Court are at large, it is permissible for both of them to plead them before that Court.

19. However, as indicated earlier we are disposing of this appeal on the footing that the admitted amount which is paid by claimant No. 2 to claimant No. 1 is Rs. 10,000/-. The calculation which we have made and the final order which we have passed would obviously be subject to such variations as become necessary by the findings, which the trial Court might give in respect of the additional claim of Rs. 14,000/- for which the matter is being specifically remanded. The calculations which we have made would in that sense be provisional but if no further amount is found by the trial court as due to claimant No. 2 then the calculations would be final and would represent the apportionment of the total compensation.

20. The above discussion leads to the conclusion that because of the frustration of the contract by unforeseen event of acquisition by the State, claimant No. 2 has acquired a right to enforce his charge to the extent of Rs. 10,000/- and interest thereof under Section 55(6) (b) of the Transfer of Property Act. Can he add to this charge the solatium of 15 per cent, which is awarded under sub-section (2) of S. 23 of the Land Acquisition Act? Shri Paranjpe argued that in the view which we have taken of the provisions of Section 3(b), claimant No. 2 is a person who is now interested in the land and that interest has been acquired by the State at the time of the acquisition of the land S. No. 4. The definition of 'land' in clause (a) of Section 3 is again inclusive and is therefore a broad definition. The expression 'land' includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. This

being an inclusive definition Shri Paranjpe argued that the expression 'land' would also include an interest in the land. When Government acquired land it acquired all interests and such interests must be valued in terms of the provisions of Section 23(2). With this premise he wanted us to read the provisions of Section 23. Sub-section (1) thereof indicates that while awarding the amount of compensation for the land acquired, the Court is required to take into consideration clauses first to sixth which fall thereafter. Clauses secondly to sixthly are not relevant for the present purpose. The first clause says that the Court shall take into consideration the market value of the land at the date of the publication of the notification under Section 4, sub-section (1). Shri Paranjpe therefore argued that the market value of the interest of claimant No. 2 in the land, with reference to the expression 'land' within the meaning of that expression contained in clause 3(a) would be that value which the Land Acquisition Officer has fixed for the land or which the Court might ultimately fix for the land. Sub-section (2) thereof says that in addition to the market value of the land, as above provided, the Court shall in every case award a sum of fifteen per centum of such market value in consideration of the compulsory nature of the acquisition. This payment which is known as solatium is made because of the compulsory nature of the acquisition. It is not the market value or the value which is otherwise payable for the damages under the various clauses firstly to sixthly of Section 23. Under Section 6(1) an unwilling person is made to part with his land and therefore an additional payment of 15 per cent. is given to him. This, according to Mr. Paranjpe must also be made available to claimant No. 2 whose interest in the land has been compulsorily acquired.

21. We are unable to agree with this reason as it contains an obvious fallacy. What is acquired is land or property which has been described by the inclusive definition of land in clause (a) of Section 3. What is payable under the Act is compensation for the compulsory acquisition. Now, compensation is not merely confined to market value. Shri Paranjpe seems to assume that compensation is market value besides which 15 per cent. is an additional payment. Section 23 as a whole deals with matters which must be considered by the Court in determining the compensation payable. While awarding compensation, the first items that must be taken into consideration is the market value of the land. While the land is being acquired with the standing crop, damages are to be paid for that purpose which are included in

clause secondly of Section 23(1). If the acquisition results in severing the land from other portion and that results in damages, they must be made good. In this manner each of the clauses of sub-section (1) of S. 23 deals with a separate item which has to be valued and added up together. To this amount be added an amount of 15 per cent. over the market value. When a sum total of all these items is made, the ultimate sum represents the compensation payable for the compulsory acquisition of the land. It is this amount which is now payable for the land. To whom to pay, and how much to pay each, is a matter of apportionment or distribution. In drawing support to this argument Shri Paranjpe referred us to the provisions of Sec. 11, which relate to the inquiry to be made by the Land Acquisition Officer and the award to be ultimately passed. He points out that the award must contain three items: (i) the true area of land, (ii) the compensation which in the opinion of the Land Acquisition Officer should be allowed for the land; and (iii) the apportionment of the compensation among all the persons known or believed to be interested in the land, or whom, or of whose claim, he has information, whether or not they have respectively appeared before him. Mr. Paranjpe therefore submits that claimant No. 2 is having interest in the land and as such a person to whom the compensation must be apportioned by the Collector under Section 11 while making the award.

22. Here again we do not think that the reference to Section 11 can be of any assistance. The Collector is not in a position to make an award relating to the apportionment since there is a dispute. The third item under Section 11 is payable only when clause falls in Section 29 contained in Part IV of the Land Acquisition Act. Section 29 says that where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such apportionment shall be specified in the award and as between such persons the award shall be conclusive evidence of the correctness of the apportionment. Clause (iii) of Section 11 can come into operation only when there is an agreement between the parties who claim apportionment and to the extent there is an agreement the Collector can record the apportionment. Section 30 says that when the amount of compensation has been settled under Section 11, if any dispute arises as to the apportionment of same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court. Since dispute is raised by the claimants regarding apportionment there

is no power in the Collector to decide the dispute but he has to refer it to the decision of the Court. In the present case where there were only two claimants and the apportionment was a matter of dispute there could be no pronouncement under item (iii) of Section 11 in the award, but having made his declaration under items (i) and (ii) the Land Acquisition Officer has no option but to refer the dispute to the Court. That is what he has done.

23. When the matter is referred to the Civil Court under Section 30, it is important to note that the Land Acquisition Act has not made any provision for the purpose of apportionment or distribution of the compensation. The Act provides for the persons interested in the land or persons interested in the compensation payable for the land to apply for both the purposes, viz. for the purpose of claiming an enhanced compensation for the land acquired, as also for the purpose of claiming apportionment. The dispute relating to the adequate payment of compensation is referable to the Civil Court under Section 18, but that dispute is referred after the Land Acquisition Officer makes his award with respect to the final amount as regards compensation. Further enhancement of the compensation is a matter of inquiry by the Civil Court under a reference under S. 18 of the Land Acquisition Act. That claim is to be decided in terms of S. 23 of the Act. So far as Section 30 is concerned, the Collector or the Land Acquisition Officer has no right to entertain the dispute or to decide it but has only a right to refer the dispute to a Civil Court.

24. A Division Bench of this Court in the case of (1958) 60 Bom LR 1208 had an occasion to consider the implication of Section 30 and the rights of the Civil Court to decide the dispute relating to apportionment. The learned Judge observed as follows.—

"Section 30 of the Land Acquisition Act merely provides that the Collector may make a reference to the District Court on a dispute as to the apportionment of the amount of compensation or any part thereof or as to the persons to whom the same or any part thereof is payable. But the Legislature has not laid down the principles by reference to which the dispute relating to apportionment has to be decided. The reason is obvious. When a dispute relating to apportionment arises, the Court is trying a dispute as to the civil rights between the parties relating to their interest in the money into which the land is transformed."

We are in respectful agreement with these observations. Having permitted

those persons to apply who had interest in the compensation or who had claim to the compensation or who had also interest in the land, the enquiry, as we had stated earlier, takes two different directions. One is the fixation of the compensation payable and the other is dispute relating to apportionment which is referred to the Court under Section 30. Since it has been so received in the Civil Court it becomes a matter to decide the civil rights of the parties and to make valuation in terms of money, of those civil rights which the parties have. There the rights of the parties are like those of two brothers who have equal motties in the land itself, it would be easy for the Civil Court to pronounce that in the total compensation payable including solatium, the interest of each one will be half. However, apart from the simple case of this kind, there are various civil interests which are required to be valued when the dispute between the claimants is to be resolved. For instance there may be an attaching creditor who had attached the land of his debtor for the purpose of recovering the decretal dues. If before he succeeds in enforcing his decree against the property attached, the land is acquired by the State, what would happen? He would undoubtedly have a claim towards the compensation which would be awarded, as the compensation would represent the converted pool of money of the land itself. The interest of such an attaching creditor could never exceed the decretal amount. Thus his interest will have to be independently valued and a fixed compensation to the extent of his decree would be payable to such a claimant. He would not be a general sharer in the general compensation in terms of certain percentage or proportion. In the same way if there is a mortgagee who has his mortgage debt against the property and the property comes to be acquired, what would happen to the mortgaged amount? Sub-section (2) of S. 73 of the Transfer of Property Act provides that where the immovable property, which was mortgaged, has been compulsorily acquired, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation. The mortgage under the Transfer of Property Act is a transfer of an interest in the property. However, the Legislature being aware of the nature of this interest has provided for the payment of only that amount to the mortgagee which would be due under his mortgage. In other words, if the total compensation paid is much more than the mortgage amount as found due it will not be permissible for the mortgagee to say that his interest in the land was compulsorily

acquired and as such he should be paid solatium of 15 per cent. under sub-section (2) of S. 23. If that is so, even when the interest was in the nature of transfer of property, or transfer of interest in the land itself, we fail to understand how a claimant like claimant No. 2, who had only contracted to purchase the property and whose contract is now frustrated can claim any share in the solatium payable under sub-section (2) of Section 23. His interest, which is now a limited interest as indicated by Section 66 (55?) (6) (b) of the Transfer of Property Act is a definite amount as described in that clause. Purchase money properly paid with interest and earnest, if any, together with interest would be the only amount which he can claim and to the extent of this amount he would have a charge on the property. He has therefore a limited interest to the extent of a definite amount, as what was acquired was the land and not the interest of this claimant separately as such. In fact if the acquisition was not there, the only right available to claimant No. 2 was to obtain a sale-deed by paying the full consideration under the agreement of sale. He could not have independently exercised the right to enforce the charge under Section 55 (6) (b). Since that right of claiming sale-deed is not available to him because of the compulsory acquisition by the State, he is required to fall back upon the alternate right available to him to enforce the charge under S. 55 (6) (b). This was a dormant right which became available to him because of the compulsory acquisition. Though therefore such a right continues to be a charge on the amount of compensation payable representing the land, it must always be remembered that this right is a limited one to recover a sum certain and nothing beyond. This right which arises as a result of the compulsory acquisition could not be considered to be an interest in the land which was acquired as such by the State. Fifteen per cent solatium payable under sub-section (2) of S. 23 represents the payment for compulsory acquisition of land and as we have indicated above, there was no compulsory acquisition of the interest of this claimant at all, he could not resort to the provisions of sub-section (2) of S. 23 for claiming any additional amount.

25. We are therefore of the view that what claimant No. 2 will claim is only Rs. 10,000/-, the earnest money claimed under the agreement of sale, Ex. 57. We are inclined to allow 6 per cent. interest as reasonable. However, in this case, certain developments have taken place with regard to the payment of compensation, which was deposited by the Collector in the Court and cogni-

zance must be taken of these facts. It is also necessary to remember that possession was handed over to claimant No. 2 under agreement, Exh. 57, in view of a loss which he may sustain for the advance of Rs. 10,000/-. So long as, therefore, claimant No. 2 was in possession he could not claim any compensation by way of interest on the advance of Rs. 10,000/-. He was deprived of the possession on the 9th of October 1965. The Land Acquisition Officer deposited the amount of Rs. 34,500/- which represented the compensation in respect of the 30 Acres of the land acquired and also referred the dispute under Section 30 of the Court. The money was lying in the Court till 17-2-1969 on which date it came to be paid to claimant No. 2. From 9-10-1965 or 10-10-1965 to 17-2-1969 claimant No. 1 was liable to pay claimant No. 2 6 per cent interest on Rs. 10,000/-. It may be borne in mind that in view of this judgment the claimant No. 2 was not entitled to keep anything more than Rs. 10,000/- with him. The payment of Rs. 24,500/- was an excess payment to him on that date. However, he was directed by the appellate Court to repay the amount in Court and he paid Rs. 10,000/- on 10-10-1969 and Rs. 24,500/- on 25-10-1969. During this period, claimant No. 1 was entitled to recover 6 per cent. interest from claimant No. 2 on Rs. 24,500/- upto 10-10-1969 and on Rs. 14,500/- upto 25-10-1969. Since we have held that Rs. 10,000/- were legitimately due to claimant No. 2 he could have retained that amount during the entire period and he need not pay interest to claimant No. 1 for that amount. It then appears that the entire amount of Rs. 34,500/- was repaid to claimant No. 2 on 3rd June 1970. Before this payment for the intervening period from 25-10-1969 to 3rd June 1970 he was entitled to recover interest on Rs. 10,000/- at 6 per cent. Thereafter claimant No. 2 deposited Rs. 10,000/- in Court on 1-6-1971 and Rs. 14,500/- on 1-8-1971. So far as this period is concerned, from 3rd June 1970 to 1st June 1971 claimant No. 2 will have to pay interest at 6 per cent on Rupees 24,500/ and for the remaining period upto 1-8-1971 on 14,500/-. Having made an account of interest which are respectively payable by one party to the other it has been found by the learned Advocates on both the sides that claimant No. 2, has to pay Rs. 325.50 to claimant No. 1. On the compensation that there is no further payment it would appear that out of the total compensation of Rupees 34,500/-, Rs. 9,675/- are payable to claimant No. 2, this is because he is entitled to Rs. 10,000/- and interest thereof but for the intervening period described above, he becomes liable to interest amounting to Rs. 325.50 to claimant No. 1.

In this manner his claim of Rs. 10,000/- is reduced by Rs. 325/- and the claim now works out at Rs. 9,675/-. He has already retained with him Rs. 10,000/- and he will have to pay back Rs. 325/- to claimant No. 1. The balance of amount of Rs. 24,500/- is lying in the Court. In addition he is entitled to recover Rupees 325/- from claimant No. 2 by execution of this order.

26. At this stage we may point out that the dispute cannot be finally disposed of because the claimant No. 2 has alleged further payment of Rupees 14,000/- towards the purchase money. This claim having been disputed, as we have pointed out earlier, the matter will go back to the trial Court for finding out whether claimant No. 2 proves the payment of Rs. 14,000/- or any part thereof to claimant No. 1 towards the purchase price of the acquired land S. No. 4. We have already indicated that the parties are at liberty to lead further evidence and take up all defences to which they are entitled to in law and fact. After hearing the parties in this manner, if the trial Court comes to the conclusion that some amount or the entire amount is not only paid towards the purchase price but is recoverable in view of the legal position under Sec. 55 (6) (b) of the Transfer of Property Act, he will award that much amount together with interest at 6 per cent from the date of payment to claimant No. 2 from claimant No. 1 and that would be a claim against the compensation amount. In the meanwhile we give liberty to claimant No. 1 to withdraw the amount of Rs. 24,500/- from the Court on furnishing security to the satisfaction of the trial Court.

27. So far as the costs are concerned, we are inclined to award costs to the parties in proportion to their success in both the Courts. However, the claim of Rs. 14,000/- is yet to be decided on merits. After it is so decided by the trial Court, it will award proportionate costs to either side depending upon their success in this litigation.

28. Since the acquisition proceedings are fairly old we direct that the learned trial Judge will dispose of the matter as early as possible and it will be appreciated, if he could dispose of the same within two months, after receipt of record.

29. There will be no order as to costs for the State throughout.

Order accordingly.

AIR 1972 BOMBAY 228 (V 59 C 44)

K. K. DESAI, J.

Nagnath Tatya Halge, Applicant v. Kishan Tatya Kale, Opponent.

Civil Revn. Appln. No. 243 of 1970, D/- 13-4-1971, against order of K. H. Kakre, Joint Civil J., Jr. Division at Ambajogai, D/- 8-9-1969.

(A) Civil P. C. (1908), S. 11 — Previous suit for rent — Order refusing to stay or adjourn suit till defendant's application for fixation of standard rent is decided by the Rent Controller — Cannot operate as res judicata for stay of subsequent suit for rent on similar ground. (Para 4)

(B) Civil P. C. (1908), S. 11 and O. 14, R. 2 — Issue of res judicata — Should not ordinarily be tried as a preliminary issue.

The question of res judicata that may be raised on behalf of any party in a suit should not ordinarily be disposed of as a preliminary issue. This question should normally be tried and disposed of at the final hearing of the suit; when all the issues can be adjudicated upon by Court at the same continuous hearing. (Para 5)

H. G. Vaishnav with A. H. Vaishnav, for Appellant; B. N. Deshmukh, for Opponent.

ORDER:— There is no substance in this revisional application on behalf of the original plaintiff from the order dated September 8, 1969, made by the trial Court, whereby findings were made in favour of the plaintiff on issues 1, 2 and 6 and directions were given that the trial of the issues 4 and 5 should be proceeded with after the decision of the Rent Controller in the application made by the original defendant for fixation of reasonable and/or standard rent.

2. Prior to the present suit No. 127 of 1968, the plaintiff had instituted a previous Suit No. 258 of 1967. That suit was for recovery of rent at the rate of Rs. 125/- per month for a period of one year from November 13, 1966, to November 12, 1967. In that suit the defendant made three contentions as follows:—

3. Prior to the lease in suit, an agreement was made between the parties that the plaintiff would construct two rooms and a latrine and a bath room and the rent of Rs. 125/- was agreed on the promise made by the plaintiff to make the above further constructions. The parties had agreed that in default of the plaintiff making the further constructions the rent was to be Rs. 50/- per month. The third contention was that until the question

of reasonable and/or standard rent was decided by the Rent Controller the further hearing of the suit for rent should be stayed. Issues were framed on the above contentions made by the defendant. These issues were answered against him and decree as prayed in the previous suit was passed. The plaintiff thereafter filed the present suit No. 127 of 1968 for recovering rent of 7 months at the rate of Rs. 125/- per month. The defendant made selfsame and/or similar contentions by his written statement in the present suit. The plaintiff by his application Ex. 17 submitted that additional issue be framed as follows:—

"Whether the defendant is barred by principles of res judicata to raise the contentions decided in the previous suit?"

The plaintiff further applied that a finding be made on the above additional issue in his favour and accordingly without recording any further evidence a decree as prayed be passed in the present suit. The learned Judge below by the above order dated September 8, 1969, held that the questions of merits raised by the defendant had been adjudicated upon in the previous suit and were res judicata. He, then referred to the plaintiff's application before the Rent Controller for fixation of standard and/or reasonable rent. He held that the decision of Court in the previous suit that the hearing should not be stayed till the Rent Controller decided the defendant's application was not res judicata. That decision was not disposal of any question on merits. He, therefore, held that the suit should be stayed till the disposal by the Rent Controller of the defendant's application for fixation of the standard and/or reasonable rent. He accordingly held that issues 4 and 5, viz. "(4) Whether the plaintiff is entitled to the relief claimed?" and "(5) What decree and order?", should be decided after the Rent Controller disposed of the defendant's application for fixation of standard rent.

4. Mr. Vaishnav for the plaintiff contends that the learned Judge below was wrong in holding that the issue whether the suit should be stayed till the Rent Controller decided and fixed the monthly rent was not barred by principles of res judicata. It is extremely difficult to understand this argument of Mr. Vaishnav. The question of stay and/or adjournment of a suit for certain purpose must be altogether different in two suits. It is quite clear that refusal to adjourn a previous suit can never be res judicata in connection with an application for adjournment of another suit, though

the application may be based on same and/or similar grounds. This contention made by Mr. Vaishnav appears to be frivolous. The revisional application itself is accordingly entirely frivolous. The learned Judge below was right in adjourning the suit till the Rent Controller had disposed of the question of reasonable rent.

5. It requires to be recorded that the question of res judicata that may be raised on behalf of any party in a suit should not ordinarily be disposed of as a preliminary issue as has been done in the present case. This question should normally be tried and disposed of at the final hearing of the suit; when all the issues can be adjudicated upon by Court at the same continuous hearing. The learned Judge below has not borne this principle in mind when he disposed of three issues as preliminary issues and adjourned the trial of two issues for decision on merits.

6. The rule is discharged with costs.

Rule discharged.

AIR 1972 BOMBAY 229 (V 59 C 45)

K. K. DESAI, J.

The Charity Commissioner, Maharashtra State, Bombay, Appellant v. Hirjibhoy Mancherji Kavarana and others, Respondents.

A. F. O. D. No. 290 of 1967, D/- 25-3-1971, against order of A. T. Zambre, J., City Civil Court, Bombay, D/- 17-12-1965.

Bombay Public Trusts Act (29 of 1950), Section 50-A — Power of Charity Commissioner to frame a scheme includes power to appoint trustees — (X-Ref:— Section 50).

The provisions in Section 50-A are notwithstanding anything contained in Section 50 which means an alternative independent power of framing of the Scheme has been created in favour of the Charity Commissioner and this power must be parallel and similar in all respects to the power of the Court to frame a scheme under Section 50. Hence the power of the Charity Commissioner to frame a scheme for the management or administration of a trust must include power altogether to amend and nullify the previously existing scheme of appointment, removal etc. of the trustees. The power must be sufficiently large to enact that persons in management of the trust as at the date of framing of the scheme will not continue in management and cease to be managers/or trustees. (Para 5)

DP/EP/C406/72/DGB

S. N. Naik i/b M/s. Little & Co., for Appellant; Y. S. Chitale with S. P. Bharucha i/b M/s. Gagrut and Co. (for No. 1) and V. H. Ghanekar (for Nos. 2 and 3), for Respondents.

JUDGMENT:— This is an appeal on behalf of the Charity Commissioner against the order dated December 17, 1965, made by Mr. Judge Zambre directing that clauses 7 and 8 of the scheme framed by the Charity Commissioner be dropped and consequential modifications be made in the scheme.

2. Mr. Naik for the Charity Commissioner has submitted that the finding made by the learned Judge that having regard to the scheme in Sections 47 and 47-AA the power vested in the Charity Commissioner under Section 50-A of the Bombay Public Trusts Act, 1950, to frame a scheme does not include power to appoint trustees, is contrary to the intent of the provisions in Section 50-A and not sustainable. The observation of the learned Judge that a scheme framed in respect of a public trust under Section 50-A by the Charity Commissioner would be a set of rules for guidance of the trustees and may provide for number of the trustees and the mode of appointment of trustees and vesting of the trust properties in trustees so appointed and such similar matters but does not empower the Charity Commissioner to appoint trustees of the scheme is not warranted and is contrary to the scheme of the Act.

3. Mr. Chitale for the respondent 1 has with some emphasis submitted that the learned Judge's findings are based on the scheme of the Act and the provisions in the above Sections 47 and 47-AA and the findings made by the learned Judge should accordingly be confirmed. (Mr. Chitale further attempted to argue that in so far as the learned Judge confirmed the scheme framed by the Charity Commissioner, the findings of the learned Judge were not correct. In his submission, the facts of the case did not disclose any necessity or expediency of framing of a scheme. The framing of the scheme was not in the interest of the trust in question and the learned Judge should have accordingly set aside the scheme framed by the Charity Commissioner. Now, this second and/or the last contention must be negated on the simple ground that an appeal has not been filed on behalf of the 1st respondent against the findings made by the learned Judge that the scheme has been properly framed by the Charity Commissioner and he had jurisdiction to frame the same. The second contention accordingly is negated).

4. As regards the rival contentions made on behalf of the parties on the question of the power of the Charity Commissioner to appoint trustees in the scheme framed by him, the following requires to be noticed:—

5. Under clause (11) of Section 60, being the section relating to duties, functions and powers of the Charity Commissioner, it is specifically provided that the Charity Commissioner has the power to frame or modify scheme under Section 50-A. This Section 50-A and the above clause (11) and Section 47-A have been added to the original Act by amendments made by Bombay Act VI of 1960. Section 50 has reproduced the scheme of Section 92 of the Code of Civil Procedure with certain nominal alterations and inter alia provides for the relief of settlement variations and/or alterations in a scheme and inter alia, for removal of a trustee, appointment of a new trustee, vesting of property in a trustee and certain other reliefs could also be claimed. By the amended Section 50-A inserted in the Act in 1960, it was provided as follows:—

"50-A (1) Notwithstanding anything contained in Section 50, where the Charity Commissioner has reason to believe that, in the interest of the proper management or administration of a public trust, a scheme should be settled for it, x x x x x, the Charity Commissioner may, if, x x x x, he is satisfied that it is necessary or expedient so to do, frame a scheme for the management or administration of such public trust x x x x x x x x". The sub-section (4) provided that the scheme framed shall, subject to the decision of the competent Court under Section 72, have effect as a scheme settled or altered, as the case may be, under a decree of a Court under Section 50. As is stated in the opening part of the Section 50-A, the provisions in this section are notwithstanding anything contained in Section 50. In other words, alternative independent power of framing of the scheme has been created in favour of the Charity Commissioner. This power, prima facie, must be parallel and similar in all respects to the power of the Court to frame a scheme in a suit instituted under Section 50.

Now, apart from the contents of the sections on which reliance has been placed by Mr. Chitale and which will require to be discussed, it first requires to be stated that the power vested in Court to frame and settle and vary and modify schemes which has continuously existed under Section 92 of the Code of Civil Procedure from the date of its enactment and which

otherwise existed by reason of the High Courts being guardians of charity is known to include the incidental power to make provisions for appointment etc. of trustees and for appointing trustees of the scheme itself. This power has been continued in the Courts under Section 50 of the Act and has been, by the Section 50-A added in 1960, vested in and/or delegated to the Charity Commissioner. It would be surprising, therefore, to come to the conclusion that the Legislature whilst delegating under Section 50-A power of Courts to the Charity Commissioner had not intended that he should have power to make initial appointment of the trustees of the scheme framed by him. The language of Section 50-A itself provides that the Charity Commissioner should proceed to frame a scheme under that section after giving an opportunity to be heard to the trustees of the trust concerned. It is patent that the power to frame a scheme for the management or administration of a trust must include power altogether to amend and nullify the previously existing scheme of appointment, removal etc. of the trustees. The power must be sufficiently large to enact that the persons in management of the trust as at the date of the framing of the scheme will not continue in the management and cease to be managers and/or trustees. This wider construction is, however, not necessary for the purposes of the present case, because the Charity Commissioner has not sought to remove the respondent No. 1 from continuing in the office of trustee of the trust in question. Now, it is difficult to appreciate the learned Judge's finding that the power to frame scheme is only power to frame a set of rules for the guidance of the trustees and regarding the management and trust pertaining to its actual working. By the clauses 7 and 8 of the scheme (which have been struck down) provision was made for appointment of the first trustees of the trust framed under the scheme and it was further provided that a trustee appointed under the scheme shall be a major male Parsi ordinarily residing in the State of Maharashtra. The relevant part of clause 7 provided as follows:—

"7 (a) The following persons shall be the first trustees of the said trust under the scheme.

Shri Hirjibhoy M. Kavarana and two others to be appointed by the Charity Commissioner out of the panel of x x x x. If no panels are submitted within 3 months, then the Charity Commissioner may appoint the remaining 2 trustees suo motu. Shri Hirjibhoy M. Kavarana will be in management for life and shall receive Rs. 1,500/- per

year as remuneration x x x." The learned Judge was of the view that the power to frame a scheme did not include even power to appoint initial trustees of a scheme and for that simple reason, he struck off both the clauses 7 and 8 as invalid.

6. The Section 47 provides that any person interested in a public trust or the Charity Commissioner may apply to the Court for the appointment of a new trustee in the circumstances mentioned in clauses (a) to (h) of sub-section (1). The sub-section (2) provides:—

"(2) No such application shall be entertained. — (a) unless the trustee who on account of any of the reasons mentioned in clauses (a) to (h) of sub-section (1) is not fit or available to administer the trust is the sole trustee or unless by the vacation of office by one or more trustees on account of any of the said reasons the minimum number of trustees required by the instrument, scheme, order or decree of the Court or usage or custom of the trust for the administration of the trust is reduced;" Mr. Chitale argued that under Sec. 47 even Court is not empowered to appoint a new trustee thereby meaning additional trustee on the grounds mentioned in clauses (a) to (h) of sub-section (1) of Section 47, unless the minimum number of trustees fixed by the relevant instrument, scheme, etc., is reached or is not available for administration of the trust. He, therefore, submits that the power of framing scheme conferred under Section 50-A was not larger than the power conferred on the Court under Section 47. New and additional trustees cannot, therefore, be appointed by the Charity Commissioner when he frames scheme under Section 50-A. Now, this argument is without taking notice of the fact that the Section 47 relates to one single small question of administration of public trust, the question being of appointment of additional trustees. The emphasis in the provisions of sub-section (2) is that additional trustees cannot be appointed by Court contrary to the provisions of the trust as appearing in an instrument, a scheme, an order or a decree of the Court. In breach of the provisions in such instrument, scheme, etc., the Court is not enabled to appoint additional trustees. The argument advanced is not tenable, because the section relates to the power of appointing additional trustees under the circumstances discussed above and has no bearing whatsoever on the larger power of the Court and the Charity Commissioner for framing of schemes in pursuance of the jurisdiction conferred under Sections 50 and 50-A of the Act. Similarly, the

provisions in Section 47-A which relate to ancillary powers of Court in making orders of vesting of properties in additional trustees appointed under Section 47 and the provision in Sec. 47-AA enabling the Charity Commissioner to make an application to the Court for appointment of new trustees under Section 47 have no relevance to and have no bearing on the question of jurisdiction conferred on the Court and the Charity Commissioner for framing of schemes under Sections 50 and 50-A of the Act. In my view, reliance has been placed on these sections under a misapprehension that they are relevant in considering the scope of jurisdiction of the Court and the Charity Commissioner for framing of schemes under Sections 50 and 50-A. The other sections which are referred to by the learned Judge in his judgment have not even a distant bearing on the question of jurisdiction of the Charity Commissioner to frame a scheme and appoint initial trustees of the scheme framed by him.

7. In the result, the finding made by the learned Judge that the Charity Commissioner had no power and jurisdiction to frame clauses 7 and 8 of the scheme must be held to be incorrect. These findings are set aside. The scheme framed by the Charity Commissioner will continue to include the clauses 7 and 8 as framed by him. The appeal is allowed. Costs of all parties to this appeal will come out of the estate.

Appeal allowed.

AIR 1972 BOMBAY 232 (V 59 C 46)
DESHPANDE, J.

Bindichand Hiralal Bhandari, Petitioner v. Babu Sadashiv Borhade and others, Opponents.

Spécial Civil Appln. No. 444 of 1967, D/- 11-3-1971.

Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), Sections 12, 13 and 14 — Acts or omissions of a tenant cannot deprive his sub-tenant of the statutory protection where the impugned act or omission is not that of the sub-tenant and he is not shown to have been privy to the same.

A suit was brought by a landlord for possession of a shop against his tenant for failure to pay arrears of rent for more than 6 months in spite of a notice under Section 12 (2). The suit was contested by his sub-tenant on ground that he was a lawful sub-tenant by virtue of a sublease created by the

tenant in his favour before the date of Ordinance 3 of 1969 which amended Section 15 (2) and was therefore protected under the Act.

Held that the sub-tenant could not be evicted for failure of his lessor to pay arrears in compliance with Section 12 (3). AIR 1967 Bom 210, Explained. (Para 7)

Cases Referred: Chronological Paras

AIR 1972 Bom 46 = 73 Bom LR
140, Mangharam Chubarmal v.
B. C. Patel 10

AIR 1968 SC 647 = (1968) 2 SCR
154, State of Orissa v. Sudhanshu
Sekhar Misra 9

AIR 1967 Bom 210 = 66 Bom LR
338, Indian Coffee Worker's Co-
operative Stores v. Mrs. Bachoo-
bai 8

1901 AC 495 = 70 LJPC 76, Quinn
v. Leatham 9

M. L. Pendse, for Petitioner; S. M.
Mhamane and S. K. Vaidya, for Op-
ponents Nos. 1 (A to D & F).

ORDER:— The petitioner is the original plaintiff. On 1-9-1964 he filed a suit for possession of a shop situate in Ganji Market, Saraf Bazzar, Ward No. 6 of Ahmednagar City, bearing Municipal Committee No. 2801, City Survey No. 3093, against two defendants under the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, (hereinafter referred to as the 'Rent Act') on the sole ground of defendant No. 1 tenant having failed to pay arrears of rent for more than six months in spite of service of notice under Section 12 (2) of the Rent Act. It was alleged that defendant No. 2 was running the said shop as the servant of the defendant No. 1. Defendant No. 1 did not contest and the proceedings were set ex parte against him. Defendant No. 2 contested the suit, pleading that he was a lawful sub-tenant and had paid rent to defendant No. 1 and cannot be evicted for breach of Section 12 (3) of the Rent Act by defendant No. 1.

2. The trial Court accepted the case of the plaintiff that defendant No. 2 was the servant of defendant No. 1 and passed a decree for eviction against both for non-payment of rent by defendant No. 1 and also a decree for rent against defendant No. 1. On appeal by defendant No. 2, decree for eviction against him was set aside by the District Judge holding that, he was a lawful sub-tenant and his possession was protected by the Rent Act and he cannot be evicted for failure of the defendant No. 1 to comply with Section 12 (3) of the Rent Act. The plaintiff challenges this decree in this Spl. C. A. under Article 227 of the Constitution of India.

3. Mr. Pendse for the petitioner contends that finding of fact as to the defendant No. 2 being the sub-tenant is vitiated by several errors. According to him, no rent agreement or rent receipts have been produced, nor attempt to lead evidence to prove direct lease agreement is even made, nor defendant No. 1 is examined to prove the grant of sub-lease by him to defendant No. 2. He contends that, reliance by the District Judge on an irregularly maintained rough note-book and un-proved documents of the Office of the Shop and Establishment Inspector, amounts to relying on hearsay evidence. I do not find any substance in this contention. The learned District Judge has relied on the evidence of defendant No. 2, his two witnesses and, also on the Registration Certificate under the Shops and Establishments Act issued in the years 1957 and 1959, showing that defendant No. 2 was running his own shop in the premises in dispute. This finding of fact does not cease to be so far the reasons suggested by Mr. Pendse. There is also no substance in the contention that the evidence of the plaintiff is not considered or that the judgment of the District Judge bristles with several misquoted extracts of evidence. None was however cited before me.

4. Mr. Pendse, however, contends that assuming that the defendant No. 2 is a lawful sub-tenant, he is still liable to be evicted along with the main tenant, once the main tenant, defendant No. 1, is so found liable under Section 12 (3) of the Rent Act due to his failure to pay the arrears of rent. Now, it would have been so under the ordinary law of landlord and tenant under which sub-tenant cannot possess or claim any better or independent rights apart from, the one that can be claimed through the main tenant. He has to sink or swim with the main tenant. But not so under the Rent Act. The defendant No. 2 is proved to have been a lawful sub-tenant. Sub-lease in his favour is proved to have been created before 1957. Definition of the word 'tenant', in Section 5 (11): (a) includes sub-tenant inducted lawfully before the amendment of Section 15 (2) of the Rent Act by Ordinance No. III of 1959. It will not make any difference as to whether sub-tenant is in possession of the whole or only a part of the premises leased to the tenant. Implication of this inclusive definition is that protection afforded to any tenant against his landlord under any provisions of the Rent Act, is also available to the sub-tenant against his lessor, the main tenant, in the same manner and to the same effect, as any other main tenant himself can claim against the

landlord. By creating sub-lease before the date of Ordinance No. III of 1959, the tenant ceases to furnish his landlord any cause of action for eviction under Section 13 (1) (e) of the Rent Act. Such sub-leases are rendered now lawful even though these were not so when the same were created. The landlord has to suffer such sub-leases and put up with the possession of the premises or portion thereof by the sub-tenants without any privity of contract with them. Section 14 then confers a right on the sub-tenant to claim the status of tenants on the determination of the interest of the tenants in the premises. This right is again available to the sub-tenants, whether the landlords like it or not and in spite of them.

5. It is thus clear that the protection available to sub-tenants under the Rent Act is not the creation of the contract but is statutory. It does not depend upon sweet-will or pleasure of the landlord or the main tenant and also cannot depend on their act or omission. This protection of the Rent Act is made available independently of the rights, and acts, or omission of the main tenant.

6. Section 12 of the Rent Act affords a sort of guarantee of the continuance of the tenancy and, secondly of the possession of premises to the tenant against his landlord as long as he is ready and willing to pay rent and to abide by the term of the tenancy. Any sub-tenant also is entitled to claim the same guarantee and protection, in regard to the premises or portion in his possession as against his lessor i.e., the main tenant. This can be denied to him only on his failure to pay rent to his lessor i.e., tenant, or on his non-compliance with the terms of the tenancy. This protection obviously cannot be denied to him on failure to pay rent by the tenant to the landlord or breach of any terms of the tenancy by the tenant. Such act or omission of the tenant may result in the loss of protection of the Act to him in regard to the portion in possession of the tenant. This may, however, result in the determination of tenant's interest in the portion of the premises in possession of the sub-tenant and confer the status of a tenant on him. But mere non-payment of rent by the main tenant to the landlord cannot result in the liability of the sub-tenant for eviction. This militates against the guarantees and protection afforded by this very section to the sub-tenant under Section 14 which contemplates reversion of tenant's rights in such contingency on the sub-tenant and not on the landlord. No sub-tenant ever will be able to either claim tenant's rights under Section 14 if his rights in the premises

are to determine along with the tenant, or the landlord's act or omission without his own any such failure, act, or omission. It shall also have to be borne in mind that Section 12 (3) of the Rent Act, does not appear to aim so much at landlord's right of resumption of the premises as at ensuring the receipt of the rent by him. Possession by the landlord in such contingency is more the result than the object.

7. Strong reliance is placed on the two clauses of Section 14 wherein it is said that the sub-tenant becomes tenant "on the same terms and conditions" and "subject to the provisions of the Act". The contention of Mr. Pendse that 'terms and conditions' referred to therein include liability to eviction and forfeiture of tenancy incurred by the main tenant, is simply untenable. This clause can apply only after a sub-tenant, becomes tenant in exercise of the right under this section. Mr. Pendse, however contends that accrual of such rights to the sub-tenant is controlled by Sections 12 and 13 of the Rent Act and he cannot claim any independent right or protection against eviction, if the landlord succeeds in making out a case for the main tenant's eviction under any of the clauses of Sections 12 and 13 of the Rent Act. To my mind, such construction of the above clause, "subject to provisions of this Act", of Section 14 is not warranted by the language of this section itself or Sections 12 & 13 and any such construction will render the rights and protection conferred on the sub-tenant under several provisions just illusory and ineffective. Under Section 12 (3) and Cls. (a) to (e) and (f), (j) of Section 13 (1) of the Rent Act the tenant is liable to lose protection of the Act, if he does or omits to do the acts envisaged therein. This cannot be construed to mean that such acts or omissions of any tenant can deprive the sub-tenant of the statutory protection where impugned act or omission is not his and the sub-tenant is not shown to have been privy to the same, otherwise. Under clauses (g) to (i) of Section 13 (1), landlord can claim possession on proof of his need for some purpose or the other. This claim again shall have to be tested not only against the rights and the security afforded to the tenant under sub-sections (1) of S. 12 and sub-section (2) of S. 13 and other provisions such as Sections 16 to 17-C, but the same shall also have to be tested in the light of the protection afforded to the sub-tenant in regard to the portion actually in his possession. Claim, of the landlord under clauses (k), (l) of S. 13 shall have to be examined accordingly. Any other interpretation will reduce the intended protection to sub-tenants to an absurdity. The clause 'subject to the provisions of

the Act' shall have to be construed harmoniously consistent with the protection given to the sub-tenants too. So construed, it can only mean that the sub-tenant will not be qualified to be the tenant under Section 14 when he also incurs liability for eviction under Section 12 (3), and Cls. (a) to (e), (f) and (j) of Section 13 (1) of the Rent Act for some act or omission of his or when the landlord has succeeded in proving his need against sub-tenant also under Cls. (e), (h), (i), (j) of S. 13 (1), in spite of Section 13 (2) of the Rent Act or when absence of sub-tenants need under Cls. (k), (h) is proved about the portion in his possession. In fact it is difficult to conceive how a tenant's failure to pay rent under Section 12 (3) will ever be attributable to any act or omission of the sub-tenant-excepting very remotely, and how sub-tenant will ever incur liability for eviction in favour of the new landlord in such a case. There is thus no force in the contention of Mr. Pendse that the landlord is entitled to decree for possession even against the lawful sub-tenant without any act or omission of his, on mere proof of non-compliance of Section 12 (3) by the tenant.

8. Mr. Pendse relies on the judgment in Indian Coffee Workers' Co-op. Stores v. Mrs. Bachobai, 66 Bom LR 338 = (AIR 1967 Bom 210) to support his contention. Landlord in that case has succeeded in getting a decree for possession against the tenant and sub-tenants on the ground of unlawful subletting and unauthorised construction. In the meanwhile Ordinance No. III of 1959 was enforced and the sub-tenants claimed protection under Section 15 (2) of the Rent Act, in their Spl. C. A. to this Court. Protection was denied to them by this Court in view of the finding of fact that the sub-tenants also had incurred forfeiture of their rights by being party to the said unauthorised construction. It was held that the sub-tenant could not claim protection of the Act when they had failed to observe the terms of the tenancy. This is the only and true ratio of the Division Bench judgment and it does not run counter to what I have held above. With respect I agree with the views of Division Bench so far.

9. But Mr. Pendse relies on the observations in the last two paras of the judgment at page 340 of the report. Apparently reading thereof creates an impression of these supporting his contention. On close reading, however, observations are neutral. None in fact militates against what I have said above. But the judgment ends with the following conclusion:—

"In our view, therefore, even on the assumption that the tenant defendant

No. 1 had effected the alterations, since the landlord became entitled to possession defendants Nos. 2 and 3 cannot have the protection of Section 14".

These observations in the last two paras can assume different complexion if read in the light of the above conclusion. These, can be construed to mean that the landlord need not prove any act or omission of the sub-tenant, once any act or omission of the main tenant furnishes cause of action to the landlord to claim a decree for possession. With great respect, I do not agree with this view, if these observations really so mean. But in view of the controversy and the decision in the said case as summarised above, these observations were not necessary. These observations really do not constitute the ratio of the judgment in view of the principles laid down in State of Orissa v. Sudhanshu Sekhar Misra, AIR 1968 SC 647 and Quinn v. Leathem, 1901 AC 495. Secondly, I have no quarrel with the broad principles that, rights of sub-tenants under Section 14 are controlled by Sections 12 and 13 of the Rent Act, or that if the landlord is entitled to possession under the said provisions, sub-tenant's rights under Section 14 must yield. Question, as to what extent, the landlord's rights under Sections 12 and 13 are also affected by the protection given to the sub-tenants, did not fall for, and have not received consideration, in the above judgment and hence, these observations cannot have any binding effect. I therefore do not think it necessary to refer this matter to a larger Bench.

10. I find some support to my view in the judgment of Bhasme, J. in 73 Bom LR 140 = (AIR 1972 Bom 46), (Mangharam Chubarmal v. B. C. Patel) who also found difficulty in agreeing with the above views of Division Bench. Learned Judge has also recorded express dissent therefrom.

11. Rule is accordingly discharged. No order as to costs.

Rule discharged.

AIR 1972 BOMBAY 235 (V 59 V 47)

(AT NAGPUR)

CHANDURKAR, J.

Trust for Education, Achalpur, Petitioner v. Chandrabhan Akaji Dhor, Respondent.

Special Civil Appln. No. 545 of 1970, D/- 17-11-1971 against order of Y. G. Shirke, Member, Maharashtra Revenue Tribunal, Nagpur, D/- 28-10-1969.

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 129 (b) — Exemption from compul-

sory ownership of land — A trust for education of settler's own family is not a public trust and hence not entitled to the exemption under the Section as the educational purpose referred to in clause (b) must have reference to public benefit. 1951 AC 297 & (1945) 1 All ER 198 & (1941) 1r R 323, Foll. (Paras 7 and 9)

Cases Referred: Chronological Paras
1951 AC 297 = (1951) 1 All ER 31,

Oppenheim v. Tobacco Securities Trust Co. Ltd. 9

(1945) 1 All ER 198 = 1945 Ch 123, Re: Compton Powell v.

Compton 9

1941 1r R 323, Re: Moenery 9

R. N. Deshpande, for Petitioner; N. N. Deshpande, for Respondent.

ORDER:— The question which arises in this petition is whether the lands in respect of which a trust has been made by the owner for education of the male members and children in his family are exempted from the provisions relating to the statutory transfer of ownership. The respondent is the tenant of survey number 13, area 15 acres 1 guntha, of village Bag Ambada, tahsil Achalpur, district Amravati. This field originally belonged to one Madhaorao Vithalrao Pangarkar. He got this field in a family partition made on 13-1-1950 when the respondent was already cultivating the field as a lessee. Madhaorao Pangarkar created a trust on 16-8-1960 in respect of about 60 acres of land including the land in dispute and himself became the managing trustee. The trust deed which is a registered document recites that the income of the trust property is required to be spent exclusively for the education of all the existing male children in the family as also for the education of the male children that would be born from time to time in the family.

2. When the proceedings for transfer of statutory ownership were started before the Agricultural Lands Tribunal, Achalpur, it was contended on behalf of the landlord that the tenant cannot get any right to purchase the field as it was owned by the trust for educational purposes. In his evidence the original owner stated that his two sons and his grand-son were taking education and that the field was kept separate for educational purposes. It was expressly stated by him that the trust was made exclusively for the education of the family members.

3. The Agricultural Lands Tribunal accepted the contention of the landlord and held that the provisions of Sections 46 to 49-A of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereinafter referred to as the Tenancy Act, did not apply to the field in view of the provisions of

Section 129 (b) of the Tenancy Act and the proceedings were, therefore, dropped.

4. In an appeal filed by the respondent the Special Deputy Collector reversed the order of the Agricultural Lands Tribunal and he took the view that a trust, beneficiaries of which were the members of the family, was not exempted from the provisions of compulsory transfer of ownership. Further he also held that no accounts had been produced to prove that the entire income of the land was appropriated towards the purpose for which the trust was created. He, therefore, remanded the case to the Agricultural Lands Tribunal for fixation of the purchase price.

5. The petitioner then filed a revision application before the Maharashtra Revenue Tribunal. The Revenue Tribunal took the view that the beneficiaries of the trust were the present and future members of the Pangarkar family and the benefit of the trust property was "strictly limited to the education of the born and unborn members of the family" and since the provisions of Section 129 of the Tenancy Act indicated that the protection under that section was granted only to those trusts which were created for the benefit of the public, the respondent was entitled to a transfer of ownership. The Tribunal found that the intention of the law in Section 129 was clear that the protection was given only to those trusts which were created for a public purpose. The revision application filed by the petitioner was therefore, rejected. The petitioner has now filed this petition challenging the orders of the Maharashtra Revenue Tribunal and the Special Deputy Collector.

6. In this petition also the argument for the petitioner of the learned counsel is that even a private trust for the benefit of members of the settlor's family are included in the category of lands referred to in Section 129 (b) of the Tenancy Act. It is contended that while the word "public" is expressly used when referring to an institution for public religious worship, that word is not used with reference to the other institutions such as trust for educational purpose, hospital, Panjarpole and Gaushala, and therefore, it is contended that the trust for the above purposes need not be for a public purpose so as to claim exemption under S. 129 of the Tenancy Act. Reliance was placed on the provisions of Section 88-B of the Bombay Tenancy and Agricultural Lands Act, 1948 which contains an express provision that a trust claiming an exemption under that Section must be one which is or is deemed to be registered under the Bombay Public Trusts Act, 1950, and it is contended that if the legislature intended that the bene-

fit of Section 129 of the Tenancy Act, 1958, should be given only to a trust for a public purpose, then the requirement of registration under the Bombay Public Trusts Act, 1950, would have found place in Section 129 of the Tenancy Act also.

7. The material part of Sec. 129 of the Bombay Tenancy Act, 1958, is as follows.—

"129. Nothing in the foregoing provisions except Section 2, the provisions of Chapter II (excluding Sections 21, 22, 23, 24 and 37) and Section 91 and the provisions of Chapters X and XII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in sections mentioned above, shall apply—

(a) to lands held or leased by a local authority, of university established by law in the State;

(b) to lands which are the property of a trust for an educational purpose, hospital Panjarpole, Gaushala, or an institution for public religious worship, provided the entire income of such lands is appropriated for the purposes of such trust;

(c) to lands assigned or donated by any person before the commencement of this Act for the purpose of rendering any of the following services useful to the community, namely:—

maintenance of water works, lighting or filling of water troughs for cattle;

(d) to any land taken under management by a Civil, Revenue or Criminal Court;

Provided

Explanation:— For the purpose of clause (b), a certificate granted by the Collector after holding an inquiry, that the conditions mentioned in the said clause are satisfied by a trust shall be the conclusive evidence in that behalf". It cannot be disputed that the provisions of Sections 41 to 49-A of the Tenancy Act which are contained in Chapter III of the Act are not applicable in the case of lands referred to in clauses (a) to (d) of S. 129 of the Tenancy Act. Under clause (a) lands held or leased by a local authority, or university established by law in the State are exempted from the provisions relating to statutory transfer of ownership. Similarly cl. (c) expressly refers to lands assigned or donated by any person before the commencement of the Act for the purpose of rendering services useful to the community as indicated in that clause and such lands are exempted from the operation of the provisions regarding statutory transfer of ownership. In the original Bill and the Act clause (d) was not there at all and it was introduced for the first time by Maharashtra Act No. V of 1961. It is clear that clauses (a) and (c) of

Section 129 refer to lands which are used for public purposes or purposes which are beneficial to the community. A local authority and an university are institutions for public benefit. Clause (c) expressly refers to lands assigned or donated for rendering services useful to the community, such as maintenance of water works, lighting or filling of water troughs for cattle. The scheme of clauses (a) and (c) of Section 129 cannot be left out of consideration while considering the question whether the purposes in clause (b) also must have some reference to the community at large. The purposes of Panjarpola and Gaushala are obviously public purposes. A Panjarpole connotes a charitable institution which takes care of old, sick and disabled animals. A Panjarpole is thus always run for a public charitable purpose. The nature and purpose of the institution called Gaushala is also similar. Since Panjarpole and Gaushala by their very nature are institutions of public benefit it was not necessary to qualify these words by the word "public". With reference to the institution for religious worship also the legislature has expressly stated that it is only if the institution is for public religious worship that the lands belonging to it will be exempted from the provisions relating to statutory transfer of ownership.

It is thus obvious that the scheme of the provisions of clauses (a), (b) and (c) of Section 129 of the Tenancy Act was to exempt from the operation of the provisions regarding statutory transfer of ownership all lands from which the landlord or member of his family did not receive benefit and which were set apart for public benefit. If that be the scheme, then even the trust for educational purpose referred to in clause (b) of S. 129 must have reference to public benefit. It is necessary therefore that if the trusts specified in clause (b) of Section 129 claim exemption from the operation of the provisions regarding transfer of ownership they must be trusts which are constituted for the benefit either of the public at large or some considerable portion of it answering the public description. It follows that they must be charitable trusts as "public trust" and 'charitable trust' are generally considered as synonymous expressions. (See Lewin on Trusts, 15th Edition, Chapter I, S. 2).

8. It is true that the condition of registration as a trust under the Bombay Public Trusts Act, 1950, which is required to be satisfied by the trust before it claims an exemption under Section 88-B of the Bombay Tenancy and Agricultural Lands Act, 1948 is not to be found and, indeed, could not be found in Section 129 of the Tenancy Act, 1958. The Tenancy Act, 1958 came into force in

the Vidarbha Region of the erstwhile State of Bombay with effect from 30th December 1958. The Bombay Public Trusts Act, 1950, was not then in force in the Vidarbha Region. For the first time the Act became applicable to the Vidarbha Region by virtue of the Bombay Public Trusts (Unification and Amendment) Act, 1959, which came into force on 1-2-1961. The requirement of registration under the Bombay Public Trusts Act, 1950, could not, therefore, have been made a condition for claiming the benefit of exemption under Sec. 129 and the absence of that condition, therefore, is of no significance.

9. There is no doubt that the trust which the original landlord Pangarkar has made is clearly a private family trust and is not a public charitable trust. The gift is in its nature a private or family benefaction. It is purely a personal gift and a trust for private individuals. An established principle of the law of charity is that a purpose is not charitable unless it is directed to the public benefit and the element of public benefit is the necessary condition of legal charity. (See Halsbury's Laws of England, 3rd Edition, Vol. 4, para. 488). The essential difference between a private and a public trust is that in the former beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained, but in the latter the beneficial interest must be vested in an unascertained and fluctuating body of persons, either public at large or some considerable portion of it answering a public description. A trust for the education of the members of one's own family cannot be called a public trust. In *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, 1951 AC 297, Lord Simonds has observed that a trust for the education of members of a family or of a number of families cannot be regarded as charitable. It was further observed that "a group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes." In *Re Compton Powell v. Compton*, (1945) 1 All ER 198 it was held that a gift for the education of descendants of named person introduced into their qualification a purely personal element and such gift was therefore to be regarded as a family trust and not as one for the benefit of the section of the community. In that case Lord Greene M. R. after referring to certain observations made by Gayan Duffy, J. in *Re Moenery*. (1941) Ir. R 323 said:

"If I may respectfully say so, this reasoning appears to me to be unassail-

able. Even if my view that the necessity of founding a claim upon the fact of kinship to an individual precludes the possibility of regarding a gift as charitable is too widely stated, I am of opinion that a gift for the education of descendants of named persons must be regarded as a family trust and not as one for the benefit of a section of the community on any fair view of what that phrase may mean."

It is not, therefore, possible to accept the contention that the lands in respect of which a trust was made for the education of the settler's children and their children would be entitled to the exemption under Section 129 (b) of the Tenancy Act, 1958.

10. The petition must, therefore, fail and is dismissed with costs.

Petition dismissed.

AIR 1972 BOMBAY 238 (V 59 C 48)

NAIN AND S. K. DESAI, JJ.

M/s. K. I. Suratwala and Co., Appellants v. Mahmud Bidi Works Sholapur and others, Respondents.

A. F. O. D. No. 70 of 1963, D/- 29-4-1970 against order of N. S. Pathak, Civil J. Sr. Division at Sholapur, D/- 22-10-1962.

(A) Bombay Money Lenders Act (1946), Ss. 2 (6), 25, 2 (9) (g) — Transaction between traders styled as Bidi selling agreement — Construction — Dominant intention of the transaction has to be considered in deciding its nature — On construction, the agreement held to be an unconscionable and usurious loan transaction which attracted the provisions of S. 25 — Profits mentioned in the agreement were in fact 'interest' as defined in S. 2 (6).

Where the agreement between the parties admitted receipt of Rs. 58,000/-, in lieu whereof the defendant agreed to repay the amount with 'profits' by supplying the goods described in the agreement in 48,000 bundles grossly valued at Rs. 26,400 at a fixed price per bundle, which was not to vary if the price was increased but in case of fall in the prices of the goods the defendant agreed to make good the loss so as to make up the ultimate amount agreed to be repaid i.e. Rs. 1,32,000/- (made up of Rs. 58,000/- principal plus Rs. 74,000/- as profits), on construction of the agreement.

Held that (i) the agreement was a loan transaction which provided for an escalation down of the market rate and not an escalation upwards;

(ii) that clause (8) of the agreement prohibiting the defendant No. 1 from

alienating, encumbering, or disposing of his property, movable or immovable, till the agreement was fulfilled and creating a charge in favour of the plaintiffs on the bidi trade-mark used by defendant No. 1 clearly showed the anxiety of the plaintiff to secure to himself the moneys advanced by him and indicated that the dominant intention of the so called selling agreement was to advance a loan at exorbitant interest.

(iii) that the recital in the agreement that both the parties were manufacturers of and traders in bidis reflected the anxiety of the plaintiffs to get out of the provisions of the Bombay Money Lenders Act and the definition therein of the word 'loan'.

(iv) that the amount repayable by the defendant No. 1, described as "profit" in the agreement was nothing other than interest.

(v) that the fact that plaintiffs were expecting goods at ascertainable prices in repayment of the sum advanced made no difference to the fact that what had to be repaid was a particular sum of money prefixed in the agreement. In case of sale of goods only price is charged and there is no question of charging any profit by the buyer to the seller. C. R. A. No. 356 of 1969, D/- 3-2-1970 (Bom. at Nag.), Rel. on; AIR 1946 PC 145, Ref.; AIR 1953 SC 485, Dist. (Paras 8 to 13)

(B) Debt Laws — Usurious Loans Act (1918) (10 of 1918), S. 2 (2) — Loan — Definition of loan under this Act is of wider connotation — It gives the court power to declare a transaction as loan if in its opinion the transaction is in substance a loan. (Para 14)

(C) Stamp Act (1899), S. 35 — Document not properly stamped — Admitted in evidence — Its admissibility cannot thereafter be questioned at any stage, of the same proceedings or even in appeal. AIR 1961 SC 1655, Foll. (Para 22)

Cases Referred: Chronological Paras

(1970) C. R. A. No. 356 of 1969, D/- 3-2-1970 (Bom at Nag)	16
AIR 1961 SC 1655 = (1962) 2 SCR 333, Javer Chand v. Pukhraj Surana	22
AIR 1953 SC 485 = 23 ITR 120, Shree Ram Mills Ltd. v. Commr. of Excess Profits Tax	19
AIR 1946 PC 145 = 59 Mad LW 595, Beninson v. Shiber	20

V. H. Gumaste with M. B. Kadam, for Appellants; M. D. Pathak, for Respondents.

NAIN, J.:— This is an appeal by the original plaintiffs against the judgment dated 22nd October 1962 of the learned Civil Judge, S. D., Sholapur, dismissing the plaintiffs' suit for recovery of Rupees 33,909.94.

2. The plaintiffs instituted the suit for recovery of the said amount, interest and costs. The plaintiffs are a partnership firm and it has been proved that they were registered under the Indian Partnership Act 1932. The defendants No. 1 are also a partnership firm. The defendant No. 2 is an admitted partner in the said firm. He is the person who executed the agreement, Ex. 42, which is the subject-matter of this litigation. The defendants Nos 3, 4 and 5 have denied that they were partners in the firm of defendants No. 1 at the time of the accrual of the cause of action.

3. The agreement, Ex. 42, which is the subject-matter of this litigation was executed on 25th October 1957. Thereby the plaintiffs advanced to the defendant No. 1 a sum of Rs. 58,000. The defendant No. 1 contracted to sell to the plaintiffs 48,000 bundles of bidis at Rupees 2-12-0 per bundle. The price of these 48,000 bundles worked out at the agreed rate to Rs. 1,32,000/-. The bidis were to be supplied within a period of five years from the date of the agreement in a particular proportion every month. It was provided that if the defendants committed default in supplying bidis, the balance amount then remaining out of Rupees 1,32,000/- would be recoverable by the plaintiffs from defendants No. 1. The agreement also provided that for the amount due to the plaintiffs there would be a charge on the trade-mark label of the bidis under which trade mark the defendants marketed their goods.

4. Upto 29th June 1961, the defendants delivered to the plaintiffs 35,300 bundles of bidis. The plaintiffs alleged that the defendants No. 1 failed to deliver the remaining quantity. The defendants alleged that they had delivered 35,600 bundles but were unable to prove the delivery of the difference of 300 bundles. These bidis were of the value of Rupees 98,925.06. If this amount is deducted out of Rs. 1,32,000/- we get the figure of the claim of the plaintiffs in the suit of Rs. 33,909.04. This amount the plaintiffs claimed from the defendants No. 1 in terms of the agreement Ex. 42.

4-A. The defendant No. 2 died on 18th December 1961 and the defendants Nos. 2(A) to 2(L) were joined as his heirs and legal representatives. The defendants Nos. 2(K) and 2(L) denied that they were the heirs and legal representatives of defendant No. 2.

5. In the written statement defendants No. 1 contended that the agreement, Ex. 42, was brought about by undue influence, coercion and fraud, that the amount of Rs. 58,000 was advanced as a loan by the plaintiffs to defendants No. 1 at an exorbitant rate of interest, that the transaction was governed by the Bombay Money Lenders Act, 1946, and

that defendants No. 1 were only liable to pay interest at 9 per cent. per annum. They further contended that the plaintiffs had been over-paid and that the plaintiff firm was not registered under the Indian Partnership Act, 1932, and therefore the suit was not maintainable. They also contended that Ex. 42 was a bond and was not sufficiently stamped and was therefore not admissible in evidence.

6. The trial Court held that the defendants Nos. 3 to 5 were not partners in the firm of defendants No. 1. The trial Court also held that the agreement Ex. 42 was a bond and was not properly stamped. It, however, appears that the said agreement was admitted in evidence, marked as an exhibit and referred to in the examination-in-chief and cross-examination. The trial Court further held that the agreement was not brought about by undue influence and was not void. The trial Court also held that the transaction embodied in the agreement, Ex. 42, was a money lending transaction and was an unconscionable and usurious bargain. In the result, the trial Court dismissed the plaintiffs suit with costs. The plaintiffs have, come in appeal against the said decision.

7. The first contention taken before us by Mr. Gumaste appearing for the plaintiffs is that the suit transaction is not hit by any of the provisions of the Bombay Money Lenders Act and that even the provision of Section 25 of the said Act limiting the rate of interest does not apply to it. He contended that the transaction was purely a transaction for sale of bidis and advance payment made towards the price. He therefore contended that the plaintiffs' suit has been wrongly dismissed on this ground.

8. In order to appreciate this contention it is necessary to refer to a few provisions of the Bombay Money Lenders Act. Section 2 (6) of the Bombay Money Lenders Act, 1946 defines interest and provides that interest includes any sum, by whatsoever name called, in excess of the principal paid or payable to a money-lender in consideration of or otherwise in respect of a loan, but does not include types of transactions enumerated in the said section. One of the kinds of loans, excepted from the said section is a loan to a trader except for the purposes of Sections 23 and 25. Section 2 (9) (g) provides that Sections 23 and 25 will be applicable to loans even if they were to traders. Although the learned trial Judge has referred in his judgment to Sec. 23, in our opinion Section 23 has no application because in the suit no amount of interest which is higher than the amount of loan has been claimed. But it is clear that Section 25 would apply, if we hold that the amount of Rs. 58,000/- advanced

by the plaintiffs to defendant No. 1 was a loan and the difference, between Rupees 1,32,000/- and Rs. 58,000/- was interest and the limitation on rates of interest prescribed by Section 25 would be applicable to the said transaction. Section 25 of the Bombay Money Lenders Act, 1946, provides that the State Government may from time to time by notification in the Official Gazette fix the maximum rates of interest for any local area or class of business of money-lending in respect of secured and unsecured loans. It is not in dispute that at the date of the suit transaction the rates of interest prescribed under Section 25 were 12 per cent. per annum for unsecured loans and 9 per cent. per annum for secured loans.

9. We must now turn to the agreement, Ex. 42, for its construction so as to decide whether the dominant intention of the said agreement was to advance a loan by the plaintiffs to defendant No. 1 on interest.

10. The agreement, Ex. 42, is dated 25th October 1947. It recites that the plaintiffs as well as defendants No. 1 were both manufacturers of and traders in bidis. This recital reflects the anxiety of the plaintiffs to get out of the provisions of the Bombay Money Lenders Act and the definition of the word "loan". It also recites that defendant No. 1 on the date of the agreement received from the plaintiffs Rs. 58,000/- and in lieu thereof the defendants No. 1 had agreed to 'repay the said amount with profits by supplying the goods described in the agreement'. We have later to see whether this 'profit' was to secure payment of interest and whether the supply of goods was repayment in kind and if so, whether repayment in kind would not fall in the definition of loan. Clause (2) of the agreement provides that the prevalent wholesale rate of bidis at the time of the agreement was Rs. 2-12-0 per bundle and that the amount of Rupees 1,32,000/- repayable by the defendant No. 1 to the plaintiffs was worked out at that rate for 48,000 bundles deliverable within a period of five years. Clause (4) of the agreement provides that bidis of the value of Rs. 26,400/- were to be supplied every year, out of which Rs. 11,600/- represented the principal and Rs. 14,800/- were 'profit'. This clause also provides that in this way within a period of five years, defendant No. 1 had agreed to repay the principal amount of Rs. 58,000 received from the plaintiffs and that Rs. 74,000/- were 'the amount of profit'. Clause (9) provides that if the rate of bidis went down below Rs. 2-12-0 per bundle the defendant No. 1 would supply bidis at the lower market rate then prevailing and make up the total payment

of Rs. 1,32,000/-. Neither this clause nor any other clause of the agreement provides that in case the market rate went up the bidis would be supplied at the higher market rate and consequently a smaller quantity would have to be supplied to make up the amount of Rupees 1,32,000/-. In other words the agreement provides for an escalation down of the market rate and not an escalation upwards. We might here comment on the anxiety of the plaintiffs to secure the minimum payment of Rs. 1,32,000/- even if the market rate went down. In case the market rate went up the plaintiffs would have been repaid even more than Rs. 1,32,000/-. Clause (7) of the agreement provides that if defendant No. 1 committed a breach of the agreement, the plaintiffs would be entitled to recover from the defendants No. 1 the amount of Rs. 1,32,000/- after deducting therefrom the price of the bidis delivered. This clause provides for the mode of recovery through Court but we are not concerned with the same. This clause uses the expression "after deducting the amount paid by me (defendant No. 1) towards the repayment of the aforesaid amount of Rs. 1,32,000/-" (words in bracket and underlining supplied). Cl. (8) of the agreement provides firstly that unless the agreement was fulfilled the defendants No. 1 and would not alienate or dispose of moveable and immoveable property or encumber the same; and secondly, the plaintiffs would have a charge on the bidi trade mark used by the defendants No. 1. This clause would show the anxiety of the plaintiffs to secure themselves for the advances made by them to defendant No. 1.

11-12. The anxiety of the plaintiffs to get out of the definition of the word 'loan' and the provisions of the Bombay Money Lenders Act, the provisions for 'repayment' of Rs. 1,32,000 in lieu of Rupees Rs. 58,000/-, and the attempt to describe the difference as 'profit', the provision for escalation down of the price and not for escalation upwards, the anxiety to secure at least Rs. 1,32,000/- and if possible a larger amount, provision for recovery of the balance of Rs. 1,32,000/- in case of short deliveries, reference to the value of goods delivered as "amount paid", securing the repayment of amount by negative covenant against alienation of property and by creating charge on trade mark would tend to show that the dominant purpose of the agreement, Ex. 42, is to secure the repayment of a loan advanced with usurious interest and not to secure sale of goods.

13. It would also appear to us from the terms of the agreement set out and discussed hereinabove that the difference of Rs. 74,000/- between the

amount of advance, viz. Rs. 58,000/- and the amount repayable by the defendants No. 1 to the plaintiffs and which has been described in the agreement as 'profit' is nothing other than interest. The definition of the word 'interest' in sub-section (6) of S. 2 of the Bombay Money Lenders Act provides that interest includes any 'sum' by whatsoever name called. Mr. Gumaste for the plaintiffs contended that what the defendants No. 1 were to give was bidis of the value of Rs. 74,000/- and not money. The amount of payment in excess of advance was not a 'sum' and was therefore not interest. It, however, appears to us that the amount repayable is fixed in money and is a 'sum'. It may be that the plaintiffs were expecting goods at ascertainable prices in repayment of the sum. That, however, makes no difference to the fact that what had to be repaid was a particular sum of money. This is more so because the plaintiffs were not taking any risk even on account of a fall in prices. If the prices went down they were to get larger quantity of goods. The plaintiffs, however, provided benefit to themselves by not giving any advantage to defendant No. 1, if the prices went down. In case of sale of goods only price is charged and there is no question of charging any profit by the buyer to the seller. There is no explanation from the plaintiffs as to what this profit represented. To us it is clear that the 'profit' represented nothing other than interest. We have therefore come to the conclusion that the amount of Rs. 74,000/- called 'profit' in the agreement was nothing other than interest.

14. Mr. Gumaste also contended that the definition of the 'loan' in sub-section (9) of S. 2 of the Bombay Money Lenders Act meant an advance at interest whether of money or in kind. He contended that while advance could be in kind the repayment could not be in kind. This argument is, however, based on the assumption that the repayment was in kind. In this case the repayment is provided for in money, the amount of Rs. 74,000/- is specified. It is only repayable by sale of bidis at particular prices and in case of breach the balance is payable in money. This would therefore not make the payment not in money. Repayment in money or in money's worth at ascertainable prices is repayment of a loan.

15. Mr. Gumaste contended that the agreement itself recited and there was no dispute about the fact that both the parties, viz. the plaintiffs on the one hand and defendants No. 1 on the other, were manufacturers of and traders in bidis and the Bombay Money Lenders Act would therefore have no application. This

argument would be correct except for Sections 23 and 25 of the Bombay Money Lenders Act. We are not concerned with Section 23. Section 2 (9) (g) expressly provides that Sections 23 and 25 will be applicable to loan even if they were to a trader. Section 25 would, therefore, be applicable to the suit transaction and this section provides maximum rate of interest chargeable for secured and unsecured loans. This rate at the relevant time was 9 per cent. per annum for secured loans and 12 per cent. per annum for unsecured loans.

16. A Division Bench of the Bombay High Court sitting at Nagpur held on 3-2-1970 in C. R. A. No. 356 of 1969 that in construing a document one has to look at the dominant intention of the transaction. Mr. Gumaste contended that on a true construction of the agreement, Ex. 42, the dominant intention was sale of goods and not advancement of a loan and payment of interest. We have, however, discussed the terms of the agreement itself and, in our opinion, the dominant intention of the transaction is to advance a loan and to secure its repayment along with a high rate of interest. The sale of bidis might have been mutually beneficial to both the parties but the dominant intention was not an agreement of sale but an agreement for repayment of loan with interest. It may also have been the intention of the parties to give it a colour of a sale agreement so as to take it out of the operation of the Bombay Money Lenders Act. We have, however, to see the true intention of the transaction and as we have stated above it is clear to us that the nature of the transaction is money lending transaction. However, no other provision of the Bombay Money Lenders Act, 1946, will apply to it except the two sections referred to above in view of the fact that defendants No. 1 are traders.

17. Mr. Gumaste invited our attention to the judgment of a Division Bench of this Court in Suleman Haji Ahmed Umer v. Haji Abdulla Haji Rahimtulla, 42 Bom LR 971, which brings out a distinction between a deposit and loan for the purposes of Arts. 57, 59 and 60 of the Indian Limitation Act, 1908. There the question was whether the amount advanced was a deposit repayable on demand or a loan which must be repaid within 3 years of the time when it was repayable. In our opinion, this judgment is totally irrelevant for the purposes of our case.

18. Mr. Gumaste also invited our attention to the definition of loan in Section 2 (2) of the Usurious Loans Act, 1918 (Act 10 of 1918) which provides that a 'loan' means a loan whether of money or in kind and

includes any transaction which is, in the opinion of the Court in substance a loan. In this case the loan is of money. The Usurious Loans Act 1918 gives a wider definition and provides that if a transaction is in the opinion of the Court in substance a loan, it is a loan. In this case we have already held that in our opinion the transaction was in substance a loan and therefore the said transaction would be a loan even under the Usurious Loans Act, 1918. We are however concerned with the definition of the word loan in the Bombay Money Lenders Act and have come to the conclusion that the suit transaction was one of a loan advanced within that definition.

19. Mr. Gumaste also cited to us the judgment of the Supreme Court in *Shri Ram Mills Ltd. v. Commr. of Excess Profits Tax*, AIR 1953 SC 485, where it has been held that a loan imports a positive act of lending coupled with an acceptance by the other side of the money as a loan. We have no quarrel with the proposition laid down in this judgment and we are bound by it. But as we have already shown that this was a positive act of lending of Rs. 58,000/- and it was accepted by defendant No. 1 as a loan, the transaction is a transaction of loan within the meaning of this definition. This apart from the fact that the Supreme Court was construing the word "loan" in a case arising under the Excess Profits Tax Act, 1940 and not as defined under the Bombay Money Lenders Act, 1946.

20. Mr. Gumaste also cited a judgment of the Privy Council in *Beninson v. Shiber*, AIR 1946 PC 145 but as we find that it has no application to the facts of the case before us we do not consider it necessary to discuss it.

21. Mr. Gumaste also took up through the evidence of the Managing Partner of the plaintiffs and a representative of the firm of defendant No. 1. In his evidence the Managing Partner of the plaintiffs has emphasised the fact that he is a bidi manufacturer and trader and so were the defendant No. 1 and that the plaintiffs were not money lenders; whereas the representative of the defendant No. 1 has deposed that this was intended to be a transaction of loan and that the plaintiffs were demanding interest at 24 per cent. per annum. These are the rival contentions in the evidence, but we think that the agreement has to be construed by its own terms and what we have held is on the construction of the agreement, Ex. 42, itself rather than on the rival contentions of the parties in the evidence.

22. The learned trial Judge held that the agreement, Ex. 42 was a bond, within the meaning of Section 2 (c) of the Indian Stamp Act and was liable to

be stamped with an ad valorem stamp duty due under Art. 15. We, however, find that the document had already been exhibited and used at the trial. Under Section 35 of the Indian Stamp Act once a document is so admitted in evidence and used it cannot be thereafter questioned at any stage of the same proceedings or even in appeal. We cannot therefore hold that it was open to the learned Judge to hold in the judgment that the instrument was inadmissible in evidence once it had been marked as an exhibit and admitted in evidence. The Supreme Court has also so held in the case of *Javer Chand and Ors. v. Pukhraj Surana*, AIR 1961 SC 1655.

23. We asked Mr. Gumaste whether if interest was calculated on Rupees 58,000/- even at 12 per cent. per annum which was the notified rate for unsecured loans at the time of agreement, any amount would be due by defendant No. 1 to the plaintiffs. He, however, stated that in that event nothing would be found due to the plaintiffs from the defendant No. 1. There is therefore no question of giving a decree to the plaintiffs for any amount.

24. The appeal therefore fails and is dismissed with costs.

25. Mr. Gumaste made an oral application that in case we decide against the plaintiffs, we should grant to them leave to appeal to the Supreme Court. The amount of the value of the subject-matter in dispute is undoubtedly over Rs. 20,000/- and the case turns on the interpretation of the Bombay Money Lenders Act, 1946, and construction of document, Ex. 42. It appears that the case is a fit one to appeal to the Supreme Court of India. We therefore, grant a certificate to the plaintiffs under Arts. 133 (1) (a) and (c) of the Constitution of India.

Appeal dismissed. Leave to appeal to Supreme Court granted.

AIR 1972 BOMBAY 242 (V 59 C 49)

MODY AG. C. J. AND VAIDYA, J.

Shirang Ganapati Pandit, Petitioner v. The State of Maharashtra and others, Respondents.

Special Civil Appln. No. 1402 of 1970, D/- 11-9-1970.

(A) Constitution of India, Arts. 14 and 15 — Admission to Medical College — Rule 2 of Rules framed by Government of Maharashtra for admission to B. J. Medical College, Poona and Miraj Medical College, Miraj is valid.

Rule requiring pooling together of the seats at B. J. Medical College, Poona

DP/EP/C405/72/TVN/VBB

and Miraj Medical College, Miraj and distributing them between the two colleges in the proportion of the number of students registered for the Pre-Professional Examination (Medical) at the Poona University and Shivaji University at Kolhapur is neither arbitrary nor irrational, considering the existence and history of these two Universities. The basis adopted has logical nexus with the object sought to be achieved viz. of allocating certain seats in the Poona B. J. Medical College to the students of Shivaji University because the Government is not able to provide more seats in the Miraj Medical College for the time being. Contention that the allocation ought to be on the basis of number of students who passed the examination and got minimum qualification marks was rejected on the ground that it was not practicable. The allocation had to be made sufficiently in advance of the commencement of the academic year. AIR 1970 SC 35 and Special Civil Appln. No. 2767 of 1967 (Bom). Followed. (Paras. 12 to 14)

(B) Constitution of India, Arts. 15 (4) and 46 — Admission into educational institutions — Reservation of seats for backward class in the proportion of that class to the population of the State as per last census is valid. AIR 1963 SC 649, Followed — (X-Ref:— Rule 4 (d) of Rules framed by Govt. of Maharashtra for admission to B. J. Medical College, Poona and Miraj Medical College, Miraj).

(Paras 16 and 19)
(C) Constitution of India, Arts. 15 (4) and 46 — Admission into educational institutions — Rule carrying forward vacant seats in a particular group to the other groups in the backward classes is reasonable and is allowed by provisions in Arts. 15 (4) and 46. (Rule 4 (d) of the Rules framed by Government of Maharashtra for admission to B. J. Medical College, Poona and Miraj Medical College, Miraj). (Para 21)

(D) Constitution of India, Arts. 15 (4) and 46 — Admission into educational institutions — Provision of less or minimum qualification marks in the case of appli- (contd. on col. 2)

Students (including students of backward class community)

1. Bombay University

2. Poona University

3. Nagpur University

4. Marathwada University

5. Shivaji University, Kolhapur

Five notes are added to the rule giving some further directions to the students of the Bombay University and the Nagpur University and students belonging to

cants of backward classes is permissible. (Para 20)

Cases Referred: Chronological Paras

AIR 1970 SC 35 = (1970) 1 SCR

413, Chitra Ghosh v. Union of India. 13

AIR 1969 SC 1 = (1969) 1 SCR 103,

Trilokinath Tiku v. State of Jammu and Kashmir 18

AIR 1968 SC 1012 = (1968) 2 SCR

786, P. Rajendran v. State of Madras 22

AIR 1968 SC 1379 = (1968) 3 SCR

595, State of Andhra Pradesh v. P. Sagar 18

(1967) Special Civil Appln. No. 2767 of 1957 (Bom) 23

AIR 1964 SC 1823 = (1964) 6 SCR

368, Chitralekha v. State of Mysore 18

AIR 1963 SC 649 = (1963) Supp

(1) SCR 439, M. R. Balaji v. State of Mysore 16

M. V. Paranjpe, V. A. Gangal and Sharad Manohar, for Petitioner; T. R. Andhyarjina i/b M/s. Little and Co. Attorney (for Nos. 1 and 2), B. R. Ketkar (for No. 3) and Prakash S. Shah (for No. 4), for Respondents.

VAIDYA, J.:— In this petition under Art. 226 of the Constitution of India, the validity of Rr. 1 [N. B. 1 (C) 2] 2, 4 (c) and (d) of the Rules framed by the Government of Maharashtra for admission to Government Medical Colleges is challenged by the petitioner, who sought admission in B. J. Medical College in Poona and was refused admission following the said rules.

2. The rules are framed by the Government for admission to all the Government Medical Colleges in the State for the academic year 1970-71. The rules are annexed to the petition as Exhibit A. Rule 1 in substance, lays down that a candidate for admission must submit an application in writing upon a prescribed form to the authorities mentioned therein. The students of the different Universities are directed to forward applications to the authority mentioned against the University concerned as follows:

Authority to whom application should be forwarded.

The Dean, Grant Medical College, Byculla, Bombay 8.

The Dean, B. J. Medical College, Poona.

The Dean, Medical College Nagpur.

The Dean Medical College, Aurangabad.

The Principal, Miraj Medical College, Miraj.

scheduled castes, scheduled tribes, etc. The notes in Rule 1 which are relevant so far as this petition is concerned are

"N. B. 1(c): Although the seats at the Miraj Medical College and B. J. Medical College, Poona, are pooled together and distributed between the two colleges in the proportion of the number of students registered for pre-professional examination (Medical) at the Poona University and the Shivaji University, Kolhapur, vide rule 2, the students of the Shivaji University should submit a single application for admission to Principal, Miraj Medical College, Miraj and the students of the Poona University should submit a single application to the Dean, B. J. Medical College Poona, as they are the authorities to fill in the seats allotted to the students of respective Universities. Applications submitted by the students wrongly will not be considered.

N. B. 2. The students who have secured less than 45 per cent. of total marks will not be considered for admission. Similarly the students belonging to the Scheduled Castes, Scheduled Tribes etc., and applying for admission to reserved seat should have secured not less than 40 per cent. of total marks".

Rule 2 which is the most material rule relevant to the challenge in this petition runs as follows:—

"Admissions are granted once a year only at the Medical Colleges mentioned in Rule 1 in the beginning of the academic year. Except the seats for the nominees of the Government of India and the seats at the B. J. Medical College, Poona and Miraj Medical College, Miraj, all the seats at each medical college are earmarked for the students of the Universities to which the particular medical college is affiliated. For admission to the B. J. Medical College, Poona and Miraj Medical College, Miraj, the seats at the two Medical Colleges, should be pooled together and distributed between the two colleges in the proportion of the number of students registered for the Pre-Professional Examination (Medical) at the Poona University and the Shivaji University, Kolhapur". Rule 3 deals with the qualifications of the candidates and the certificates which they should furnish and we are not concerned with that rule in this petition. Rule 4 (a) lays down that selection of students amongst those who have applied for admissions to a medical college will be on the basis of merit as disclosed in the marks obtained in the Science subjects including additional paper on Physics at the qualifying examinations specified under R. 3(a) of a particular University in Maharashtra State, modified with respect to the career of the student; and it lays down that credit will be given to students having extra-curricular qualifications such as sports qualifications. It says that the same conditions will also govern the selection inter se of candidates for the

reserved places at the Colleges. Rule 4(b) gives a preference to sons and daughters or dependents of persons in the defence forces. Rule 4 (c) run as follows:—

"Other Backward Classes as mentioned in the uniform list of Backward Classes for the whole of Maharashtra under G. R. E. and S. W. D. No. CBC 1467-M dated the 13th October 1967, and as amended from time to time will be eligible for admissions against the reserved seats in the Medical College". The percentage of these seats reserved is provided in Rule 4 (d) which runs as under:—

"The percentage of seats reserved at each medical College after excluding the reserved seats for the nominees of the Miraj Medical Centre and D. M. P. qualification holders, will be as follows:—

Category.	Percentage of reservation.
1. Scheduled castes and Nav Buddhas converted from scheduled castes	13 per cent.
2. Scheduled tribes including those outside specified areas	7 per cent.
3. Denotified tribes and Nomadic tribes	4 per cent.
4. Other backward classes	10 per cent.

Reserved seats remaining vacant in any of the above mentioned groups for want of students in that group should go to the other groups even if the percentage in a particular group exceeds the percentage prescribed for that group provided that the total percentage of the seats does not exceed 34 per cent. of the total seats reserved for Backward Classes. These seats should go to the members of the general public only when Backward Class students from any of the above mentioned group are not available to fill up the seats. The above percentage should be inclusive of the numbers of students who get admission on merits and should not be in addition thereto".

It is not necessary to refer to the other rules which deal with certain reservations, provisions in the different Universities, exemption from payment of fees in respect of certain communities, scholarships for lady students, some facilities and other matters relating to admission, as the said provisions are not relevant or referred to in support of this petition and we are not therefore, concerned with them in this case.

3. It is not disputed that as a result of the application of the impugned rules the petitioner was refused admission, although he secured 66.8 per cent. marks in S. S. C. examination in the year 1968 and was declared to have passed the examination in the first class in the Pre-Professional (Medical) examination held in

April 1970 by the Poona University obtaining about 66.8 per cent. marks in the examination. As he did not belong to any of the communities for whom seats were reserved, he had to compete with the general students on merits. The scarcity of seats available for students of Poona University and Shivaji University has unfortunately deprived the petitioner of a chance to become a student for the M. B. B. S. course in the B. J. Medical College at Poona.

4. According to the petitioner, the students, who passed in first class (that is to say, those obtaining 60 per cent. and above marks) at the examination held by the Poona University in the year 1970 were 467 in number. The petitioner's number in the order of merits was 151. It is undisputed that 200 seats are available in the year 1970-71 for the first year M. B. B. S. course at the B. J. Medical College, Poona, and out of these two seats have been reserved for students nominated by Government of India. The remaining 198 seats are available to the students of the Poona University and Shivaji University. Thirty-four per cent of the available seats are reserved for scheduled castes, scheduled tribes and other tribes and backward classes as per Rule 4 (d) stated above. The remaining seats available for the general candidates were further allocated between the general students of Poona University and Shivaji University on the basis of the proportion between the number of students registered at the Pre-Professional (Medical) examination in the two Universities in the year 1970. The number of students registered at the Poona University was 2450 and the number of students registered at the Shivaji University was 2039 and as a result of applying the proportion between the said number in the year 1970-71, 59 seats were allocated out of the seats available in the B. J. Medical College for the students passing pre-professional examination from the Shivaji University. The petitioner alleged that only 92 seats remained for the students of the Poona University, who were not belonging to the scheduled castes, scheduled tribes or backward classes. The petitioner's grievance is that because of this allocation of the seat in the B. J. Medical College to the students of the Shivaji University he lost his chance of being admitted to the B. J. Medical College. It is alleged in the petition that in the year 1969, 125 seats were made available for the students of the Poona University, and even a student who got 65 per cent marks in that year in the Poona University i.e., less than the marks obtained by the petitioner, was admitted to the College, where-

as as a result of the reduction of the seats available to the students of Poona University in the year 1970-71, he lost his chance of getting himself admitted, even though he got more marks.

5. It is unnecessary to refer to certain other allegations made in connection with the attempts of the petitioner's father and uncle to get information about the rules relating to admission and the statistics with regard to the students of the two Universities seeking admission in the medical colleges, as all the relevant facts are now before us in the form of affidavits in reply and affidavits in rejoinder. It is undisputed that the pooling of the students is going on since 1964, when the Shivaji University was started and the system of pooling is not challenged in the petition. What is challenged by petitioner is the validity of the allocation made in the seats in the B. J. Medical College on the basis of the number of students registered at the Pre-Professional (Medical) examination in the two Universities. It is alleged that Rule 2 quoted above, which directs the allocation on the basis of students so registered is arbitrary, irrational and must be struck down as making a discrimination between the students of the Poona University and the students of Shivaji University without any reasonable or logical nexus with the object of the Government in giving admission to the best students to the medical colleges. Nota Bene 2 in Rule 1 and Rule 4 (d) which provides for reservation of seats for scheduled castes, scheduled tribes and backward classes is challenged on the ground that the percentages fixed for these communities under that rule are arbitrary, that the classification of the backward classes on the basis of castes is in contravention of Article 15 (1) of the Constitution inasmuch as there was nothing to show that the castes mentioned in the list of backward classes were socially and educationally backward within the meaning of clause (4) of Article 15, and that the discrimination made between the students belonging to those communities and other in N. B. 2 to Rule 1 is not a discrimination made for the advancement of the said classes. It is also alleged that an unreasonable discrimination is made between the students of Poona University and the students of other Universities in the State by compelling them to share the seats available in a Medical College affiliated to that University with the students of another University. The petitioner, therefore, prayed for a writ of mandamus or any other appropriate writ, order or direction directing the State

of Maharashtra, respondent No. 1 and the Dean B. J. Medical College respondent No. 2, to admit the petitioner for the first year M. B. B. S. course in the B. J. Medical College, Poona, or in the alternative to issue a writ directing the said respondents to consider the question of giving him admission. The Vice-Chancellor of Poona University, Poona was made respondent No. 3 to the petition and the Vice-Chancellor, Shivaji University, Kolhapur was made respondent No. 4. Persons likely to be interested or affected by the result of the petition were joined as respondents Nos. 5 to 24.

6. The petition is resisted by respondents Nos. 1 to 4. On behalf of the State of Maharashtra, reliance is placed on an affidavit in reply filed by Mr. S. T. Vanjari, Under Secretary to the Government of Maharashtra, Urban Development, Public Health and Housing Department and also on the affidavits of (1) Dr. Vishwanath Ganpat Ganla, Dean of the B. J. Medical College, Poona and (2) Mr. V. S. Mathkar, Under Secretary to the Government of Maharashtra, Education, Sports and Social Welfare Department. In the affidavit filed by Mr. Vanjari it is stated that the allocation of seats between the students of the Shivaji University and the Poona University had to be made on account of the circumstances in which these two Universities came into existence and the reservation for the various communities was made on the basis of the proportion of scheduled castes, scheduled tribes and backward classes to the entire population of the Maharashtra State, according to the last census. It is also stated that between the various classes of students to whom seats are allocated according to the rules, admission to the medical colleges is given strictly on the basis of their merits. In the affidavit filed by Mr. Mathkar, it is pointed out that in view of Articles 38 and 46 of the Constitution the policy of the Government of Maharashtra in the field of social welfare and welfare of backward classes is governed by the principles stated in the said articles, viz. to strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life and the State shall promote with special care the educational and economic interest of the weaker sections of the people. He refers to the classification of backward classes in the State of Maharashtra as (1) the scheduled castes including Navabuddhas (2) scheduled tribes including tribes outside specified areas (3) Nomadic tribes and

denotified tribes; and (4) other backward classes, and goes on to say:—

"The history of the backward classes is the history of the rigid caste system prevailing in India over the centuries and the evils attending this system. It is common knowledge that many castes in India have remained backward on account of centuries of suppression under which they lived and under which they were denied opportunities of social progress and upliftment. The upliftment of the backward classes was engaging the attention of State even before the advent of independence. A committee under the chairmanship of Mr. O. H. B. Starte, I. C. S. was appointed by the Government of the Province of Bombay to go into the question of the depressed classes and aboriginal tribes. This committee, submitted its report in the year 1930 and made certain recommendations inter alia, about the measures to be adopted for the upliftment of the backward classes. The said committee had prepared a list of backward classes in the Province of Bombay and it was annexed to its report as Appendix No. 2. The said list describes the backward classes by their caste names but it is clear from the said report that the classes named therein are classes which on account of historical reasons, were socially and educationally backward and required a special treatment for the purpose of their upliftment."

He averred that after the coming into force of the Constitution of India, as it was felt that the classification of backward classes on the basis of their castes was not feasible in view of the provisions of Articles 16 (2) and 16 (4), the Government by its resolution No. 490/46, dated November 1, 1950 cancelled the earlier classification of communities as advanced, intermediate and backward classes and prepared a fresh list of backward classes in respect of the entire State of Bombay as it existed then prior to its reorganisation on November 1, 1956. The said list, however, was more or less the same list as prepared by the Starte Committee. After the reorganisation of the former State of Bombay under the States Reorganisation Act, 1956, certain other communities in the areas comprised by the former States of Madhya Pradesh and Hyderabad and States of Saurashtra and Kutch were added to the list. After the formation of the Maharashtra State in 1960, once again the Government contemplated drawing up a uniform list of backward classes applicable throughout the State of Maharashtra so that the backward classes in the State may receive uniform treatment and benefits and accordingly a list was prepared on

October 1, 1962 which comprised the scheduled castes, scheduled tribes and backward classes in the districts which are described as Marathawada districts and Vidarbha districts. Again on October 13, 1967 the list was further altered and in a new list containing the names of 185 backward classes was prepared and it is stated that this list was prepared taking into consideration the social and educational backwardness of the various castes. The affidavit further refers to another committee known as the Deshmukh Committee appointed in 1961 to go into the question of reservation for backward classes in the services, which recommended inter alia that percentage reservation for backward classes should be linked to the population statistics of the entire State for State level recruitment and districtwise for district level recruitment. Acting on this recommendation, the Government of Maharashtra in the General Administration Department passed a resolution dated April 9, 1965, whereby after reviewing the Government's previous orders regarding the reservation of vacancies for members of the backward classes and concessions in their favour in the matter of recruitment to the Government services, in the light of the recommendation of the Deshmukh Committee, the Government ordered in modification of the then existing orders, that the reservation of vacancies in the Government services for the backward classes should be as follows:—

- | | |
|---|--------------|
| (1) Scheduled castes and scheduled castes converted to Buddhism | 13 per cent. |
| (2) Scheduled tribes including those outside specified areas | 7 per cent. |
| (3) Denotified tribes and Nomadic tribes | 4 per cent. |
| (4) Other backward communities | 10 per cent. |

It is, therefore, averred in the affidavit that the percentage adopted by the Government for reservation of vacancies in the Government services for backward classes by the aforesaid resolution was on the basis of the population of the respective categories of backward classes mentioned above, except in the case of the last category, in which case the percentage of reservation was very much lower than that category deserved having regard to its population in the State. Following the very principle, the Government of Maharashtra by its resolution No. EBC 2169/2167-J, dt. July 10, 1969 adopted the same percentage basis for reservation of percentage of seats for backward classes

in Government education institutions for all types of courses. The Government further directed that if the reserved seats remained vacant in any of the above mentioned groups for want of students in that group, such seats should go to the other groups even if the percentage prescribed for them is thereby exceeded provided that the total percentage of the seats prescribed for all the backward classes does not exceed 34 per cent. The Government directed that the seats not filled by backward classes should go to the members of the general public only when backward classes from any of the above mentioned groups were not available to fill up those seats. The percentages so reserved included the number of students who got admission on merit. The affidavit explained that it is because of this basis that the percentage relating to admission of these communities was fixed in Rule 4 (d) of the rules relating to admission to Government medical College.

7. Respondent No. 2 filed an affidavit stating that the admissions to that college were made strictly according to the rules prescribed by the Government and according to the merits of the candidates ascertained and determined according to the rules of admission.

8. On behalf of respondent No. 4, Vice Chancellor of Shivaji University, reliance was placed on an affidavit of the Deputy Registrar of that University submitting that the allocation of seats to the students of the Shivaji University was legal and proper and the petition was liable to be dismissed and the petitioner could not make any grievance in respect of the rules framed by the Government.

9. The uncle of the petitioner, one Shankar Vishnu Pandit, filed an affidavit in rejoinder denying submissions made in the affidavits relied on by the respondents and reiterating the contentions made in the petition.

10. It is undisputed that before 1964, the areas at present served by Shivaji University were served by Poona University and the Miraj Medical College at Miraj, which is at present affiliated to Shivaji University, was, prior to 1964, affiliated to Poona University. Thus prior to 1964, even the students, who had passed their qualifying examination from the colleges in the area which is now served by Shivaji University, had to seek admission to the B. J. Medical College at Poona as well as to the Miraj Medical College, and students, who had passed their qualifying examination from the college which is affiliated to Poona University, had to seek admission to the Miraj Medical College as well as the

B. J. Medical College. The Shivaji University Act, 1962, defines the University area as meaning the area specified in the schedule, and the scheduled to the Act described the area as (1) Kolhapur District (2) Ratnagiri District (3) Sangli District (4) Satara District and (5) Sholapur District. After the enactment of the Shivaji University Act, the area of the Poona University, as defined in the Poona University Act, 1948, comprised of (1) Poona District (2) Ahmednagar District (3) Nasik District, (4) Kolaba District (5) Dhulia District (6) Thana District and (7) Jalgaon District. The general rule which was followed by the Government of Maharashtra for admission to the medical colleges was that the students of a University were admitted only to the college, which was the medical college affiliated to that University. In the case of Shivaji University, however, it was found that following the said rule would result in denying opportunities to the students of Shivaji University as it was difficult to increase the number of seats at the Miraj Medical College. It is stated in the affidavit filed by Mr. Vanjari that prior to 1964, the number of seats available to Poona University (ignoring the reservation for the nominees of the Government of India) was 230 of which 200 seats were available at the B. J. Medical College and 30 seats were available at the Miraj Medical College. But in the year 1964 the number of seats in the Miraj Medical College was increased to 60. The Government, therefore considered that after 1964 to limit the opportunities available to the students of Shivaji University to a maximum number of 60 in the Miraj Medical college was not fair to the students of the areas of that University, particularly because it was found that the number of students seeking admission to medical college increased year by year even in that area. The Government was, therefore, compelled to pool together the seats available at the B. J. Medical College and Miraj Medical College from the year in which the Shivaji University started working i.e. 1964, after so pooling the seats available in the two colleges, the Government allotted the seats to the students of Poona University and Shivaji University on the basis of the students registered in the said two Universities respectively for the pre-profession qualifying examination held prior to the first year course in medicine to which admission was to be made.

11. What is challenged in this petition is not the rule regarding the pooling of the seats in the medical colleges at Poona and Miraj but the methods adopted by the Government for allocating the seats between the two Universities on the basis of students registered

in the said two Universities, as stated above. Mr. Paranjpe the learned counsel for the petitioner, urged in the first instance that the allocation made on the basis of students so registered for the examination had no nexus with the object of securing the best students available into the medical colleges. According to him, the Government ought to have allocated the seats not on the basis of the number of students registered for the examination but on the basis of the number of students who passed the examination and got the minimum qualification marks of 45 per cent. in the case of other students and 40 per cent. in the case of scheduled caste and other backward class students. He faintly tried to argue, that the method adopted by the Government in allocating the seats was arbitrary and discriminated against the students at Poona University in depriving them of the seats available to them, in a college affiliated to their University, although in respect of other students in the Maharashtra State, the students were entitled to seek admission in the medical colleges affiliated to their respective University.

12. These submissions have to be rejected on the simple ground that the petitioner cannot complain of any discrimination between himself, who is a student of Poona University, and other students of other Universities. The students of two Universities form two distinct classes in view of the separate examinations conducted by the said Universities. The Government of Maharashtra wants to provide fair opportunities to students of the Universities by equitably allotting the seats available at Poona and Miraj. The nature and object of classifying the students into two classes as students of Poona University and Shivaji University cannot be, therefore, assailed as contravening Art. 14 or 15 of the Constitution. The classification is based on intelligible differentia and is reasonable having regard to the existence of these two Universities and their history. The basis adopted by the Government has a relevant connection with the object sought to be achieved by the Government, viz., of allocating certain seats in the Poona B. J. Medical College to the students of Shivaji University because the Government is not in a position to provide more seats in the Miraj Medical College for the time being.

13. The question of admitting the best students on the basis of their merits arises only after the said object of allocation is fulfilled. The petitioner has no right to ask for any relief from this Court on the ground that the allocation so made by the Government of the seats in Poona B. J. Medical College works against him. Poona B. J. Medical College

admittedly is a college run by the Government. It is for the Government to lay down the criteria for eligibility. The Government cannot be denied the right to decide from what sources the admission will be made. It is open to them, therefore, to admit the students from Shivaji University into that college, if they find it impossible to give fair opportunity to the students of that University. A somewhat similar question arose in a recent case in *Chitra Ghosh v. Union of India*, AIR 1970 SC 35 where Mr. Justice Grover speaking for the Court laid down:—

"That essentially is a question of policy and depends inter alia on an overall assessment and survey of the requirement of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification".

It is clear that the Government of Maharashtra in the present case has taken into consideration the number of students in the two Universities, viz., Poona University and Shivaji University, and has adopted an objective test of determining the proportion of allocation on the basis of students registered for the examinations to be passed for qualifying for the first M. B. B. S. course.

14. Mr. Paranjpe, however, submitted that all those who were registered for the examination may not pass; and all those who pass may not get the qualifying marks; and when all those who get the qualifying marks may not seek admission in the medical college; and, therefore, the number of students registered for the examination cannot be a rational basis for determining the allocation. This contention has no merit. In theory it may be possible to conceive that only those who seek admission on the basis of securing qualifying marks must be taken into consideration for allocation. In practice, however, such a method would result in a great number of difficulties in working out the rule. The allocation of seats has to be made sufficiently in advance of the commencement of the academic year. It is common knowledge that immediately after the results are out, there is a rush for admission to these medical colleges. The college authorities must know in advance how many students of Shivaji University and Poona University have to be admitted and on what basis. It is also possible that the Government has in view the danger of an unhealthy rivalry developing between the two Universities for securing a larger

number of seats in the medical colleges which may ultimately result in a fall in the standard of education. It cannot, therefore, be said that the basis adopted by the Government is unreasonable or irrational. It has a rational connection with the object of the Government to allocate certain seats to the students of the Shivaji University in time for the college authorities to know how many students could be admitted to the college and on what basis.

15. The only other ground which was urged by Mr. Paranjpe in support of the petition was that the reservations made for the scheduled castes and scheduled tribes and backward classes on the basis of the proportion of these communities to the population of the State, as stated in the affidavit filed by Mr. Mathkar, was irrational, and further that the classification of the other backward classes on the basis of castes was illegal. He contended that the provision contained in Rule 4 (d) laying down that the reserved seats remaining vacant in any of the reserved group for want of students in that group should go to the other groups of scheduled castes, and scheduled tribes and backward classes, was also unworkable and irrational.

16. We find no substance in any of these contentions. It is possible that some other mode of reserving the seats may be adopted, but it cannot be said that the basis of the proportion of population adopted by the Government of Maharashtra in reserving seats for scheduled castes and scheduled tribes and other backward classes on the basis of the last census is in any manner unreasonable. In the leading case on the subject *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649 Gajendragadkar, J., as he then was, speaking for the Court laid down the principles as follows, while setting aside an order of the Government of Mysore which resulted in reservation of seats for 68 per cent of population of Mysore State treated as backward classes as plainly inconsistent with Article 15 (4):—

"In our country where social and economic conditions differ from State to State, it would be idle to expect absolute uniformity of approach; but in taking executive action to implement the policy of Art. 15 (4), it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Article 46 and the preamble of the Constitution. It is for the attainment of social and economic justice that Art. 15 (4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under

Art. 15 or 29 (2). The context, therefore, requires that the executive action taken by the State must be based on an objective approach free from all extraneous pressures. The said action is intended to do social and economic justice and must be taken in a manner that justice is and should be done".

Applying the said principles to the facts of the present case, we find that the Government has adopted an objective and just test for determining the proportion of seats to be reserved in the medical colleges.

17. It is further clear from the affidavit filed by Mr. Mathkar that the castes which are classified as other backward classes were so classified originally on the basis of the recommendations of the State Committee which was appointed under a resolution passed by the then Bombay Legislative Council "to enquire into the educational economic and social condition of the Depressed Classes (untouchables) and of the Aboriginal Tribes in the Presidency and to recommend measures for their uplift". That Committee, after considering the state of society in the whole of the then Bombay Presidency, recommended that the backward classes should be divided into depressed classes which would consist of untouchable classes only and the aboriginal and Hill Tribes and other backward classes. As stated in the affidavit of Mr. Mathkar, the classifications had to be revised from time to time due to reorganisation of the States, the merger of States and the recommendations of a committee known as Deshmukh Committee, which, no doubt, was appointed only to report on reservation for backward classes in services. That committee also considered the social and economic conditions as well as the representation in the services of the various communities and recommended the classification, which is adopted by the Government of Maharashtra, into (1) scheduled castes and scheduled castes converted to Buddhism, (2) scheduled tribes including those outside specified areas, (3) denotified tribes and nomadic tribes, and (4) other backward classes. We accept the statement of Mr. Mathkar that this classification is based on a careful consideration of the social and economic conditions of the castes by the Government of Bombay (now Maharashtra). That the Deshmukh Committee recommended that the percentage of reservations for backward classes should be modified and linked to the population statistics of the State; and that this recommendation was substantially implemented by the Government of Maharashtra is not disputed although so far as the other backward classes are concerned, the percentage of reservation for them is less

than the proportion of their population to the population of the State.

18. It is clear from the affidavit of Mr. Mathkar that the classification of certain castes as "other backward classes" in the aforesaid list dated October 13, 1967, is made on considering their backward social, economic and educational conditions. This is permitted under Art. 15 (4) of the Constitution. They are some of the castes recognised as "other backward classes" in the report made by the Backward Classes Commission (appointed by the President under Art. 340 of the Constitution in 1953) taking into consideration: (1) their low social position in the traditional castes hierarchy of Hindu Society; (2) lack of general educational advancement among the major section of a caste or community; (3) inadequate or no representation in Government service; (4) inadequate representation in the field of trade, commerce and industry and (5) their economic backwardness and consequent inability to take advantage of the available opportunities as well as the recent trends in their advancement as a result of various measures initiated by Government (vide paras 25, 27 of Chapter V of the Backward Classes Commission Report, 1955). Although the Government has not implemented its recommendations, perhaps in view of the number involved, — the Court can take judicial notice of its contents under Section 57 of the Evidence Act as it is a report submitted by the Commission appointed under Art. 340 of the Constitution and as such, a matter of public history and a document of reference. Apart from this report, however, we are satisfied in the present case from the affidavit of Mr. Mathkar, the State Committee Report and Deshmukh Committee Report that the criterion adopted by the Government of Maharashtra for determining the backwardness of the castes in the said list dated October 13, 1967 as "other backward classes" is their social, economic and educational backwardness similar to the backwardness from which the scheduled castes and scheduled tribes suffer. Hence, Mr. Paranjpe's challenge to the classification as one contravening Art. 15 (1) is futile. Vide Shah, J. para 6 in *State of Andhra Pradesh v. P. Sagar*, AIR 1968 SC 1379 (1380) and para 4 in *Trilokinath Tikur v. State of Jammu and Kashmir*, AIR 1969 SC 1; and also Subba Rao, J. (as he then was) paras 15, 18 and 19 in *Chitrlekha v. State of Mysore*, AIR 1964 SC 1823.

19. Mr. Paranjpe further submitted that since the rest of the population of the State was not concerned with the Shivaji and Poona Universities, it was illogical to adopt the basis of the proportion of these communities to the entire population of the whole State in deter-

mining the proportion of seats to be reserved in medical colleges in the areas of Shivaji and Poona Universities. We do not find anything illogical in it. Reservation is permitted under Art. 15 (4) for the backward classes and, perhaps, there is no better basis for such reservation than the proportion of the population of the backward classes to the whole population of the State. It would be totally unreasonable to expect the State to take a separate census of the backward classes population only of the areas of the two Universities or of each of the Universities in the whole State. The contention of Mr. Paranjpe that the rest of the population of the State is not interested in the admissions of the medical colleges at these two Universities has to be rejected because the Government of Maharashtra is certainly justified in adopting a uniform rule of reservation in respect of all parts of the State; and if it has adopted a uniform rule on the basis of the population, we find nothing in it which is irrational or is hit by Article 14 or 15.

20. Mr. Paranjpe next contended that the reservation of the seats to students of these communities was also vitiated by the fact that they were qualified to apply for admission even if they got 40 per cent marks as against the minimum of 45 per cent prescribed for other students and thereby the Government instead of advancing the backward communities was encouraging them to be less advanced than the others. This argument ignores the very purpose for which Article 15 (4) was enacted. The backward communities, who are recognised as such, and the scheduled castes and scheduled tribes have been suffering from social and economic handicaps for centuries and one of the ways by which their conditions can be ameliorated by making students, who get even somewhat lower marks, to be eligible for admission to medical colleges; and this must be considered as a measure in advancement of these backward communities.

21. Similarly, the contention of Mr. Paranjpe that the rule of carrying forward the vacant seats in a particular group to the groups in the backward classes is unworkable, has no merit because, in our opinion, Rule 4 (d) is very practical and reasonable and easy of application. We do not find any difficulty in its working. The said rule is quoted above. It is manifest that the four groups mentioned in the rule are "socially and educationally backward classes of citizens" and "scheduled castes and scheduled tribes" and Art. 15 (4) lays down that nothing in Art. 15 or in clause (2) of Art. 29 shall prevent the State from making any special provision for the advancement of the said classes, castes and tribes. The Government of Maharashtra

has made such a special provision in Rule 4 (d) for the four groups mentioned therein. They can be and are given special preferences under Art. 15 (4). Under the rule, 34 per cent seats are reserved for all the four groups together and within the said 34 per cent seats, further special provision is made for filling up vacant seats reserved for any one or more of the four groups by throwing them open to students belonging to the remaining groups. All the four groups form one category of socially and educationally backward citizens. They are to be given preference. Therefore provision is made for filling up vacant seats among the seats reserved for them. The sub-division into the four groups is made obviously only to allocate the reservation to the four groups falling under the one category of socially and educationally backward citizens so that the comparatively brighter students in one group may not keep out the students of the other groups. All this, in our judgment, is permissible under Art. 15 (4) of the Constitution of India and consistent with Art. 46 which requires the State "to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and scheduled tribes". The petitioner cannot, therefore, challenge Rule 4 (d) on the ground that after reserving seats for each of the groups, it further makes special provision for the benefit of these groups by throwing open the vacant seats in one group for students of other groups or on the ground that vacant seats in any of the four groups should be thrown open to all students on merit without making them again available to students belonging to the said groups.

22. Mr. Paranjpe relied on a decision of the Supreme Court in *P. Rajendran v. State of Madras*, AIR 1968 SC 1012 and contended that there a district-wise selection was struck down as defeating the object of getting the best students. But there the object was admittedly solely the object of getting the best student on merit. In the present case, the Govt. has not merely the object of getting the best students but also the objects of allocating seats between Shivaji University and Poona University and of reserving seats for scheduled castes, scheduled tribes and backward classes. In our judgment, therefore, there is nothing in the said case which supports the argument of Mr. Paranjpe that the rules framed by the Government of Maharashtra for admission to the medical colleges for the year 1970-71 offend Arts. 14 and 15 of the Constitution.

23. Mr. Desai, the learned Counsel for the Government of Maharashtra, has brought to our notice a judgment of

Tarkunde, J. in Special Civil Appln. No. 2767 of 1967 (Bom) where this Court considered, inter alia, the validity of the rules in force in 1967-68 regarding pooling of seats in the medical colleges and held that there was nothing illegal about the pooling of seats and it was pointed out that merely because some students of Poona University who got more marks than the students in the Shivaji University, would be denied an opportunity to join the medical college, the rule of allocation cannot be challenged on the ground of discrimination against the Poona University students. We respectfully agree with the conclusions arrived at there; and Mr. Paranjpe has not challenged the conclusions arrived at by the Division Bench in that case.

24. So far as the present petition is concerned, we find no substance whatsoever in the grounds urged in its support by Mr. Paranjpe and the petition must be, therefore, dismissed.

25. Rule discharged. In the circumstances of the case, no order as to costs.

Petition dismissed.

AIR 1972 BOMBAY 252 (V 59 C 50)

K. K. DESAI, J.

Abdul Hussain Shaikh Gulamali Jambawalla, Appellant v. M/s. Bombay Metal Syndicate, a firm, Respondents.

A. F. O. D. No. 863 of 1967, D/- 29-3-1971, against order of P. C. Kapadia, J., City Civil Court at Bombay, D/- 16-11-1966.

Limitation Act (1963), Art. 113 — Contract of indemnity — Cause of action — When accrues. (X-Ref:— Ss. 22, 23) (X-Ref:— Contract Act (1872), Ss. 124, 126).

The ordinary common law cause of action on a contract of indemnity arising only upon damnification and sufferance of loss has not been wiped off by the extra cause of action introduced by the rulings of Chancery and Equity Courts which vest the promisee with a right to call upon the promisor to carry out his obligations by payments to the creditors and third parties and/or by deposits made in Court in anticipation of the actions and proceedings which such creditors and third parties may take against the promisee. (Para 7)

Thus where a purchaser undertook to indemnify a seller against the amount of sales tax that may be levied and the seller was required to pay sales tax, it was permissible for him to call upon the purchaser to pay the amount directly to the authorities concerned.

DP/EP/C586/72/YPB

Since on the failure of the purchaser the seller paid the amount, the cause of action to recover the same arose on the date when he paid the amount and not on the date when he was ordered to pay sales tax. AIR 1967 SC 1315, Followed; AIR 1942 Bom 302 and AIR 1940 Bom 161, Referred to. (Para 8)

Cases Referred: Chronological Paras
AIR 1967 SC 1315 = (1967) 2 SCR 312, Shanti Swarup v. Munshi Singh 5, 7

AIR 1942 Bom 302 = 44 Bom LR 703, Gajanan Moreshwar v. Moreshwar Madan 4, 7, 8

AIR 1940 Bom 161 = 42 Bom LR 175, Shankar Nimbaji v. Laxman Supdu 8

K. P. Malkani, for Appellant Hemendra Shah with V. J. Jhaveri, for Respondents.

JUDGMENT:— This is an appeal on behalf of the original plaintiff from the judgment and decree dated November 16, 1966, of Mr. Judge Kapadia of the City Civil Court, Bombay, whereby the learned Judge tried the issue of limitation as preliminary issue and upon finding that the suit was barred by the Law of Limitation dismissed the same with costs.

2. The relevant facts are as follows:—

3. Between October 11, 1957 and January 3, 1958, the plaintiff had sold and delivered to the defendants certain different goods and had also recovered the price thereof. In the letter dated October 11, 1957, the defendants stated: "In respect of the transactions under your invoice x x x x x dated 25th September 1957 we do hereby indemnify you against any amount of sales tax that may be levied by the authorities with or without any guarantee thereof, as the case may be, as and when charged". Similar letter of indemnity was executed by the defendants on January 3, 1958. There is no dispute between the parties that in respect of the goods sold and delivered by the plaintiff to the defendants during the above period a contract of indemnity in the terms contained in the above letters existed.

4. In connection with the sales tax relating to the goods sold by the plaintiff to the defendants as mentioned above, the sales tax authorities issued an order dated February 28, 1963, calling upon the defendants (plaintiff?) to pay Rs. 3,101.25 by way of sales tax and Rs. 378/- as penalty. The plaintiff called upon the defendants to deposit the amount of tax and penalty, but the defendants failed to do so. An appeal filed by the plaintiff was dismissed on November 12, 1963. The revisional application filed by the plaintiff was dis-

missed in July 1963. Prior to the institution of the above appeal, between April 27, and July 1, 1963, the plaintiff deposited the aggregate sum of Rs. 3,479.25 with the sales tax authorities. To recover that amount the

(contd. on col. 2)

plaintiff filed the present suit on April 13, 1966. The parties were agreed before the learned Judge below that the claim in suit was governed by the provisions in Article 113 in the Schedule to the Limitation Act of 1963 which runs as follows:—

"113. Any suit for which no period of limitation three years. When the right to sue accrues is provided elsewhere in this Schedule.

Relying upon certain observations of Chagla J. (as he then was) in the case of Gajanan Moreshwar v. Moreshwar Madan, 44 Bom LR 703 = (AIR 1942 Bom 302), the learned Judge below held that in the present case the right to sue had accrued in favour of the plaintiff when the order dated February 28, 1963, demanding and/or levying sales tax and penalty was issued. As three years' period had expired from that date prior to the date of the institution of the suit, he held that the suit was barred and dismissed the same.

5. Mr. Malkani for the plaintiff has submitted that the above finding of the learned Judge is contrary to the decision of the Supreme Court in the case of Shanti Swarup v. Munshi Singh, AIR 1967 SC 1315. The effect of the observations of the Supreme Court in this case, according to Mr. Malkani, was such that in the present case the right to sue on the contracts of indemnity between the parties should be held to have accrued to the plaintiff only upon the plaintiff being damaged and suffering loss of the sum of Rs. 3,479.25 by deposit and payment thereof between April 27 and July 1, 1963. He, therefore, submitted that the suit that was filed before expiry of three years from April 27, 1963, was within the prescribed period of three years and was not barred by the Law of Limitation.

6. Mr. Jhaveri for the defendants has submitted that on a true construction of the contracts of indemnity contained in the two letters mentioned above, the plaintiff became entitled to be indemnified immediately upon the levy of the sales tax and penalty. The levy was made by the order dated February 28, 1963. In fact, in accordance with the contracts of indemnity, the plaintiff had called upon the defendants to deposit the amount of the tax and the penalty. The true construction of the contracts of indemnity was that the right to sue accrued in favour of the plaintiff immediately upon the plaintiff receiving the order dated February 28, 1963. In this connection, he relied upon the observations of Chagla, J., in the above-referred case.

7. Now, in connection with the phrase "right to sue accrues" that appears in the third column of Art. 113, one may refer to the contents of Sec-

tions 22 and 23 of the Act which relate to continuing breaches and torts and suits for compensation for acts not actionable without special damage. Without quoting the contents of these sections it is sufficient to state that the Law of Limitation has recognised that liabilities for payments of damages and/or compensation may continue to accrue from day to day newly in respect of continuing breaches of contracts and torts. One illustration of a cause of action which may continue to come into existence under a contract from time to time and day to day will be a negative covenant agreed to between purchasers and sellers in deeds of conveyances and between lessors and lessees in the deeds of leases. But this is not the subject in which it is necessary to indulge too deep. It is sufficient to state that a contract of indemnity may be such as may give rise to two and different sorts of claims which may be enforceable in a Court of law. The ordinary common law cause of action on a contract of indemnity did not arise at any date prior to damnification and/or loss that the plaintiff suffered. In other words the cause of action arose only if and when the plaintiff was damaged and suffered losses. Now, it is true that this view of the nature of contracts of indemnity was by the Chancery and/or Equity Courts considered very harsh and not sufficient to carry out the entire and true purpose of such contracts. The common law was by rulings of Chancery and Equity Courts amended and it was held that the promisee in a contract of indemnity was entitled to additional and extra cause of action vesting him with a right to call upon the promisor to carry out his obligations by payments to the creditors and third parties and/or by deposits made in Court in anticipation of the actions and proceedings which such creditors and third parties may take against the promisee in the indemnity contract. The effect of the findings made by the learned Judge below is that the above additional relief which is afforded to a promisee in an indemnity contract by Law established under rulings of the Chancery and Equity Courts was sufficient to make a finding that the cause of action which would have accrued to such promisee only

upon being damnified and suffering loss as originally at common law was not a separate cause of action. It appears to me that in spite of the discussion contained in the case of 44 Bom LR 703 = (AIR 1942 Bom 302) there is no justification in holding against the plaintiff-indemnified promisee that a fresh cause of action does not accrue to him under the same contract of indemnity when he is in fact damnified and/or suffers loss. It is true that by the law of indemnity as amended by the rulings of the Chancery and Equity Courts, promisee in an indemnity contract would have a cause of action to claim relief of directions that the promisor do make payment to the third party creditor so that in fact the promisor (promisee?) is never damnified. It is true that in this very connection the promisee may claim relief of deposit of the relevant amount in a Court of law so that the promisee can have the deposited money in hand for payment to the third party creditor. This is a new cause of action created by the rulings of the Chancery Courts. This has not wiped off the common law cause of action vested in a promisee under an indemnity contract for enforcement of obligation on the indemnity contract itself by seeking a direct decree against the promisee (promisor?). To such decree he was entitled at common law only upon damnification and sufferance of loss. This cause of action arises only upon damnification and sufferance of loss. The observations made above are in consonance with the observations of the Supreme Court in the case of AIR 1967 SC 1315 where in paragraph 5, Their Lordships observed:—

"The vendees, in the present case, covenanted to the vendors not only to purchase the property mentioned in the sale deed but also to relieve the vendors from the liability of the mortgages, and in that sense there was an implied contract to indemnify the vendors. The cause of action in such a case arises when the plaintiff-vendors are actually damnified. The mere fact that a mortgage decree has been obtained against the plaintiff is not sufficient to put the statute in motion. In other words, the statute runs not when the event happens which caused the loss but on the actual damnification."

8. In view of the above observations of the Supreme Court, I do not deem it necessary to discuss the observations of Chagla, J., in the case of 44 Bom LR 703 = (AIR 1942 Bom 302) mentioned above as also the contrary statements of law contained in the judgment of Lokur, J. in the case of Shan-kar Nimbaji v. Laxman Supdu, 42 Bom LR 175 = (AIR 1940 Bom 161), which

both cases are referred to in the judgment of the learned Judge. In my view, on a true construction of the contracts of indemnity admitted between the parties, it was permissible for the plaintiff to call upon the defendants to pay the amounts claimed in the order dated February 28, 1963, directly to the sales tax authorities. That was because of the additional cause of action afforded by rulings of Courts of Equity. It was, however, permissible for the plaintiff to wait and institute the present suit on the basis of the original cause of action arising at common law upon damnification and sufferance of loss. The plaintiff was for the first time damnified and suffered losses for which he was entitled to be indemnified when he made payments between April 27 and July 1, 1963. The plaintiff's suit was within three years from the date of the above period and accordingly within the time prescribed by Article 113.

9. In the result, the finding of the learned Judge on the question of limitation is set aside. The decree dismissing the suit is set aside. The suit is referred back to the trial Court for further disposal according to law. The defendants will pay costs of this appeal. Order accordingly.

AIR 1972 BOMBAY 254 (V 59 C 51)

MODY AND CHANDRACHUD, JJ.

Bibi Batool and others, Petitioners v. The Principal Judge, City Civil Court, Bombay and others, Opponents.

Special Civil Appln. Nos. 1116, 1138 of 1966 and O. S. Misc. Petn. No. 478 of 1966, D/- 23-8-1967.

(A) Bombay Municipal Corporation Act (3 of 1888), S. 105-B and Chap. V-A — As amended by Maharashtra Act 14 of 1961 — Constitutionality — Section 105-B and provisions of Chap. V-A do not violate Art. 14 of the Constitution and are valid. (Paras 43, 44)

(B) Constitution of India, Art. 14 — Legislation vesting discretion in authority — Guiding principles to test its constitutionality under Art. 14.

(Paras 26, 27, 43)

(A+B) When a legislation vests discretion in the nature of an option in an authority it would not amount to discrimination if there exist principles which would guide that authority in the exercise of its discretion. Such guiding principles may be specifically stated in the Act itself or they can be gathered from the various provisions of that Act, including its title and preamble or even

from the statement of objects and reasons of the Act. Such guiding principles may also be yielded by the surrounding circumstances which existed at the date of the legislation and which occasioned the legislation. Such surrounding circumstances may be gathered from facts of which the Court itself can take judicial notice or from evidence in the form of affidavits. The opinion of the State Government, however, cannot be said to form part of the surrounding circumstances. It cannot, therefore, be legitimately referred to for this purpose.

(Paras 26, 27)

The classification of tenants into tenants of corporation premises and tenants of non-corporation premises in S. 105-B is based on justifiable reason and such classification has rational nexus with the object and policy of the Bombay Act which introduced Chap. V-A. AIR 1967 SC 1581, Applied.

(Para 17)

Section 105-B gives to the commissioner a discretion or option to select one out of the two procedures for recovery of corporation premises, viz. (i) under Chapter V-A which is quasi judicial and (ii) under the general law through ordinary courts. But there are no principles to guide the Commissioner in the exercise of his discretion to resort to one or the other of the two procedures and to pick and choose between occupiers and occupiers of corporation premises.

(Para 28)

The test to judge whether a remedy is more drastic than another or not is whether one remedy is substantially different from the other from the point of view of the incidence of prejudice which may be caused to the parties against whom the proceedings may result in such orders.

(Para 29)

The two procedures available are, however, substantially similar and, therefore, the procedure under Chap. V-A is not more drastic or more prejudicial than the ordinary procedure to be followed in the ordinary courts of law.

(Para 42)

The principle to be applied in such cases is that when there is an option to pick and choose, the existence of both the factors, namely the element of the special procedure being more drastic and the element of lack of guidance, would make the legislation void and violative of Art. 14. But if either of them is absent, so far as the legislation itself is concerned, it would not be violative of Article 14.

(Para 43)

Though there is a lack of guiding principles as the two procedures available under Chap. V-A are substantially similar there is no denial of equality and the impugned provisions do not violate Art. 14. Case law discussed.

(Paras 43, 44)

(C) Precedents — Binding effect of a decision — Does not depend upon whether a particular argument was considered or not, provided that the point with reference to which an argument was subsequently raised was actually decided — (X-Ref:— Civil P. C. (1908), Pre.). AIR 1963 SC 151, Rel. on. (Para 15)

(D) Precedents — Decision based upon two or more independent reasons each of which sufficient to justify final conclusion and decision based on cumulative effect of decision on several points— Distinction between as to binding effect of — (X-Ref:— Civil P. C. (1908), Pre.).

Where a decision has been reached for two independent reasons, either of which taken individually was sufficient by itself to justify the final conclusion, it cannot be urged that the decision on one of the reasons is the only or main factor leading to the conclusion and the decision on the other is in the nature of obiter. In that class of cases the decision on each of the two points being capable of leading to the conclusion actually reached in that case would lay down a ratio and such ratio on each of the two points would be binding on any lower court. In the other class of cases would fall a final conclusion arrived at as a result of the decisions on several points, the conclusion being based on the cumulative effect of the decisions on each of those points in that case. The final conclusion would in that class of cases rest on the cumulative support of the decisions on each of the points and such a conclusion would serve as a precedent and be of binding effect only in those cases where all such reasons cumulatively exist, but in cases where any of those reasons is absent, though the other reasons be present it would be open to the Court to assess the effect of the absence of any particular reason or reasons and after assigning due effect to them to reach its own conclusion. (Para 43)

Cases Referred: Chronological Paras

AIR 1967 SC 122 = (1966) Supp	
SCR 401, State of J. & K. v. Bakshi Gulam Mohamed	33
AIR 1967 SC 361 = (1967) 1 SCR 739, Bharat Barrel and Drum Mfg. Co. v. L. K. Bose	32
AIR 1967 SC 1581 = Civil Appeal No. 1101 of 1965, D/- 4-4-1967, Northern India Caters (P) Ltd. v. State of Punjab	11, 17, 25
AIR 1967 SC 1895 = Civil Appeals Nos. 526, 527 and 529 of 1966, D/- 10-4-1967, M/s. Devi Das Gopal Krishnan v. State of Punjab	24
AIR 1966 SC 282 = (1965) 2 SCR 453, Calcutta Dock Labour Board v. Jaffar Imam	34

- AIR 1965 SC 247 = 1965-1 Cri LJ 236, Ram Sarup v. Union of India
- AIR 1964 SC 728 = (1964) 5 SCR 344, Workmen of B. L. and Co. Ltd. v. B. L. and Co. Ltd.
- AIR 1964 SC 914 = (1964) 1 Lab LJ 12, Associated Cement Staff Union v. Associated Cement Co. Ltd.
- AIR 1963 SC 151 = (1963) 2 SCR 774, Somawanti v. State of Punjab
- AIR 1963 SC 375 = (1963) 2 SCR 943, State of Mysore v. Shivabappa
- (1962) 1 Lab LJ 287 = (1962) 4 Fac LR 508 (SC), Remington Rand of India v. Its Workmen
- (1962) 1 Lab LJ 629 = (1962) 4 Fac LR 180 (SC), Western India Match Co. v. Industrial Tribunal
- AIR 1961 SC 1062 = (1961) 3 SCR 287, Visheshwara Singh v. Commr. of Income-tax
- AIR 1961 SC 1245 = (1962) 1 SCR 151, Jagannath Prasad v. State of Uttar Pradesh
- AIR 1961 SC 1457 = (1962) 1 SCR 574, Daryao v. State of U. P.
- AIR 1961 SC 1602 = (1962) 2 SCR 125, Jyoti Pershad v. Union Territory of Delhi
- AIR 1961 SC 1731 = (1962) 2 SCR 169, P. J. Irani v. State of Madras
- (1961) 42 ITR 203 (All), Commr. of Income-tax v. Man Mal Uttam Chand
- AIR 1958 Madh Pra 103 = 1957 Jab LJ 1011 (FB), Surajmal v. State of Madhya Pradesh
- AIR 1957 SC 38 = 1956 SCR 781, Burn and Co. v. Their employees
- AIR 1957 SC 233 = 1955 SCR 98, New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd.
- AIR 1957 SC 503 = 1957 SCR 678 = 1957 Cri LJ 605, Asgarali Nazarali Singaporewalla v. State of Bombay
- AIR 1956 Bom 304 = 59 Bom LR 786, C. R. H. Readymoney Ltd. v. State of Bombay
- AIR 1955 All 496 = 1955 All LJ 665, Sharda Prasad v. A. G. of Uttar Pradesh
- AIR 1954 SC 153 = 1954 SCR 572, Baburao Shantaram More v. Bombay Housing Board
- AIR 1954 SC 545 = 1955 SCR 448, Suraj Mall Mohta & Co. v. A. V. Viswanatha Sastri
- AIR 1953 SC 404 = 1954 SCR 30 = 1953 Cri LJ 1621, Kedar Nath Bajoria v. State of West Bengal
- AIR 1952 SC 75 = 1952 SCR 284 = 1952 Cri LJ 510, State of West Bengal v. Anwar Ali Sarkar
- AIR 1952 SC 123 = 1952 SCR 435 = 1952 Cri LJ 805, Kathi Raning Rawat v. State of Saurashtra
- 1950 AC 361 = 1950-1 All ER 737, Jacobs v. London County Council
- 1934-2 KB 206 = 103 LJKB 429, London Jewellers Ltd. v. Attenborough
- AIR 1916 PC 78 = 43 Ind App 91, Sheoparsan Singh v. Ramnandan Prasad Narayan Singh
- In Special Civil Appln. No. 1116 of 1966: S. C. Chagla i/b. M/s. Gagrut & Co. with M. M. Bhagadia, Attorneys, for Petitioners; C. J. Shah i/b Crawford Baylay and Co. Attorneys for Opponent No. 2
- H. M. Seervai, Advocate General with A. M. Setalvad i/b M/s. Little and Co., for Opponent No. 7, Advocate General as per Court's notice.
- In O. S. Misc. Petn. No. 478 of 1966: S. J. Sorabji with B. N. Zaiwalla i/b P. S. Parikh and Co. Attorneys, for Petitioners; C. J. Shah with A. M. Desai Attorneys, for Opponents Nos. 1 and 2, H. M. Seervai Advocate General with A. M. Setalvad i/b Little and Co. Attorneys, for Opponent No. 3.
- In Special Civil Appln. No. 1138 of 1966: S. J. Sorabji with V. R. Chhatrapati i/b M/s. Chhatrapati and Co., for Petitioners; C. J. Shah i/b M/s. Crawford Bayley and Co. Attorneys, for Respondent No. 3. H. M. Seervai Advocate General with A. M. Setalvad, i/b M/s. Little and Co. Attorneys, for Opponent No. 7, Advocate General as per court's notice.
- MODY, J.:**— Orders of eviction have been passed against the petitioners in these three petitions in respect of "corporation premises" under the special provisions contained in Chap. V-A of the Bombay Municipal Corporation Act, 1888. The petitioners in two of the three petitions have filed their petitions under Art. 227 of the Constitution of India and the petitioner in the third petition has filed its petition under Art. 226 challenging the validity of the order of eviction passed against each of them. Various grounds have been taken in each of the three petitions in support of the challenge, but all the three petitions raise one common question which is a question of law. The common question is whether the provisions of Chapter V-A of the Bombay Municipal Corporation Act, and particularly Section 105-B thereof, violate Arts. 14 and 19 (1) (f) and (g) of the Constitution and are therefore void. Counsel in all the three petitions stated that they were agreed that the above question be tried as a preliminary point in all these three matters as a common question and that only thereafter each

of the three matters be dealt with separately if and to the extent it may be necessary.

2. The provisions of Chapter V-A were introduced in the Bombay Municipal Corporation Act by a Maharashtra Act, being Act No. XIV of 1961, as an amendment to the main Act. Sec. 105-A contains the definitions of "Commissioner", "corporation premises" and "unauthorised occupation in relation to any corporation premises". These definitions are not material for the purpose of this case. Section 105-B contains six sub-sections all of which are not relevant. Sub-sections (1) and (2) are very material and they read as follows:—

"105-B. (1) Where the Commissioner is satisfied—

(a) that the person authorised to occupy any Corporation premises has, whether before or after the commencement of the Bombay Municipal Corporation (Amendment) Act, 1960,—

(i) not paid for a period of more than two months, the rent or taxes lawfully due from him in respect of such premises; or

(ii) sub-let, contrary to the terms or conditions of his occupation, the whole or any part of such premises; or

(iii) committed, or is committing, such acts of waste as are likely to diminish materially the value or impair substantially the utility, of the premises; or

(iv) otherwise acted in contravention of any of the terms, express or implied, under which he is authorised to occupy such premises;

(b) that any person is in unauthorised occupation of any corporation premises;

(c) that any corporation premises in the occupation of any person are required by the corporation in the public interest, the Commissioner may notwithstanding anything contained in any law for the time being in force, by notice (served by post or by affixing a copy of it on the outer door or some other conspicuous part of such premises, or in such other manner as may be provided for by regulations, order that that person, as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within one month of the date of the service of the notice.

(2) Before an order under sub-section (1) is made against any person, the Commissioner shall issue, in the manner hereinafter provided, a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

The notice shall,—

(a) specify the grounds on which the order of eviction is proposed to be made and

(b) require all persons concerned, that is to say, all persons who are or may be in occupation of, or claim interest

in, the corporation premises to show cause against the proposed order, on or before such date as is specified in the notice. If such person makes an application to the Commissioner for the extension of the period specified in the notice, the Commissioner may grant the same on such terms as to payment and recovery of the amount claimed in the notice, as he deems fit.

Any written statement put in by any person and documents produced, in pursuance of the notice, shall be filed with the record of the case, and such person shall be entitled to appear before the Commissioner by Advocate, attorney or pleader.

The notice to be served under this sub-section shall be served in the manner provided for the service of a notice under sub-section (1); and thereupon the notice shall be deemed to have been duly given to all persons concerned."

3. These provisions indicate that the Commissioner is to be satisfied as mentioned therein at two stages, the first stage is before he issues a show cause notice and the second is before he makes his final order of eviction.

The first satisfaction is a mere prima facie satisfaction, arrived at ex parte, on such material as is then placed before him. The only purpose or object for providing for such satisfaction is to prevent him from issuing a show cause notice wantonly or out of caprice. The final satisfaction however is to be reached after duly considering all the material placed before him as a result of the inquiry held by him after notice to the occupier of corporation premises concerned. In the decision of this case before us what is material is this final satisfaction and it is this final satisfaction to which reference will be made in this judgment.

4. Sub-section (3) of S. 105-B empowers the Commissioner to evict a person who refuses or fails to comply with an order made under sub-s. (1). Sub-s. (6) empowers the Commissioner to cancel an order made by him under sub-s. (1) if the person against whom the order has been made, vacates the premises or complies with certain terms of the order as more specifically mentioned in sub-s. (6).

5. Section 105-E reads as under: "The Commissioner shall, for the purpose of holding any Enquiry under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) any other matter which may be prescribed by regulations made under Section 105-H".

6. Sub-section (1) of S. 105-F provides that an appeal shall lie from every order of the Commissioner made in respect of any corporation premises, under Section 105-B or S. 105-C, to an appellate officer who shall be the Principal Judge of the City Civil Court of Bombay or such other judicial officer in Greater Bombay of not less than ten years' standing, as the principal Judge may designate in this behalf. Sub-section (2) provides a period of thirty days for filing an appeal from an order under Sec. 105-B or S. 105-C; the period to be calculated as mentioned in that sub-section. The proviso to that sub-section empowers the appellate officer to entertain the appeal after the expiry of the said period of thirty days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. Sub-section (4) provides that every appeal shall be disposed of by the appellate officer as expeditiously as possible.

7. Section 105-G provides that save as otherwise expressly provided in this Chapter, every order made by the Commissioner or the appellate officer under that Chapter shall be final, and shall not be called in question in any original suit, application or execution proceeding.

8. Although the common question relates to a challenge under Art. 19 (1) (f) & (g), no contention has been advanced in respect of the same. The contention about the violation of Art. 14 has been pressed. In support of the contention that Section 105-B violates Art. 14, two main contentions have been urged. The first contention is that Section 105-B differentiates between persons in possession or occupation of corporation premises and persons in possession or occupation of non-corporation premises, that is to say, premises other than the Corporation premises, and that there is no valid basis for making such differentiation. The second contention is that even assuming that there is a valid basis for making such differentiation, there is discrimination *inter se*, i. e., within the class of persons in possession or occupation of corporation premises because of three reasons. The first reason is that Section 105-B gave to the Commissioner a discretion or option to select one out of two procedures for recovery of corporation premises, the two procedures being the one under Chap. V-A and the other under the general law through ordinary courts, the two procedures being alternative and not substitutive. The second reason is that the procedure for recovery of corporation premises under Chap. V-A is more drastic and more pre-

judicial than that under the general law. And the third reason is that the discretion so given to the Commissioner is an unguided and unfettered discretion of an executive officer.

9. As regards the first contention, Mr. Setalvad, the learned Counsel for the State, contended that a differentiation has been made between persons in possession and occupation of corporation premises on the one hand and persons in possession and occupation of non-corporation premises on the other, but that the differentiation has been made on a valid basis, the classification having been validly made. As regards the second contention he did not dispute the first reason stated by Mr. Sorabji, the learned Counsel for some of the petitioners. He, however, disputed the second and the third reasons. As regards the second reason he contended that the alternative procedure under Chap. V-A is not more drastic or more prejudicial to the person against whom it is adopted as compared with the procedure under the general law and followed in the ordinary courts of law. As regards the third reason he contended that the discretion given to the Commissioner is not unguided or unfettered. He contended that the object and purpose of introducing Chap. V-A by the Maharashtra Act XIV of 1961 and the policy underlying the provisions of Chap. V-A is to provide for speedier recovery of corporation premises and that the policy furnishes guidance to the Commissioner in the exercise of his discretion in selecting one out of the two procedures. He contended that the object and policy is disclosed by the provisions of Chap. V-A itself, the Statement of Objects and Reasons in connection with the Maharashtra Act XIV of 1961 and the affidavit in reply filed on behalf of the State. He contended that in view of this object and policy a condition must be read as it were under Section 105-B to the effect that the Commissioner shall adopt the special procedure under Chapter V-A if he is satisfied that speedier recovery of Corporation premises is necessary in a particular case.

10. The provisions of Chap. V-A clearly show — and it is not at all disputed before us — that the special procedure provided for under Chap. V-A is a quasi-judicial and principles of natural justice would apply to it.

11. In the case of the Northern India Caterers Private Ltd. v. State of Punjab, being Civil Appeal No. 1101 of 1965, which was decided by the Supreme Court by its judgment dated 4-4-1967 (reported in AIR 1967 SC 1581), which Judgment is not yet reported, Section 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, XXXI of 1959, was held to be violative

of Art. 14. The petitioners before us contend that material provisions of the Punjab Act are substantially similar to those of Chapter VA and that therefore we must hold that Section 105-B also violates Article 14 and is therefore void. It is really because of that judgment that the above common question is being tried by us as a preliminary point. For arriving at a correct assessment of the effect of that Supreme Court Judgment in deciding the point raised before us it is necessary to first refer to the material provisions of the Punjab Act.

12. The preamble of the Punjab Act states that it was passed to provide for eviction of unauthorised occupants from public premises and for certain incidental matters. Section 2 (e) defines "public premises" and, briefly stated, they mean premises belonging to the State Government, District Board, Municipal Committee, notified area committee or panchayat. Section 3 provides that a person shall be deemed to be in unauthorised occupation of any public premises if he falls within the various categories mentioned in that section. A comparison of Section 3 of the Punjab Act and Section 105-B, sub-section (1), of the Bombay Act shows that their provisions are similar in all material respects. As a matter of fact, there is no dispute that they are materially similar. Section 4 provides that if the Collector is of opinion that any person is in unauthorised occupation of public premises and that he should be evicted, he shall issue a notice in writing calling upon such person to show cause why an order of eviction should not be made against him and that the notice shall specify the grounds on which the order of eviction is proposed to be made and require all persons concerned to show cause against the proposed order within the time specified in the section. The provisions of sub-sections (1) and (2) of Section 4 of the Punjab Act are materially similar to those of sub-section (2) of Section 105-B of the Bombay Act. Section 5 of the Punjab Act provides that if, after considering the cause, if any, shown and the evidence produced by such person and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the public premises are in unauthorised occupation, he may make an order of eviction for reasons to be recorded therein. This provision in the Punjab Act is materially similar to the corresponding provision contained in the Bombay Act, there being a few minor differences. For example, the words "for reasons to be recorded therein" occurring in the Punjab Act do not find place in the Bombay Act.

Sub-section (2) of Section 5 and sub-sections (1) and (2) of Section 6 and Section 7 of the Punjab Act materially correspond to sub-sections (3), (4) and (5) of Section 105-B and Section 105-C of the Bombay Act. The provisions of Section 8 of the Punjab Act are identical with those of Section 105-E of the Bombay Act. Section 9 of the Punjab Act provides for an appeal to the Commissioner from every order of the Collector made under Section 5 or Section 7. The other provisions about appeal contained in Section 9 of the Punjab Act are materially similar to the corresponding provisions contained in Section 105-F of the Bombay Act. The provisions of Sections 10 and 12 of the Punjab Act are materially similar to those of Sections 105-G and 105-H of the Bombay Act. Section 11 of the Punjab Act provides for protection of action taken in good faith under that Act. The provisions of that section are not material to the question which arises before us.

13. A comparison of the provisions of the two Acts show that a material difference exists between them only on two points. Sub-section (2) of Section 105-B specifically provides that the person against whom the proceedings are taken under that section shall be entitled to appear before the Collector by advocate, attorney or pleader. There is no such specific provision in the Punjab Act. The other point is that the Punjab Act provides for an appeal against the order of the Collector to the Commissioner who also is an executive officer, whereas Sec. 105-F provides for an appeal against the order of the Municipal Commissioner to a judicial officer. The judicial officer provided for is a senior and experienced judicial officer because the section provides that the appeal shall lie to the Principal Judge of the City Civil Court of Bombay or such other judicial officer in Greater Bombay of not less than ten years' standing as the Principal Judge may designate.

14. The said Northern India case was heard by a Bench of five Judges of the Supreme Court and decided by a majority of three Judges who held Section 5 to be void. We will refer to the Judgment of the majority delivered by Shelat, J. The Judgment shows that in that case contentions similar to the two contentions raised before us of discrimination by classification and of discretion inter se the class of persons similarly situated were urged. Because of the rival contentions urged before us about the effect of that Judgment on the point to be decided by us, it is necessary to refer to that judgment in some detail. The Judgment first refers

to the Statement of Objects and Reasons. It states that the objects and reasons for the enactment of the Punjab Act were that there was no provision in the Land Revenue Code or in any other Act providing for summary removal of unauthorised encroachments or occupation of Government, Nazul and other specified properties that the only procedure available to Government was to sue the party concerned in a Civil Court which was a cumbersome procedure involving delay and that therefore to keep all Government owned lands free from encroachments and unlawful possessions it was necessary to provide a speedy machinery. The Judgment then refers to the various provisions of the Act to which we have already referred. It then considers the contention urged in that case that the special provisions for eviction under the Punjab Act impliedly repealed the Government's ordinary remedy for eviction under the ordinary law and negatives it. There is no such contention before us. It then considers the contention which was of the nature of the first contention before us as to whether the classification between public premises and other than public premises was valid. In so doing the Judgment, refers to the Statement of Objects and Reasons as indicating that the Act was passed, inter alia, to provide a speedier machinery for eviction of unauthorised occupants from public properties as against lengthy proceedings under the ordinary law of eviction involving delay. In discussing this point about classification the Judgment uses phrases and words like "It is possible to say" and "Assuming" which would show that the statements in the Judgments were made as an expression of only a prima facie opinion that the differentiation and classification was valid but without expressly so deciding it. The Judgment indicates that it was the prima facie opinion of the Supreme Court that the segregation of tenants of public properties and premises from the tenants of private properties was based on justifiable reason and that such segregation had a rational nexus with the object and policy of the Act. The Judgment then proceeds to consider the second head of attack on the ground of discrimination inter se the tenants and occupants of Government premises. The Judgment considers certain previous Judgments of the Supreme Court and states that the principle which emerges from those decisions is that discrimination would result if there are two available procedures one more drastic or prejudicial to the party concerned than the other and which can be applied at the arbitrary will of the au-

thority entrusted with such discretion. The Judgment holds, firstly, that under Section 5 of the Punjab Act the Collector has a discretion or option to select one of two remedies, the one being under the Code of Civil Procedure and the other being under Section 5. Secondly, the Judgment then reaches a conclusion that the remedy provided under Sections 4 and 5 was more drastic than that of the ordinary remedy under the Code of Civil Procedure. We reproduce the words material in this connection:—

"There can be no doubt that if the Collector were to proceed under Sections 4 and 5, the remedy is drastic, for a mere opinion by him that a person is in unauthorised occupation authorises him to issue a show cause notice and his satisfaction under Section 5 is sufficient for him to pass an order of eviction and then to recover under Section 7 rent in arrears and damages which he may assess in respect of such premises as arrears of land revenue" and.

"The procedure under Section 5 is obviously more drastic and prejudicial than the one under the Civil Procedure Code where the litigant can get the benefit of a trial by an ordinary court dealing with the ordinary law of the land with the right of appeal, revision, etc. as against the person who is proceeded against under Section 5 of the Act as his case would be disposed of by an executive officer of the Government, whose decision rests on his mere satisfaction, subject no doubt to an appeal, but before another executive officer, viz., the Commissioner."

The Judgment also reaches the third conclusion that Section 5 does not lay down any guiding principle or policy under which the Collector has to decide in which cases he should follow one or the other procedure and, therefore, the choice is entirely left to his arbitrary will. It also finds in that connection that there can be no doubt that Section 5 confers an additional remedy over and above the remedy by way of suit and that by providing two alternative remedies to the Government and leaving it to the unguided discretion of the Collector to resort to one or the other and to pick and choose some of those in occupation of public properties and premises for the application of the more drastic procedure under Section 5, that section has lent itself open to the charge of discrimination and as being violative of Art. 14. The Judgment, in consequence, declared Section 5 to be void as it manifestly violated the right of equality guaranteed by Article 14.

15. Mr. Sorabji once contended that the Supreme Court Judgment is "binding" on us. Now we are not deal-

ing with the Punjab Act, but with another piece of legislation. This case, therefore, necessitates an examination of the provisions of the Bombay Legislation, an examination whether the procedure under Chapter V-A is more drastic, an examination of what the object and policy of the Bombay legislation is and whether it furnishes any guidance for the exercise of a discretion by the Commissioner and then consider what is the effect of the decision in the case of the Northern India Caterers on the contentions before us relating to the Bombay legislation. As we are considering a piece of legislation different from that considered by the Supreme Court, it would be the ratio and reasoning of the Supreme Court Judgment which would be binding on us. We must, therefore, examine the provisions of the Bombay Legislation and ascertain whether the provisions of the two pieces of legislation are identical or similar or in any way different. If there is no material difference, we would be bound by the Supreme Court Judgment and must hold the Bombay legislation void by way of analogy. If, however, there is any material difference we will have to consider to what extent, if at all it will affect the application of the ratio and reasoning of the Judgment in the case of the Northern India Caterers to the case before us. Mr. Sorabji invited our attention to the decision in three cases in support of his contention that under Article 14 of the Constitution the law declared by the Supreme Court is binding on the High Courts even if some aspect or some argument has not been considered by the Supreme Court. The three Judgments he referred to were in *Sharda Prasad v. A. G. of Uttar Pradesh*, AIR 1955 All 496, *Commr. of Income-tax v. Man Mal Uttam Chand*, (1961) 42 ITR 203 (All) and *Somawanti v. State of Punjab*, AIR 1963 SC 151.

As the last Judgment is that of the Supreme Court it is not necessary to refer to the two earlier Judgments which are of the High Courts. The Judgment of the Supreme Court in *Somawanti's case*, AIR 1963 SC 151 lays down that the binding effect of a decision does not depend upon whether a particular argument was considered or not provided that the point with reference to which an argument was subsequently advanced was actually decided. We will bear this principle in mind and refer to it at the appropriate time when that point arises during the course of our Judgment.

16. The Bombay Rents, Hotel and Lodging House Rates Control Act, being Act 57 of 1947, gives special protection to tenants, inter alia, of premises situated within the area of Greater Bombay. Sec-

tion 4 of that Act, however, excludes the application of its provisions to any premises belonging inter alia, to a local authority, which would include the Bombay Municipal Corporation. In the case of *Baburao Shantaram More v. Bombay Housing Board* 1954 SCR 572 = (AIR 1954 SC 153), Section 4 was challenged as being ultra vires of Article 14 of the Constitution on the ground that it discriminated against tenants of properties belonging to Government or local authority, in that such tenants were denied the benefits of the Bombay Rent Act which were available to all other tenants in Bombay. That challenge was repelled by the Supreme Court in that Judgment on the ground that the two classes of tenants were not by force of circumstances placed on equal footing and the tenants of Government or local authority would not therefore complain of any denial of equality before the law or equal protection of the law and that there was no real discrimination, because the two classes were not similarly situated. In that case the classification of tenants into those of properties belonging to Government or local authority and of those of properties belonging to persons other than the Government or local authority was held not to be discriminatory for the purposes of the Bombay Rent Act.

17. In the case of the Northern India Caterers, Civil Appeal No. 1101 of 1965 D/- 4-4-1967 = (Reported in AIR 1967 SC 1581) the Supreme Court has reiterated that the two tests for a valid classification are that it must be founded on an intelligible differentia which distinguishes those who are grouped together from the others and that that differentia must have a rational relation to the objects sought to be achieved by the Act and that when, therefore an enactment is challenged on the ground of discrimination, the Court must first ascertain the object sought to be achieved by the legislature and then apply the two tests. In that case the Supreme Court was considering the Punjab Act the provisions of which for the purpose of deciding as to classification are practically similar to those of Chapter V-A of the Bombay Act. The Supreme Court has, as stated earlier, not finally decided the point about classification, but it has expressed an opinion that it is possible to say that in making the classification Section 5 of the Punjab Act did not violate the fundamental right guaranteed by Article 14. That opinion having been expressed on a parallel legislation is entitled to the highest respect. In expressing that opinion the Supreme Court considered the Objects and Reasons and the Preamble of the Punjab Act, and reached the conclu-

sion that that Act was passed to provide for eviction of unauthorised occupants from public properties and premises, and to keep such properties free from encroachment and unlawful possession and to provide a speedier machinery for that purpose as against the lengthy proceedings under the ordinary law of eviction involving delay. The Judgment further states that it is possible to say that there is an intelligible differentia between the two classes of occupiers and that they are similarly situated in that in the case of public properties and premises the members of the public have a vital interest and are interested in seeing that such properties and premises are freed from encroachment and unauthorised occupation as speedily as possible. It then states that it is also possible to contend that such classification is justified in that it is in the interest of the public that speedy recovery of rents and speedy eviction of unauthorised occupiers is made possible through the instrumentality of a speedier procedure instead of the elaborate procedure by way of suit involving both expense and delay. The Statement of Objects and Reasons in respect of the Maharashtra Act XIV of 1961 and the Preamble of that Act is, for the present purposes, very similar to that of the Punjab Act. The above reasoning of the Supreme Court, therefore, applies in full force to the case before us. We therefore hold that the classification of tenants into tenants of corporation premises and tenants of non-corporation premises is based on justifiable reason and that such classification has rational nexus with the object and policy of the Bombay Act which introduced Chapter V-A. We have not dealt with this point in greater detail, firstly because of the opinion expressed by the Supreme Court in the Northern India Caterers' case and as the reasons stated in that case as the basis of that opinion exist in our case and secondly because the position itself is so clear that Mr. Sorabji, though he did not give up this contention argued it very briefly and it appeared to us very feebly.

18. That takes us to the second contention urged by Mr. Sorabji. As regards Mr. Sorabji's argument in respect of that contention, there is no dispute that Section 105-B confers upon the Commissioner a discretion or option to select between two procedures, the two procedures being alternative and substitutive.

19. The second argument of Mr. Sorabji necessitates a consideration whether that discretion of the Commissioner is unguided and unfettered. Mr. Setalvad has contended that the guiding principles for the exercise of the discretion are to

be gathered from the object and the purpose of the amending Act and the contents of Chapter V-A itself. Before turning to the material on which he based this argument, it is necessary to bear in mind the principles of law relevant to this contention. Mr. Setalvad has contended that the guiding principle is the necessity of a speedier trial in each case falling under Section 105-B.

20. The first case relied upon by Mr. Sorabji is that of *State of West Bengal v. Anwar Ali Sarkar*, (1952) SCR 284 = (AIR 1952 SC 75). In that case the validity of the West Bengal Special Courts Act was challenged on the ground that it contravened Article 14. The title of that Act, as also its Preamble, specifically stated that the Act was to provide for speedier trial of certain offences. The Supreme Court held that the necessity of a speedier trial was too vague, uncertain and elusive a criterion to form a rational basis for discrimination and that the necessity of speedier trial may be the object which the legislation had in view or that it may be the occasion for making the enactment. (See for example the Judgment of Mukherjee, J. at page 316 of the Report and of Mahajan J. at page 314 of the Report). Shortly thereafter a similar point arose before the Supreme Court in the case of *Kathi Raning Rawat v. State of Saurashtra* reported in 1952 SCR 435 = (AIR 1952 SC 123). In that case the Saurashtra State Public Safety (Third Amendment) Ordinance, which empowered the State to constitute special Courts to try special classes of offences mentioned in that Ordinance, was challenged as violative of Article 14. The Preamble of the Act showed that it was passed "to provide for public safety, maintenance of public order and preservation of peace and tranquillity in the State of Saurashtra". It was held in that case that the mere mention of speedier trial as the object of the Act did not cure the defect of a class being picked out and subjected to a special procedure because the expression "speedier trial" standing by itself provided no rational basis for classification. The Court, however, found from the affidavit filed in that case on behalf of the State that when the Ordinance was passed an alarming lawlessness prevailed in some of the districts within the State, that there were gangs of dacoits operating in different places and their number began to increase gradually and that the ordinary law was found to be insufficient to cope with nefarious activities of those criminal gangs. The Court held that in the light of the circumstances prevailing at the date when the Ordinance was promulgated the necessity of speedier trial Court be the guiding prin-

ciple in exercising the discretion that the particular cases in which the persons were charged with offences covered by the Ordinance should be referred by the Government to the Special Courts under that Act. The test of the necessity of speedier trial as furnishing guidance in exercise of discretion was again considered by the Supreme Court in *Kedar Nath Baioria v. State of West Bengal*, 1954 SCR 30 = (AIR 1953 SC 404). That case concerned the challenge to the validity of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, which empowered the Provincial Government to constitute special Courts of criminal jurisdiction for special areas and to appoint Special Judges to preside over such Courts and to allot cases for trial to the Special Judges in respect of the charges for the offences specified in the Schedule to that Act. In that case the title and the Preamble of the Act showed that the Act was to provide for the more speedy trial and more effective punishment of certain offences. The Court considered various earlier Judgments of that Court, including the cases of *Anwar Ali Sarkar*, 1952 SCR 284 = (AIR 1952 SC 75) and *Kathi Raning Rawat*, 1952 SCR 435 = (AIR 1952 SC 123) and then made the following observations:—

"Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary. There are to be found cases on each side of the line; *Anwar Ali Sarkar's case*, 1952 SCR 284 = (AIR 1952 SC 75) is an authority on one side; the *Saurashtra case* is on the other. Apart from the dicta here and there in the course of the judgments delivered in these cases and the decisions based on them, there is no real conflict of principle involved in them."

As regards *Anwar Ali Sarkar's case*, 1952 SCR 284 = (AIR 1952 SC 75) it explained that no principle or policy was disclosed in the legislation challenged in that case, to guide the exercise of discretion by the Government and all that was relied upon as indicative of a guiding principle for selection was the object disclosed in the Preamble of the West Bengal Act, of providing for the speedier trial of certain offences and it was for that reason that it was held to be too indefinite and vague to constitute a reasonable basis for classification.

21. In *Asgarali Nazarali Singaporewalla v. State of Bombay*, 1957 SCR

678 = (AIR 1957 SC 503) the Act impugned was the Criminal Law Amendment Act (XLVI of 1952) which provided for trial of certain offences by Special Judges and it was held that the Act did not violate Article 14 of the Constitution because not only that the Preamble of the Act showed that it was enacted for providing a more speedy trial of certain offences but also that from material gathered from outside the Act it could be gathered that the circumstances providing when the Act was passed were that bribery and corruption was rampant and the need for weeding them out was urgently felt and it was necessary to enact measures for the purpose of eliminating all possible delay in bringing the offenders to book and that it was with that end in view that provisions were enacted in the impugned Act for speedier trial of those offences by the appointment of Special Judges. This case re-affirms the Principle laid down in the case of *Kedar Nath Baioria* 1954 SCR 30 = (AIR 1953 SC 404) that if in addition to the test of speedier trial there are other circumstances, the necessity for speedier trial would furnish a test for the exercise of discretion in selecting one or the other Court.

22. In *Jyoti Pershad v. Union Territory of Delhi*, AIR 1961 SC. 1602, the Supreme Court has by way of a summary laid down four propositions which are relevant in considering an attack on a piece of legislation made on the ground of violation of Article 14. Only the third and the fourth propositions are relevant for our purpose and they are stated at page 1609 of the Report as follows:—

"(3). It is manifest that the above rule would not apply to cases where the legislature lays down the policy and indicates the rule or the line of action which should serve as a guidance to the authorities where such guidance is expressed in the statutory provision conferring the power, no question of violation of Art. 14 could arise, unless it be that the rules themselves or the policy indicated lay down different rules to be applied to persons or things similarly situated. Even where such is not the case, there might be a transgression by the authority of the limits laid down or an abuse of power, but the actual order would be set aside in appropriate proceedings not so much on the ground of a violation of Art. 14, but as really being beyond its power.

(4). It is not, however, essential for the legislation to comply with the rule as to equal protection, that the rules for the guidance of the designated authority.

which is to exercise the power or which is vested with the discretion, should be laid down in express terms in the statutory provision itself."

Proposition 3 applies when the guidance is expressed in the statutory provision itself proposition 4 states that such guidance may not be laid down in express terms in the statute itself. The conclusion is, as stated later in that judgment that such guidance can be obtained from and afforded by the preamble read in the light of the surrounding circumstances which necessitated the legislation. That judgment shows that such surrounding circumstances can be ascertained from well-known facts of which the Court might take judicial notice or of which it is apprised by evidence produced before the Court in the form of affidavits. This statement makes it clear that the function of such affidavits is to produce evidence of facts which can go to make up the surrounding circumstances.

In *P. J. Irani v State of Madras*, AIR 1961 SC 1731, the Act impugned therein vested a discretionary power in the Government to exempt any building or class of buildings from all or of the provisions of the Act and the Act was because of that reason challenged being violative of Article 14. That decision shows that guidance in the exercise of such discretion can be furnished by the purpose of that Act as also from the preamble and all the provisions of the Act. It further shows that it may not be possible for the statute itself to contemplate every contingency and make specific provision therefor in the enactment that particular cases should or should not be exempted and it was for that reason that the power of exemption in general terms was conferred on the State Government which however could be used not for the purpose of discriminating between tenant and tenant, but in order to further the policy and purpose of the Act which was, in the context of that case to prevent unreasonable eviction of tenant and that in such cases the vesting of a discretion would not offend against the provisions of Article 14.

23. The Judgment of the Supreme Court in *Ram Sarup v. Union of India*, AIR 1965 SC 247, shows that the policy and the purpose of the Act can be gathered from the enactment which is impugned as a whole as violative of Article 14 and the policy of that Act so gathered would serve as guiding principles in the exercise of the discretion vested under the impugned Act.

24. Another case relied upon was that of *M/S. Devi Das Gopal Krishnan v. State of Punjab* cases, being Civil Appeals

Nos. 526, 527 and 529 of 1966, and certain others decided by a common Judgment of the Supreme Court D/- 10-4-1967, which has not yet been reported (Since reported in AIR 1957 SC 1895). That case was concerned with a challenge to a piece of legislation on the ground of excessive delegation, but the principle laid down therein is equally useful in considering a challenge under Art. 14 of the Constitution. It reiterates that for a statute to effectively withstand that challenge, it must give guidance to the authority in whom discretion is vested, but that whether such guidance is given or not much depends upon the provisions of a particular Act and that merely because a statute defines the purpose or the purpose for which a statutory authority was constituted and vests a discretion in it, it could not be said that the statute necessarily contains the necessary guidance because it will depend upon the provisions of the statute itself.

25. We may last refer to the said *Northern India Caterers Case* Civil Appeal No. 1101 of 1965 D/- 4-4-1967 = (reported in AIR 1967 SC 1581) in which the Supreme Court expressed its opinion about classification by referring to the Preamble and the Statement of Objects and Reasons of the Act.

26. The conclusion to be drawn from these cases is that when a legislation vests discretion in the nature of an option in an authority it would not amount to discrimination if there exist principles which would guide that authority in the exercise of its discretion. Such guiding principles may be specifically stated in the Act itself or they can be gathered from the various provisions of that Act, including its title and preamble or even from the Statement of Objects and Reasons of the Act. Such guiding principles may also be yielded by the surrounding circumstances which existed at the date of the legislation and which occasioned the legislation. It should be borne in mind that even when the same object has been stated in the preamble of two different Acts the presence or absence of different circumstances may lead to different conclusions as has been specifically so stated in the cases of *Kedar Nath Bajoria* 1954 SCR 30 = (AIR 1953 SC 404) and *Jyoti Pershad* (1962) 2 SCR 125 = (AIR 1961 SC 1602). Mr. Sorabji as well as Mr. Setalvad had drawn our attention to various passages occurring in the Judgments of the above cases and tried to show how one or the other case or the remarks made in the Judgments therein were more or less applicable to the case before us. It is, however, the principle which these cases lay down which would guide us and it would be erroneous to

emphasise or attach greater importance or greater weight to some remarks or some identity of facts without taking into account the entire perspective.

27. The State contends that guiding principles do exist in this case and that they are to be gathered from the provisions of Chapter V-A itself, the Statement of Objects and Reasons in respect of the Maharashtra Act XIV of 1961 and the affidavit in reply filed on behalf of the State. To show that guiding principle is the necessity for a speedier trial, reliance has been placed on three provisions contained in Chapter VA itself. The first is the provision contained in sub-section (1) of section 105B which requires that the Commissioner shall call upon the person to vacate within a short period of one month from the date of the service of the notice. The second is the provision contained in sub-section (2) of Section 105B which requires a person on whom a show cause notice has been served as mentioned in that sub-section to apply to the Commissioner for extension of the period specified in the notice and empowers the Commissioner to grant such extension only on terms as mentioned in that sub-section. The third requirement is that sub-section (4) of section 105F provides that every appeal shall be disposed of as expeditiously as possible. According to Mr. Setalvad, these provisions show that Chapter V-A was enacted to apply to those cases in which speedy recovery of corporation premises was necessary. The Statement of Objects and Reasons in respect of the Maharashtra Act XIV of 1961 shows that Chapter V-A was introduced in the main Act "for enabling the Bombay Municipal Corporation to carry out its policy of slum clearance, speedy development of the estate of the Corporation and providing more housing accommodation." Paragraph 4 of the affidavit in reply of Gulam Hamid Shaikh, under Secretary to the Government of Maharashtra, Urban Development, Public Health and Housing Department dated 31st March 1967 contains statements relevant to this point. It first points out that the corporation premises are exempted from the application of the Bombay Rent Act. It then states that it was found that the ordinary processes of law were dilatory and important public purposes of such authorities as the Bombay Municipal Corporation were being unduly delayed by reason of the necessity of such authorities to resort to the ordinary processes of law to evict persons in unauthorised occupation of premises belonging to such authority. It further states that in the context of the Bombay Municipal Corporation it was found in particular that projects of the Corpora-

tion for slum clearance and the speedy development of the Corporation estates and the providing of further housing accommodation were being held up by reason of the delays inevitable in following the ordinary processes of law. So far as these statements are concerned, they are statements of fact which can certainly be said to constitute the circumstances existing at the date of the enactment of the amending Act. But thereafter follows that the statement that in those circumstances the State Government was of opinion that it was desirable to enact the said Act. This statement is a statement as to the opinion of the State Government. The Judgment of the Supreme Court in the case of Jyoti Pershad shows that when a Court is ascertaining what the guiding principles are the data can be furnished by the surrounding circumstances existing at the date of the enactment and that such surrounding circumstances may be gathered from facts of which the Court itself can take judicial notice or from evidence in the form of affidavits. The opinion of the State Govt. however cannot be said to form part of the surrounding circumstances. It cannot, therefore, be legitimately referred to for this purpose.

28. A question then arises whether in these circumstances speedy recovery of corporation premises serves as a guiding principle in this case as contended by Mr. Setalvad. In this respect the preamble of the Act is not helpful, but the provision of Chapter V-A itself that thirty days' time is to be given in the order of eviction and particularly a provision that even the whole proceeding is to be disposed of as expeditiously as possible show that speedy recovery was the object. The Statement of Objects and Reasons refers to three subjects, being the Corporation policy of slum clearance, speedy development of its estates and providing more housing accommodation. The jurisdiction of the Corporation extends to Greater Bombay. The existence of slums within that area and the acute scarcity of housing accommodation prevailing within that area at the date of the amending Act are factors of which this Court can take Judicial notice. This Court can also take judicial notice that speed is very essential for clearing slums and for providing more housing accommodation. The old slums and the new ones which sprang up in Bombay after partition of India were expanding fast in 1961 and spread over open lands and even on the road sides. At the date of the amending Act lands and immoveable properties in Greater Bombay were developing and developing fast. Bungalows with large gardens and one and two storeyed structures are being replaced with skyscrapers of ten to twenty.

storeys. Estates of the Corporation are in the nature of public property, in the sense that those who pay taxes to the Municipality are interested therein. It was necessary that the slums should be speedily cleared and that the estate of the Corporation should be speedily developed. All the three objects mentioned in Statement of Objects and Reasons and repeated in the affidavit in reply necessitated speed. The object were possible of being carried out by the Corporation because the protection of the Rent Act did not extend to its tenants. The delays in law courts due to accumulation of large arrears is a subject within the special knowledge of the Courts of which Courts can take judicial notice. Such delays would cause corresponding delay in the execution of the said three objects. In our opinion, therefore what is stated in the affidavit in reply is mostly material of which this Court can take judicial notice. The only additional point contained in the affidavit in reply is a statement of fact that delay was being caused in the recovery of corporation premises. In these circumstances it is possible to say, as contended by Mr. Setalvad, that the object and the policy of the amending Act was speedy recovery of corporation premises and that it would serve as a guidance to the Commissioner in exercising his discretion or option in selecting whether the special procedure under Chapter V-A or the ordinary procedure in the ordinary courts should apply in different cases which involved recovery of corporation premises. No speed may be necessary to recover a small portion of a large tenanted corporation building from its tenant, if he be solvent, merely on the ground that he was in arrears of some rents. On the other hand, the recovery of possession of a whole tenanted corporation building may require speed if the corporation intends to urgently replace it by a suitable building for a hospital or a school. Mr. Setalvad invited us to hold that the necessity of speedier recovery furnishes guidance to the Municipal Commissioner in the exercise of his discretion under Section 105-B. Mr. Sorabji, however, contended that in the case of the Northern India Caterers the necessity of speedier recovery of public premises was the basis on which the Supreme Court expressed its opinion that the classification of Government and non-Government premises may not be violative of Article 14. He pointed out that although it was present to the mind of the Supreme Court and in fact it used it as a basis when expressing its opinion on this classification, the Supreme Court has in fact not relied upon it or even referred to it when the Supreme Court held that the

discretion vested in the Collector was unguided and unfettered that is in respect of the sub-classification between occupiers of Government property. He contended that it must therefore be held that the necessity of speedier recovery cannot be further extended to such sub-classification and that it is therefore not open to us to take this factor into account when considering discrimination by such sub-classification. He stated that it has been held in Somwanti's case AIR 1963 SC 151, that the binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. Mr. Sorabji contended that the point about the necessity of speedy recovery serving as a guidance for the purpose of sub-classification was the point to be decided by the Supreme Court in the Northern India Caterers' case, that that argument was present to the mind of the Supreme Court, but the Supreme Court has not even referred to or discussed the effect of that point in relation to the sub-classification. He contended that though the test of speedier recovery was available in the case of Northern India the Supreme Court has nevertheless held that the discretion of the Collector was unguided and unfettered. At the highest, according to him, it can be contended that when deciding that point the Supreme Court did not consider this particular argument, but that this Court cannot distinguish the final conclusion of the Supreme Court on this point concerning the sub-classification merely on the ground that this particular argument was not considered by the Supreme Court in the Northern India Caterers' case. Now the ratio as laid down by the Supreme Court in Somwanti's case AIR 1963 SC 151 is quite clear. So far as this particular point is concerned, we do not see any difference between the provisions of the Punjab Act and the Bombay legislation. Although Mr. Setalvad's contention is that the Supreme Court has not considered this aspect in connection with the sub-classification, we are of the opinion that we are not free to examine the position on the basis that we should ignore the conclusion of the Supreme Court on this point and re-consider what would be the effect on the identical point but as arising in the case before us. We, therefore, hold that, as decided by the Supreme Court in the Northern India Caterers' case in this case also there are no principles to guide the Commissioner in the exercise of his discretion to resort to one or the other of the two procedures and to

pick and choose between occupiers and occupiers of corporation premises.

29. This brings us to the consideration whether the procedure provided under Chapter V-A of the Bombay Municipal Corporation Act is more drastic than that under the ordinary law applied in ordinary courts. It is common ground that the proceedings under Chapter V-A are quasi-judicial. Section 105-F provides for an appeal. Although the order under Section 105-B is to be made if he is so satisfied it is not the result of a proceeding which is arbitrary but is a quasi-judicial and appealable. In spite of the fact that the order rests on the Commissioner's satisfaction, he must state his reasons in his order. (See the Judgment in the case of *C. R. H. Readymoney Ltd. v. State of Bombay*, (1957) 59 Bom LR 786 = (AIR 1956 Bom 304) and the observations of Tendolkar J. at page 807 and those of the Division Bench on appeal in the Judgment of Chief Justice Chagla at page 825). An appeal under Section 105-F is to a judicial officer. Any defects which occurred in the original proceedings before the Commissioner are therefore, capable of being corrected in appeal by a judicial officer. Now the test to judge whether a remedy is more drastic than another or not is whether one remedy is substantially different from the other from the point of view of the incidence of prejudice which may be caused to the parties against whom the proceedings may result in such orders. Such parties, in the impugned provisions before us, from whose point of view it is to be examined, would be the occupiers of corporation premises.

30. *Suraj Mall Mohta and Co. v. A. V. Visvanatha Sastri* 1955 SCR 448 = (AIR 1954 SC 545), has decided that if persons dealt with by the impugned Act are deprived of substantial and valuable privileges which they would otherwise have if they were dealt with under the ordinary law, which in that case was the Income-tax Act, it would be no defence to say that the discriminatory procedure also advances the course of justice. It further decided that the special procedure in that case would be more drastic if it was substantially different and more prejudicial than the procedure under the Indian Income-tax Act. That decision is also useful as showing that for assessing whether a special procedure is more drastic than the ordinary procedure or not, the Supreme Court took into account such factors as to whether the Investigator and the Judge who was to make the order were rolled into one without there being any provision for reviewing the conclusions of the

Investigator, whether the right of inspection was taken away, whether a party was deprived of his right of second appeal or revision, etc. Barring the general principles so disclosed in that Judgment, the further decision in that case is not useful to us because it applies those principles to the facts of that case. We do not propose to discuss the different aspects in that other part of that case because the facts of this case are different from those in that Supreme Court case. The same test was reiterated and again applied by the Supreme Court in the case of *Jagannath Prasad v. State of Uttar Pradesh*, AIR 1961 SC 1245. It was a case relating to a disciplinary enquiry against a Government servant which also is a quasi-judicial enquiry. Certain observations made in that case may be noted at this stage. They are to the effect that in a quasi-judicial proceeding, the approach of the Tribunal must be judicial and that therefore the Tribunal would not be entitled to rely upon hearsay evidence and further that parties could appear by their lawyers. Bearing these principles in mind we will consider Mr. Sorabji's contention that the procedure under Chapter V-A is more drastic. He has supported this contention by several arguments.

31. Mr. Sorabji's first argument was that the original decision under Chapter V-A is that of an executive officer, whereas under the ordinary procedure it would be that of a judicial officer. He contended that the executive officer would lack the training, background and approach to the matter before him which a judicial officer would have. He contended that Chapter V-A does not even provide that the commissioner or the person who would hold the enquiry should have any judicial or even legal qualifications or training. We will consider this argument a little later.

32. His second argument was that though the enquiry under Chapter V-A is a quasi-judicial enquiry, the provisions of the Code of Civil Procedure and the strict rules of evidence will not apply and it would therefore be more drastic in several respects. In this connection he relied upon the decision of the Supreme Court in *Bharat Barrel and Drum Manufacturing Co. v. L. K. Bose*, AIR 1967 SC 361, and argued that this case shows that in quasi-judicial enquiries oral evidence can be refused to be recorded without such refusal amounting to a violation of the principles of natural justice. He particularly relied upon the reference to the two earlier Supreme Court Judgments in *New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd.* 1957

SCR 98 = (AIR 1957 SC 232) and Western India Match Co. v. Industrial Tribunal (1962) 1 Lab LJ 629 (SC) and thereafter the decision in the case of Bharat Barrel itself. In our opinion, a correct appreciation of these three Judgments shows that none of them lays down a general principle as canvassed for by Mr. Sorabji. All the three cases, of course, do relate to quasi-judicial enquiries. In the case of New Prakash, however, the statute itself provided that in the appeal the Appellate Authority shall hear such persons as may appear and after such further enquiry, if any, as may have been necessary, confirm, vary or set aside the order against which the appeal was preferred. It was, therefore, a case where a statute itself limited the scope of oral evidence and therefore the Judgment in Bharat Barrel points out that neither the sections nor the rules framed under the Act contemplated anything like recording oral or documentary evidence in the usual way as in Courts of law, nor did they contemplate a regular hearing as in a Court of justice. The Supreme Court of India in its judgment in the Bharat Barrel case explained that the refusal to record oral evidence was justified in the other case of the Western India Match Co. because the Tribunal had held that the agreement in dispute in that case reached between the parties had been recorded by the Conciliation Officer in some of his letters and so it was a matter of construction of those letters and in that view there would be no violation of the principles of natural justice by reason of the refusal to examine the Conciliation Officer orally. In the Bharat Barrel case itself the petitioner who challenged the order made against him was prevented from leading oral evidence of his witness Lalta Prasad to prove an agreement alleged by the petitioner. It was the petitioner's contention that there was thereby a violation of the principles of natural justice. The Supreme Court held that there was no such violation, because, firstly, on a construction of the consent order it was held that that order did not contemplate leading of oral evidence and, secondly, that on the facts of the case the prevention of recording of oral evidence caused no prejudice because the agreement was set out in the correspondence which correspondence itself had been produced on the record. The prevention of leading oral evidence was justified in all these three cases on the individual facts of each of the three cases, but they do not lay down a general principle that rules of natural justice would not necessarily in every case be violated if oral evidence is prevented to be led in a quasi-judicial enquiry.

33. The third argument of Mr. Sorabji was in a quasi-judicial enquiry there would not be a right of cross-examination and that even if cross-examination is prevented there will be no violation of principles of natural justice. In support of this argument he relied upon the case of Bakshi Gulam Mahomed reported in AIR 1967 SC 122 (128). The Supreme Court was concerned in that case with a fact finding enquiry and not a quasi-judicial enquiry. Moreover, the statute expressly limited the right of cross-examination. It cannot therefore be contended that the observations made by the Supreme Court in that judgment apply to quasi-judicial enquiries.

34. Mr. Sorabji also relied on the Judgment of the Supreme Court in Calcutta D. L. Board v. Jaffar Imam, AIR 1966 SC 282. He drew our attention to certain remarks occurring in that judgment in paragraph 12 at page 287 of the Report to the effect ".....but such a hearing is often, if not always, likely to be ineffective because the detenu is deprived of an opportunity to cross-examine the evidence on which the detaining authorities rely and may not be able to adduce evidence before the Advisory Board to rebut the allegations made against him." These observations have not been made in connection with a quasi-judicial enquiry. The absence of a right to cross-examine is here considered in connection with the enquiry of the Advisory Board under the Preventive Detention Act, 1950. The enquiry by an Advisory Board, as pointed out in this very Judgment, is not a quasi-judicial enquiry, but the function of the Advisory Board is limited to consider the relevant material placed before it and the representation received from the detenu and then submit a report to the Government. As a matter of fact, the observations in paragraph 13 of that Report relate directly to a quasi-judicial enquiry, the same being in respect of a disciplinary inquiry against an employee alleged to be guilty of misconduct and they are that it was absolutely essential that the employer should have held a proper enquiry at which reasonable opportunity should have been given to the employee to show cause and that before reaching its conclusion the employer was bound to give evidence against the employee, give him a reasonable chance to test the said evidence, allow them liberty to lead evidence in defence, and then come to a decision of its own. The reference here to "a chance to test the evidence led against him" can only mean a right of cross-examination. In our opinion, this case, far from laying down that a quasi-judicial enquiry would not be violative of principles of natural justice by reason of a re-

fusal of the right of cross-examination. affirmatively lays down that the right to cross-examine forms a part of the principles of natural justice as applicable to quasi-judicial enquiries. This argument of Mr. Sorabji must, therefore, fail.

35. The fourth argument of Mr. Sorabji was that the principles of res judicata do not apply to quasi judicial enquiries and that therefore the enquiry under Chapter V-A is more prejudicial because an occupier of the corporation premises can be subjected to defending identical proceedings in respect of identical allegations against him over and over again. In *Burn and Co. v. Their Employees* AIR 1957 SC 38 which related to an enquiry under the Industrial Disputes Act. it has however been laid down that the rule of res judicata enacted in Section 11 of the Code of Civil Procedure is no doubt, in terms, inapplicable to an enquiry, but that the principle underlying that Section is founded on sound public policy and is of universal application. It quotes with approval the observation of Sir Jenkins C. J. in *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh*, 43 Ind. App. 91 = (AIR 1916 PC 78) "The rule of res judicata is dictated by a wisdom which is for all time." These observations, although made in a case dealing with an enquiry under the Industrial Disputes Act, is in general terms and can apply to all quasi-judicial enquiries. It is not the terms of Section 11 of the Code of Civil Procedure which will apply but the principles underlying it which will apply and those principles have been stated to be of universal application and embodying wisdom which is for all time. To the same effect are the observations in the Judgment of the Supreme Court in *Daryao v. State of U. P.* AIR 1961 SC 1457. In paragraphs 9 and 10 of that Report it has been pointed out that the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure is a technical rule, but although it has no doubt some technical aspects the basis on which the rule rests is founded on considerations of public policy and that it is in the interest of the public at large that a finality should attach to binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. Mr. Sorabji, however, contended that the principle of res judicata does not apply and has been held not to be applicable to many quasi-judicial enquiries. He referred to the judgment of the Supreme Court in *Remington Rand of India v. Its Workmen*, (1962) 1 Lab LJ 287 (SC). He relied particularly on the remark at page 290 of the Report: "Indeed, it is hardly necessary to

add that the decision of industrial disputes in a large number of matters may not easily admit the application of all the technical implications of the doctrine of res judicata". A correct appreciation of this decision however shows that it does not lay down a general principle that the principle of res judicata is not applicable to quasi-judicial enquiries. The particular remark referred to by Mr. Sorabji has been made in a case which related to an inquiry under the Industrial Disputes Act. Principles relating to industrial disputes have been set out in that Judgment. It has there been pointed out that although there may have been an industrial award or industrial agreement which is to subsist for a particular period, the workers may yet demand a change. In that case it was because the demand was made during the period of the subsistence of an industrial agreement or award that the principle of res judicata was sought to be invoked. But it is inherent in the industrial law as at present interpreted that even when there is an agreement or award which is to subsist for a particular period, two factors, being a subsequent rise in the cost of living index and a change for the better in the financial position of the employer company, may nevertheless justify a demand for a revision upwards of the amounts payable to the workers thereunder. The principle of res judicata has therefore been held to be inapplicable in such cases not because a previous decision is not binding on the parties, but because the law under which the agreement or award was made enables a change to be made if new circumstances come into existence subsequently to the agreement or award. It would not therefore, be a decision on the same facts or on the same allegations which was the basis of earlier decision, whereas the decision on same facts is the very basis of the principle of res judicata. In such industrial disputes a fresh decision can be invoked because it involves a determination of new facts and the effect of those facts on the demand of the workers.

36. Mr. Sorabji then relied upon two other decisions in *Asscd. Cement Staff Union v. Asscd. Cement Co. Ltd.* AIR 1964 SC. 914 and *Workmen of B. L. and Co. Ltd. v. B. L. and Co.* AIR 1964 SC 728. Each of these two cases relates to a position under the Industrial Disputes Act and what we have just stated in connection with the *Remington Rand* case equally applies to these two cases.

37. Mr. Sorabji also relied upon the Judgment of the Supreme Court in *Visheshwara Singh v. Commr. of Income Tax*, AIR 1961 SC 1062. The Judgment in that case states "There is no such thing

as *res judicata* in income-tax matters'. Now Mr. Sorabji is right in a sense in relying upon this observation. It should, however be read in the context of the facts of the case in which it is made. It was a matter under the Indian Income-tax Act. There was an earlier decision by the Income-tax Officer in respect of the assessee but for the year 1941-42. The particular period to which this case related was the subsequent period to the years 1942-43 to 1946-47. The question was whether the decision in respect of the earlier year 1941-42 whereby the assessee had been held to be a dealer in shares and securities for that year would on the basis of the principle of *res judicata* shut out an enquiry as to whether the assessee was a dealer in shares and securities in respect of the subsequent period. It is quite clear that the decision on the later period would depend on a fresh set of facts and circumstances and therefore a fresh investigation would not be barred on the principle of *res judicata*.

38. Mr. Sorabji had contended that it is possible for the Commissioner to record statements behind the back of the occupant against whom action is being taken. The procedure would, according to him, be more drastic because although a copy of the statement would be furnished to the occupant, the occupant would not have an opportunity to watch and comment on the demeanour of the witness during his examination-in-chief and notice and point out how the witness develops his story. In this connection the observation of the Supreme Court in the State of Mysore v. Shivabasappa, AIR 1963 SC 375, at p. 378 of the Report may be noted. The same are:

"The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To enquire in that case that the contents of the previous statement should be repeated by the witness word by word, and sentence by sentence, is to insist on bare technicalities and rules of natural justice are matters not of form but of substance."

According to these observations, it is clear that this difference in the two procedures is not of any substance.

39. It was also contended that the provisions of Sections 91, 92 and the other provisions of the Indian Evidence Act like excluding hearsay evidence would not apply. It is true that the technical provisions of the Evidence Act will not apply, but the basic principles embodied in the Evidence Act would apply. There-

fore, no hearsay evidence would be admitted. Similarly although it would be open to give oral evidence of the contents of a document in proper cases, the appellate officer who would be a trained judicial officer would take those factors into consideration and would attach due weight, in the sense of less weight, if any weight can be attached, to the oral evidence as to the contents of a document except, of course, in cases where even under the Evidence Act it would be open to lead oral evidence of the contents of documents. But these are but technical differences and not differences of any substance causing any material prejudice.

40. The fifth argument of Mr. Sorabji was that although the appeal under Chapter V-A is to a judicial officer, the appeal itself will have a limited scope. Now, in this connection the distinction between the personal factor of the appellate officer and the scope of the appeal must be borne in mind. In both cases the original order would be of an executive officer, but when the Appellate Officer is a judicial officer, he will examine the record like a Court and in that respect there would be no difference whether an appeal be to a judicial officer or to a Court under the ordinary law.

41. When the Appellate Officer is an executive officer however, honestly and conscientiously he may act, he may possibly take into consideration departmental policy decisions and departmental talks because he would not be trained to avoid even a sub-conscious impression created by them. Now, so far as the scope of the appeal is concerned, though the Commissioner's decision under appeal would rest on his satisfaction, such satisfaction would be reached under a quasi-judicial procedure at an enquiry. As seen earlier, so far as the procedure before the Commissioner is concerned, it is a quasi-judicial procedure and there is no difference of substance between that procedure and the procedure which would be followed ordinarily in a court of law and he has to record his reasons of his order in the order which he makes at the end of the proceedings. The result would be that the scope of the appeal would be substantially similar to the scope of an appeal from a lower court to a higher Court.

42. The sixth argument of Mr. Sorabji was that in respect of a parallel act the Supreme Court has held in the Northern India Caterers' case that the procedure under the Punjab Act is more drastic than the ordinary procedure followed in an ordinary court and that we must therefore apply the ratio and reasoning in the case before us and reach a

similar conclusion. We have reproduced the two relevant passages from that Judgment of the Supreme Court. A very careful reading of those two passages shows that there is an important difference between the Punjab Act and Chapter V-A. The Punjab Act provides for an appeal to an executive officer, whereas Chapter V-A provides for an appeal to a judicial officer. We are of the opinion that that particular factor is of very great importance. The difference lies not merely in the provision as to the person who is to hear the appeal, that is, whether he be an executive officer or a judicial officer, but it changes the whole evaluation of the entire procedure followed before the officer who makes the order at the initial stage. When the appellate officer is a judicial officer, he would judge even the original proceedings with a trained eye. With his qualifications, training and experience as a lawyer and a judicial officer he would notice every defect or shortcoming in the original proceedings before the Commissioner and wherever he is so satisfied he would in his appellate order set them right, in this connection it must also be noticed that because of the provision in Chapter V-A, and such provision does not exist in the Punjab Act, even in the original proceedings the person against whom the order is to be made is entitled to appear by an advocate, attorney or pleader. This point also is of great importance because as he would be represented by a trained lawyer, the lawyer would not only represent the occupant's case properly, but he would see that even the record before the Commissioner is properly and fully prepared. Of course, the appeal to a judicial officer does not widen the scope of the appeal. But the combined effect of the two provisions that a lawyer can appear for the occupier at the stage of the initial inquiry before the Commissioner and the appeal thereafter being to a judicial officer would have very important consequences of a substantial nature. The presence of the lawyer would ensure, so far as the initial inquiry is concerned, proper evidence being led, opposite side's witnesses being properly cross-examined, the case being properly argued and a full and proper record being kept. As an appeal would lie to a judicial officer, the inquiry officer himself would be more careful and the judicial officer would have a full record before him, deal with it judicially like a court and correct all shortcoming if any, in the initial proceedings. If the two procedures, namely, the one under Chapter V-A and the other being the ordinary procedure under the Code of Civil Procedure in ordinary courts of law are compared in the light of these circumstances, there appears to

be no substantial difference at all between the two procedures. The procedure before the original forum will be substantially similar. The procedure at the stage of appeal will be substantially similar. From the enquiry under Chapter V-A a second appeal or a revision may not lie. But, in our opinion, the remedies of a second appeal and a revision would be substantially substituted by a writ petition to the High Court under Article 227 which would be equally efficacious. We are, as contended by Mr. Sorabji, bound to follow the ratio and reasoning of the Supreme Court's Judgment in the Northern India Caterers' case. But in this case we have to follow it by way of an analogy. We can, however, do so only on points the facts and circumstances relative to which are substantially similar. In fact, it is on that very basis, and even though one argument or one reason was not considered by the Supreme Court, that we have followed the ratio and the reasoning of that judgment in connection with the point as to whether there exist principles to guide the Commissioner in the exercise of his discretion under Section 105 B. But the ratio and reasoning of the Supreme Court judgments referred to earlier requires that the two procedures available to the authority vested with a discretion to select between them must first be critically compared and a conclusion then reached whether they are or not substantially similar for ascertaining whether one is or is not more drastic and more prejudicial than the other. As we find that the two procedures available to the Commissioner under Chapter V-A are substantially similar, we cannot, with respect, apply, by way of a so-called analogy the conclusion in the case of the Northern India Caterers to the legislation impugned in this case and hold that the procedure under Chapter V-A is more drastic. The relevant provisions of the Punjab and impugned legislations are substantially different and no Court can ignore its duty to compare, the two procedures available under Chapter V-A and record a finding whether one of the two is or is not substantially similar to the other. No Court is entitled to make a mere superficial comparison and adopt what may be called the easier way of holding that it is bound by analogy to reach the same conclusion in this respect as that in the case of the Northern India Caterers. We find that in the case before us the two procedures available under Chapter V-A are, substantially similar and we therefore hold that the procedure under Chapter V-A is not more drastic or more prejudicial than the ordinary

procedure to be followed in the ordinary courts of law.

43. That leads us to a consideration as to what is the effect of our holding that there are no principles to guide the Commissioner in the exercise of his discretion under Section 105-B, but the procedure under Chapter V-A is not more drastic. If the special procedure be more drastic and there is lack of guidance, it would render the legislation void as happened in the Northern India Caterers' case. If, however, the special procedure be not more drastic and there also be lack of guidance, the result would be that the element of lack of guidance would not cause any prejudice because the two procedures would be substantially similar and the impugned legislation in such a case would have to be held to be valid. If, however, the special procedure is found to be more drastic and prejudicial, but there being no lack of guidance, that is, there exist principles for guidance, the impugned legislation would have to be held valid, because although the special procedure is more drastic, in the selection of one of the two procedures, the authority concerned would be guided by those principles and there would be no discrimination or violation of Article 14. In such a case it would not be the legislation which would be void, but if in any particular case or cases the officer concerned violates the principles for guidance, his decision in that particular case or those particular cases may be set aside, because the legislation itself would be valid but only the exercise of the power would be violative of Article 14. The principle therefore appears to be that when there is an option to pick and choose, the existence of both the factors, namely the element of the special procedure being more drastic and the element of lack of guidance, would make the legislation void and violative of Article 14. But if either of them is absent, so far as the legislation itself is concerned, it would not be violative of Article 14. This principle, when it is considered basically and without reference to any decided case, appears to be so clear that it is not necessary to refer to any authorities on that point. Mr. Sorabji had drawn our attention to three decided cases in *London Jewellers Ltd. v. Atten-Borough*, (1934) 2 K. B. 206, *Jacobs v. London County Council*, 1930 A. C. 361 and *Suraimal v. State of Madhya Pradesh*, AIR 1958 Madh Pra 103. None of these cases appears to be of any direct help to us. To state it in other words the principle appears to be that in cases where a decision has been reached for two independent reasons, either of

which taken individually was sufficient by itself to justify the final conclusion, it cannot be urged that the decision on one of the reasons is the only or main factor leading to the conclusion and the decision on the other is in the nature of obiter. In that class of cases the decision on each of the two points being capable of leading to the conclusion actually reached in that case would lay down a ratio and such ratio on each of the two points would be binding on any lower court. In the other class of cases would fall a final conclusion arrived at as a result of the decisions on several points, the conclusion being based on the cumulative effect of the decisions on each of those points in that case. The final conclusion would in that class of cases rest on the cumulative support of the decisions on each of the points and such a conclusion would serve as a precedent and be of binding effect only in those cases where all such reasons cumulative exist, but in cases where any of those reasons is absent, though the other reasons be present it would be open to the Court to assess the effect of the absence of any particular reason or reasons and after assigning due effect to them to reach its own conclusion. Adopting these principles we hold that in our case though there is a lack of guiding principles as the two procedures available under Chapter V-A are substantially similar there is no denial of equality and the impugned provisions do not violate Article 14.

44. In the circumstance we hold that Section 105B and therefore also the provisions of Chapter V-A do not violate the provisions of Article 14 and are valid.

45. In the result the other points arising in each of these three petitions will have to be tried before a final order can be made in these petitions.

46. As regards costs, each of the three petitioners in which this question was tried as a common question will now have to be tried in respect of the other disputes involved therein. So far as the parties to each of these petitions are concerned, we therefore order that the costs of those parties in respect of the trial of this preliminary point shall be costs in that petition. The State however, has appeared only because of the constitutional challenge to the State legislation. The State is not a party to any of these petitions. Therefore it is no longer interested in appearing in those petitions after the decision on this preliminary point. We must, therefore, finally make our order as to costs in each of the three petitions as between the State on the one hand and the petitioners in each of the

cases on the other. Bearing in mind the importance of the point involved, the duration of the hearing of the preliminary point which we are informed has lasted for about thirty-one hours, and the fact that our decision as to guiding principles is against the State we quantify the costs of the hearing of this preliminary point payable to the State at Rs. 2,400/-. We order that each of the petitioners in the three petition do pay to the State a one-third of the said amount of Rs. 2,400/-. i. e. Rs. 800/-. by way of its contribution to the said costs awarded to the State.

Order accordingly.

AIR 1972 BOMBAY 273 (V 59 C 52)

BHOLE J.

Suka Ishram Chaudhari, Petitioner v. Jamnabai Ranchodas Gujarathi and others Opponents.

Special Civil Appln. No. 1098 of 1967 D/- 1-9-1971.

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) Section 12 (3) (a) — Refusal by landlord to accept rent sent by M. O. Tenant cannot be said to be in arrears of rent nor can he be said to be not ready and willing to pay rent — Eviction under Section 12 (3) (a) is erroneous. (1966) 68 Bom LR 412, Distinguished. (Para 6)

(B) Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947) Section 13 (1) (b) — Eviction for construction of permanent structure by tenant without permission of landlord — Interference by High Court under Art. 227 — (X-Ref:— Constitution of India Art. 227).

If the Court draws an improper inference as to the legal effect of proved facts, the High Court can correct it because that is a question of law. Though it is true that the High Court has to interfere only when there is a manifest and patent error of law on the face of the proceeding when there is clear ignorance or disregard of provisions of law, yet the legal effect of an inference as regards a provision of law can also be looked into by the High Court in its supervisory jurisdiction. This will have to be done in the interests of justice if the subordinate Court has stepped beyond its bounds.

(Para 9)

Thus where the construction of a temporary nature (tin shed) was already there and the tenant erected a wall on one side of such shed to protect his goods it was held that no structure of permanent nature could be said to have been erected by the tenant within meaning of Section 13 (1) (b). (Para 11)

Cases Referred: Chronological Paras (1966) 68 Bom LR 412 = 1966 Mah LJ 620. Manorama S. Masurekar v. Dhanalaxmi G. Shah 4

AIR 1936 PC 77 = 63 Ind App 140.

Gujarat Ginning and Manufacturing Co. Ltd. Ahmedabad v. Motilal Hirabhai Spinning and Manufacturing Co. Ltd. Ahmedabad 9
S. A. Desai with P. G. Bhimrao, for Petitioner; V. M. Limaye for Opponent No. 1.

JUDGMENT:— The petitioner here is a tenant in respect of the suit premises belonging to the respondent in village Chopda, district Jalgaon. A vacant plot of land bearing S. No. 7543 and admeasuring 32' x 12' was leased out to the petitioner on 2-11-57 at a monthly rent of Rs. 4/-. The petitioner used it for running a shop after constructing a tin shed on it. It appears that in the year 1963 there was a theft in the shop and, therefore the petitioner constructed a wall in brick and mortar on the side touching the road, from where there was a possibility of the shop being broken open. There was exchange of notices at that time between the landlord and the tenant. There was also some litigation in which the landlord won. On 1-6-65 the respondent-landlord terminated the tenancy of the petitioner by a notice on the grounds that he is in arrears of rent from 1-11-64 to 1-5-65; that he had built a wall in brick and mortar on the southern side of the structure and had also built another wall in brick and mortar to partition the tin shed. The petitioner denied the allegations of the respondent and the suit followed on 15-7-65. The trial Court held in favour of the petitioner but the District Court did not agree and reversed the order passed by the trial Court and decreed the respondent's suit for possession of the suit plot. This decree of the learned Assistant Judge, Jalgaon, is sought to be corrected here by this petition under Article 227 of the Indian Constitution.

2. We are here concerned with two grounds taken up by the respondent for evicting the petitioner. The first ground is that the petitioner was in arrears of rent from 1-11-64 till 1-5-65 and the second ground is that the petitioner had constructed a wall in brick and mortar on the southern side of the tin shed; that he has also constructed another partition wall to divide the tin shed into two. The respondent, therefore, relies on Section 12 and Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act (hereinafter called "Rent Act"). In order to understand the legal effect of certain facts and circumstances for the purpose of recording whether the petitioner has neglected to make the pay-

ment of rent it will be necessary to mention certain facts.

3. We have on record Exhs. 58 to 61, which are money order coupons. These were the money orders which were sent by the Petitioner between 24-4-63 to 29-6-64 to the respondent from time to time. The respondent refused to accept these money orders sent by the petitioner as and by way of rent between April 1963 and June 1964. The money order coupons on record also show that the petitioner had sent in lump sum Rs. 24/- towards rent at the rate of Rs. 4/- per month for the period beginning from 1-11-64 to 1-5-65. The petitioner has examined himself and stated that he had sent these money orders towards rent at the rate of Rs. 4/- for the period from 1-11-64 to 1-5-65, which were refused by the respondent. In this case we are concerned with the notice dated 8-6-65 given by the respondent to the petitioner terminating the tenancy because the petitioner was in arrears from 1-11-64 to 1-5-65. Thus, we have seen that the petitioner did send rent by money orders but it was refused. The point, therefore, that is raised here for consideration is whether the petitioner could be said in these circumstances to be not ready and willing to pay rent and whether he was in arrears of rent for a period of more than six months.

4. The learned Assistant Judge while considering this point held that the payment of rent by money orders for the period from 1-11-64 to 1-5-65 absolutely irrelevant. He held that the money orders prior to the notice cannot be taken into consideration under Section 12 (2) of the Rent Act. In support of this proposition he has relied on *Manorama S. Masurekar v. Dhanlaxmi G. Shah* (68 Bom LR 412). That was a case where also a notice was served demanding rent in arrears for more than six months. In that case the amount of rent was sent after one month after notice but before the suit was filed. That was not a case, where rent was paid, as we have seen in the instant case, by money orders before notice for the period for which the landlord says the petitioner was in arrears. In that case the notice was dated 22nd December, 1966 demanding rent in arrears. The other side alleged that standard rent was tendered on 22nd January 1967 but not accepted. Money order was then sent on 4th February 1967, which was refused. In these circumstances, Patel, J., who heard the civil revision application, was of the view that under Section 12 (3) (a) of the Rent Act the Court should pass a decree if tender of rent was made after a month's notice under Section 12 (2) of the Rent Act. The fact that tender of

rent was made before the suit for ejectment was filed by the landlord does not give protection to the tenant under Section 12 (1). The learned Assistant Judge relied on these observations and held that these observations would apply to the facts and circumstances of the instant case. In my view the learned Assistant Judge has erred in applying this law to the facts and circumstances before us which are quite different from the facts and circumstances, which were before Patel, J.

5. Section 12 of the Rent Act provides for ejectment of the tenant by the landlord. It is divided into four clauses. The first clause prohibits a landlord from recovering possession of any premises so long as tenant pays and is ready and willing to pay the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy in so far as they are consistent with the provisions of the Rent Act. Therefore, as long as the tenant is ready and willing to pay and as long as he observes the conditions of tenancy, landlord cannot recover possession of the premises. The second clause directs the landlord to give a notice before a suit on the ground of non-payment of rent is filed. A landlord under this clause cannot file a suit until expiration of one month next after the notice of the demand of standard rent. The third clause deals with two kinds of arrears. Sub-clause (a) deals with a tenant who is in arrears for a period of six months or more; sub-clause (b) deals with a tenant, who is in arrears for less than six months and sub-clause (c) provides that if a tenant raises a dispute regarding the amount of standard rent or permitted increases, he is allowed to raise that dispute; and if the tenant makes the payment of which he is in arrears within one month of the notice, then the landlord cannot recover possession of the premises. But if he does not raise any dispute and if he neglects to pay until expiration of the period of one month after the notice then the Court has no other alternative but to pass a decree for eviction. So far as sub-clause (b) is concerned the tenant is asked to pay the arrears on the first date of the hearing of the suit or before such other date as the Court may fix and if he continues to pay rent regularly in Court, then no decree can be passed against him but if after notice and after filing of the suit he neither pays the arrears on the first date of the hearing of the suit nor before such other date as the Court may fix, then a decree for eviction shall have to be passed. We are not concerned with the fourth clause because that clause

merely deals with disbursement of the amount paid by the tenant in Court.

6. Now, therefore, under Section 12 of the Rent Act this Court has to see whether the tenant was ready and willing to pay rent; whether the landlord had given him necessary notice; whether in this case, which is governed by Section 12 (3) (a), the tenant is in arrears of rent for a period of six months or more and whether the tenant has neglected to make payment of the same. We have seen that the respondent had been refusing to accept rent sent to him by money orders. The arrears of rent according to the notice given by the landlord is for a period from 1-11-64 to 1-5-65. The question, in view of the fact that the tenant had sent rent by money orders and the landlord refused to accept the same is whether the tenant was still in arrears of rent. If the landlord had accepted rent, the tenant would certainly not have been in arrears and there could not have been any cause of action for the notice to be served by the landlord on the tenant. Because the landlord had been refusing to accept rent for the period for which he was said to be in arrears the cause of action arose. In my view the landlord cannot take advantage of his conduct in not accepting rent sent by the tenant and then give a notice saying that the tenant is in arrears of rent for more than six months. The intention of the legislature when enacting Rent Act could not have been to protect the landlord who refuses to accept rent and after six months turns round to say that the tenant is in arrears of rent for a period of six months or more. In my view, therefore, the facts and circumstances of the instant case show that the petitioner-tenant was ready and willing to pay rent. The facts also show that the tenant was not in arrears of rent voluntarily. It is because of the conduct of the landlord that he fell in arrears for a period of six months or more. If the landlord had accepted rent, he would not have been in arrears at all. If that is so, then, in my view, the view of the learned Assistant Judge in inferring that the petitioner can be evicted under Section 12 (3) (a) of the Rent Act is erroneous. On the other hand the inference and the legal effect of these proved facts is that the tenant cannot be evicted because he was neither in arrears of rent nor can be said to be not ready and willing to pay rent.

7. I am supported in this view of mine by a judgment of Chandrachud J. while deciding Civil Revision Application No. 1450 of 1961 on 16th April 1964. He had before him facts similar to the facts of the instant case and he has taken the same view as I am now taking.

8. Another ground taken by the landlord is that the tenant had erected on the premises a permanent structure and, therefore he is liable to be evicted. Under Section 13 (1) (a) notwithstanding anything contained in the Rent Act but subject to the provisions of Section 15, which deals with sub-letting, a landlord shall be entitled to recover possession of any premises if the Court is satisfied that the tenant has without the landlord's consent in writing erected on the premises any permanent structure. What the landlord has been pleading is that the petitioner has erected on the premises a permanent structure viz. a wall on the southern side and a partition wall dividing the tin shed. The learned Assistant Judge in his judgment relied upon the fact that the petitioner has nowhere denied the fact of constructing the wall in brick and mortar on the southern side. That is true. But the shed was there from the beginning. It is only in 1963 that the wall was constructed because of a theft. The judgment gives an impression that the whole house was constructed at the time when this wall was constructed. That is not so. The learned Assistant Judge is of the view that because the tenant has erected a house like structure consisting of two compartments with the southern wall and partition wall in brick and mortar with a foundation of about $1\frac{1}{2} \times 2\frac{1}{2}$ therefore it is an erection of a permanent structure. According to the learned Assistant Judge if the contention of the tenant in erecting the wall was to protect himself from the thieves, that will not help him and this fact according to him is quite irrelevant for deciding the issue. In that view of the matter he found that the tenant has contravened the provisions of S. 13 (1) (b). The trial Court, however, differed from him. According to the trial Judge, who had the advantage of inspecting the site, this was a temporary structure; the shed was no better than a temporary shed; the wall was constructed to protect the shed from the road side; according to trial Court the wall was constructed to save himself from thefts being committed from that side. He says that in these circumstances the wall cannot be said to be a permanent structure.

9. Now, the expression used in Section 13 (1) (e) is "permanent structure." So far as the wall is concerned, admittedly it is built for the purpose of protecting his goods from theft from the road side; it is only a part of the whole temporary shed. He has constructed the wall sloping towards the east. He has also constructed a partition wall dividing the tin shed into two. On one side the goods are kept and the other side there is a shop.

It is brought in the cross-examination that the foundation of this wall was about $1\frac{1}{2} \times 2\frac{1}{2}$. The point, therefore, that arises here for consideration is what is the legal effect of the facts here? It is contended on behalf of the respondent that this Court cannot correct a finding of fact. After all according to Mr. Limaye, the learned advocate for the respondent the wall cannot but be a permanent structure.

In my view this is not a finding of fact but is an inference as to the legal effect of certain proved facts. The Court has to infer on the basis of proved facts, whether these facts lead to the legal conclusion that the structure is or is not a permanent structure. In my view if the Court draws an improper inference as to the legal effect of proved facts, this Court could correct because that is a question of law. In *Gujarat Ginning and Manufacturing Co. Ltd. Ahmedabad v. Motilal Hirabhai Spinning and Manufacturing Co. Ltd., Ahmedabad*, AIR 1936 PC 77. Their Lordships have observed that the High Court in a second appeal is bound by the District Judge's finding of fact. But where the matter in question is as to the proper effect of legally proved facts that is a question of law. Now, it is true that this Court has to interfere only when there is a manifest and patent error of law on the face of the proceeding, when there is clear ignorance or disregard of provisions of law. In my view the legal effect of an inference as regards a provision of law can also be looked into by this Court in its supervisory jurisdiction. This will have to be done in the interests of justice if the subordinate Court has stepped beyond its bounds. This will therefore be a fit and proper circumstance to intervene. The contention raised by Mr. Limaye, the learned advocate for the respondent, therefore appears to be without basis.

10. The petitioner has taken on lease only the plot of land. He has not taken any premises. After taking this open plot of land he had in the beginning constructed a temporary tin shed. In 1963 theft was committed from the southern side, and, therefore in order to protect himself as well as his goods, he constructed the wall in brick and mortar. He has also constructed a partition wall to divide for his convenience and for his beneficial use. The rest of the construction is a tin shed. Now, can it be said that the petitioner has erected any permanent structure by constructing the southern wall and the partition wall? After all while determining the permanent character of a structure it is always necessary to see the nature of the structure and mode and degree of annexation. It may also be necessary to see the intention of the party who puts up the structure. The

nature of the structure on the whole is temporary structure except for this wall. If the landlord finds reasons to eject the petitioner, in my view, it will not be difficult for the petitioner to vacate the open plot of land without causing any injury to it. Construction of the wall in my view therefore will not cause any injury to the open plot of land which was leased to him. This is not a case where substantial improvement was made by the petitioner to the premises, which were leased out to him and which, if removed, will cause injury to the open plot of land.

11. What is the nature of these walls and the degree of annexation? What was the intention of the tenant when he constructed these walls? The nature and mode therefore of annexation of its degree can be gathered by the intention with which the tenant had built the wall though in brick and mortar. It is done to prevent the thieves from breaking open the shed which was exposed to the road. The intention therefore was not to have a permanent structure but to save himself and his goods in that temporary shed. The whole shed is still there. It is all of a temporary character. The walls are but small annexations. The open plot of land will never lose its identity in the process of the removal of the wall. The wall is but an insignificant part of the temporary shed. The original nature of the open plot of land is not materially altered or interfered with. In this view of the matter, therefore, it appears to me that the legal inference drawn by the learned Assistant Judge from the proved facts is not correct. On the other hand the inference should be that the wall in the peculiar circumstances of the case cannot be said to be permanent structure erected by the tenant within the purview of Section 13 (1) (b) of the Rent Act. If this is so, then the order passed by the learned Assistant Judge has to be set aside.

12. I, therefore, allow this petition, set aside the Assistant Judge's order and restore the trial Court's order.

13. No order as to costs.

14. Rule made absolute.

Petition allowed.

AIR 1972 BOMBAY 276 (V 59 C 53)

BHASME J.

Laljiibhai C. Kapadia and another, Appellants v. Lalji B. Desai and others, Respondents.

A. F. O. D. No. 262 of 1971, D/ 27-7-1971, against order of H. M. Thakar J, City Civil Court, Bombay in Suit Nos. 5237 of 1970.

FP/GP/D829/72/AGT

(A) Companies Act (1956), Ss. 258, 260 — Right of company to increase the number of its directors — Board of Directors cannot by appointment of Additional Directors increase the strength of the Board so as to affect the power of the company vested in it under Section 258.

(Para 15)

(B) Companies Act (1956), S. 258 — Power to increase number of directors — Exercise of — No formalities are prescribed therefor — It is not necessary for the company to pass a separate resolution increasing the number of directors to fill the additional sanctioned post — It is sufficient compliance with the provisions of Section 258 when the company chooses to appoint additional directors within the permissible limits so as to increase the number of its directors — Absence of a separate resolution re: increase in number of directors would not render appointment of additional directors null and void. (1936) 1 Ch. D. 640 Ref. (Para 20)

(C) Companies Act (1956), S. 172 (1) — Notice of meeting — Invalidity or insufficiency of notice — Question as to, is a mixed question of law and fact and its grounds have to be specifically pleaded — It cannot be raised at any stage of the proceeding — (X-Ref:— Civil P. C. (1908) Section 100). AIR 1965 SC 1535 (Approving AIR 1963 Orissa 189) Rel. on. AIR 1965 Guj 96 and (1920) 1 Ch. D. 466 and (1921) 3 K. B. 32, Ref. (Para)

(D) Companies Act (1956), Ss. 172, 173 (1) & (2) — Section 173 is mandatory and not directory — Non-compliance with it vitiates the action taken at the meeting — Allegation of insufficiency or misleading nature of notice of special business — Has to be substantiated by relevant particulars.— (X-Ref:— Civil P. C. (1908), O. 6, R. 4)

Section 173 is mandatory and not directory. A notice of meeting when it contains items of special business within the meaning of Section 173 (1) (b) must disclose all the material facts. All the share-holders, must be in a position to make up their mind in advance whether they will attend the meeting or leave it to the good sense of the majority at the meeting. Any non-compliance with this requirement will nullify the action taken at the meeting. While considering the efficacy of any such notice, a benevolent construction will not be adopted so as to defeat the provisions of the statute. It is also clear that whether or not a particular notice or an explanatory statement in a given case complies with the statutory requirement is a question of fact. There are two ways in which the mandatory provisions contained in Section 172

may be contravened. It may be a case where no explanatory statement is at all appended to the item of special business. or it may be a case where the statement is incomplete, misleading or tricky. The contravention may be the result of an act of omission or an act of commission. Whatever be the nature of the contravention, the question always is a mixed question of fact and law. When a challenge to the notice is made in court of law the court will have to consider all the facts and circumstances of the case and then decide one way or the other. (1971) 41 Com Cas 377 (Bom) and (1967) 1 Com LJ 29 (Cal) and (1948) 1 All ER 21 and (1899) 1 Ch. 861, Ref. (Para 34)

Where the explanatory statement appended to the notice of the meeting is challenged as being insufficient or misleading, the plea is very much like the plea of fraud and as such must be substantiated by all relevant particulars. In the absence of such a pleading the matter cannot be challenged in appeal or even in earlier proceeding. (Paras 37, 40)

(E) Companies Act (1956), S. 264 (1) (as amended) — Interpretation of — Use of Objects and Reasons — Provision so far as it relates to filing of consent is directory.

It is true that a statute should be interpreted without looking into other extraneous circumstances; but when a provision has undergone several changes a reference must be made to Objects and Reasons for the purpose of finding out the particular reason that prompted the legislature to evolve the provision in its current form.

The object of the legislature in enacting S. 264 is evident when one considers the various amendments made by the Legislature before the section was enacted in the present form. Those who have once acted as directors were only seeking re-appointment. It was considered throughout that the formal consent on their part was not necessary. It is very clear as to why such a condition was found necessary. It may be that a person who is appointed as a director may refuse to act on the ground that he had never consented to act as a director. When such a flaw is discovered later on and the appointment will have to be ignored as ineffective, the company will have to take again further steps for filling the posts of such director. Ordinarily a person appointed as a director is not likely to refuse to act. In a rare case he may do so. It is only to avoid the attending inconvenience that the Legislature has prescribed the condition. In the section as originally worded somewhat strong

language was used. It was enacted that a person shall not be capable of being appointed as a director unless he had filed earlier his consent in writing to act as such director. The deletion of these words in the subsequent amended form of the section is not without significance. Perhaps the Legislature thought that the condition was given comparatively more importance when it was introduced in the section. If this is the only object which the Legislature sought to achieve by prescribing a prior consent in writing then there is no reason why the absence of consent in all cases should invalidate the appointment. Even without a consent a person appointed may accept the appointment and prefer to act as a director. This is likely to happen in a majority of cases. Considering the section as a whole and bearing in mind the object of the Legislature, and magnitude of the mischief intended to be avoided it must be held that Section 264 (1) is clearly directory and not mandatory. AIR 1957 SC 832 and AIR 1952 SC 369. Ref. (Para 49)

(F) Companies Act (1956). S. 264 (2) — Interpretation of — Provision is mandatory — Filing of consent under the provision is a condition precedent for acting as a director — Unless the consent is filed within the prescribed time, person appointed as director for the first time cannot act as a director. (Obiter)

(Para 49)

(G) Companies Act (1956), Section 264 (1) — Expression "or otherwise" — Connotation of — Expression covers all the other directors who for one reason or the other cease to hold office and are immediately thereafter reappointed as directors — The expression does not refer only to directors who remain in office after the directors retiring by rotation but also the Directors who cease to be in office because of Section 260. First proviso — Dictum in AIR 1970 SC 765, Rel. on, (X-Ref:— Interpretation of Statutes — Reference to Objects and Reasons — Permissibility — (X-Ref:— Companies Act (1956) S. 256). (Paras 52, 53)

(H) Companies Act (1956), Sec. 264 (1) — Scope — Consent to act as director — Consent contemplated is referable to the candidature of a person for the office of a director — No consent is necessary to act as a director or an additional director — This is clear from the fact that one of the persons exempted from filing such consent is one who has left at the office of the company a notice under Section 257 signifying his candidature for the office of a director — Section 264 does not in any manner regulate the appointment of additional directors under Section 260. (Para 54)

(I) Companies Act (1956), ss. 173, 258, 396 (1) (b) — Suit for permanent injunction restraining defendants from acting as directors and against the company or its servants etc. from allowing them to act as such — Suit, though it related to internal affairs of the company, was maintainable as there were allegations of non-compliance with the mandatory provisions of Section 173 and Section 258 and unauthorised alteration in the Board of Directors — A share-holder as such is certainly interested to see that persons who are apparently directors of the company are validly appointed as such, though he cannot interfere with internal management of the company. AIR 1934 Bom 243, Rel. on. (Para 56)

Cases Referred: Chronological Paras

(1971) 41 Com Cas 377 = (1970) 2 Com LJ 200 (Bom). Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd.	29
AIR 1970 SC 765 = (1969) 2 SCR 627. Virji Ram Sutaria v. Nathalal Premji Bhanradia	52
(1967) 1 Com LJ 29 = 70 Cal WN 871. Shaligram Jhajharia v. National Co. Ltd.	29
AIR 1965 SC 1535 = (1965) 2 SCR 720. Shanti Prasad Jain v. Kalinga Tubes Ltd.	25
(1965) 1 Com LJ 112 = 69 Cal WN 369. Shaligram Jhajharia v. National Co. Ltd.	29
AIR 1965 Guj 96 = (1964) 1 Com LJ 326. Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd.	28
AIR 1963 Orissa 189. Kalinga Tubes Ltd. v. Shanti Prasad Jain	25
AIR 1957 SC 832 = 32 ITR 615. Commr. of Income-tax Madh. Pra. v. Smt. Sodra Devi	47
AIR 1956 Bom 537 = 26 Com Cas 313. East and West Insurance Co. Ltd. v. Mrs. Kamla Jayantilal Mehta	51
AIR 1954 SC 92 = 1954 SCR 587. State of West Bengal v. Subodh Gopal Bose	47
AIR 1952 SC 369 = 1953 SCR 1. Aswini Kumar Ghose v. Arabinda Bose	47
(1948) 1 All EF 21 = 1948 Ch 145. Grundt v. Great Boulder Proprietary Gold Mines Ltd.	31
(1936) 1 Ch 244 = 154 LT 120. Eyre v. Milton Proprietary Ltd	51
(1936) 1 Ch D 640 = 105 LJ Ch 385. Worcester Corsetry Ltd. v. Wittling	17
AIR 1934 Bom 243 = 36 Bom LR 483. V. N. Bhajekar v. K M Shinkar	56
(1921) 3 K B. 32 = 90 LJ K. B. 1145 In re; Oxted Motor Co. Ltd.	27

- (1920) 1 Ch. 466 = 89 LJ Ch. 379.
 In re: Express Engineering Works Ltd. 26
 (1899) 1 Ch 861 = 68 LJ Ch 353.
 Tiessen v. Henderson 32
 (1843) 2 Hare 461 = 67 ER 189.
 Foss v. Harbottle 33
 (1828) 1 Hud & B. 623 (IR)
 Warburton v. Loveland 48

F. S. Nariman with A. B. Diwan i/b M/s. Chimanlal Shah and Co. Attorneys, for Appellants; G. A. Thakkar with A. N. Modv i/b M/s. Haridas and Co Attorneys (for Nos. 1 and 2) and D. H. Buch with G. K. Munshi i/b M/s Bhaishankar Kanga and Girdharlal Attorneys (for No. 3) for Respondents.

JUDGMENT:— This is an appeal by defendants 2 and 3 and is directed against the judgment and decree passed in the suit filed by Respondents 1 and 2 against the appellants and Respondent No. 3. The suit was for a permanent injunction restraining Respondent No. 3 and its directors, servants and agents from allowing the appellants to act as directors of the Respondent No. 3 company. A similar injunction was also claimed against the appellants restraining them from acting in any manner as the directors of the respondent No. 3 company.

2. Respondent No. 3 is a public limited company registered under the Indian Companies Act and carries on business, inter alia, as manufacturer of rayon yarn and has its registered office at Bombay. It is the plaintiffs' case that on 9-4-1969 the Board of Directors appointed the appellants as additional directors of Respondent 3 company. The Board of Directors consisted at that time of 8 members excluding these additionally appointed directors. The plaintiffs have referred to the 8 directors as functioning directors and that may be to distinguish them from the appellants who are appointed additional directors. Thereafter notices dated 10th April 1969 were received by Respondent No. 3 company proposing the appellants as directors at the next Annual General Meeting. On 11-6-1969 the 22nd Annual General Meeting of the Respondent 3 company was convened. At the General Meeting two directors Kasturbhai Lalbhai and Naval H. Tata retired by rotation and were again elected as directors. At the same meeting by two separate resolutions the appellants were appointed directors. The two resolutions are referred to in the Plaint as Resolutions Nos. 5 and 6.

3. The plaintiffs by the suit challenged the legality of the appointment of the appellants on certain grounds. According to the plaintiffs the number of

directors on the Board can be increased by the company under Section 258 of the Indian Companies Act by passing a resolution. No such resolution was ever duly notified, proposed and passed. In the absence of any such resolution, Respondent No. 3 company had not the power to appoint the appellants as directors. The plaintiffs submit that Resolutions Nos. 5 and 6 are, therefore, invalid, void and of no effect.

4. The plaintiffs also submit that without prejudice to the aforesaid ground, the appointment of the appellants as directors was illegal, void and of no effect as they had not filed letters of consent under Section 264 (1) of the Act in respect of their proposed appointment as directors at the Annual General Meeting. The plaintiffs, as share-holders of Respondent 3 company, have the right to property in Respondent 3 company. It is for this reason that they had filed the suit restraining the appellants from acting as directors of Respondent 3 company.

5. Respondent 3 company filed its written statement and submitted that the appointment of the appellants as directors was valid and legal. It has stated that a separate resolution to increase the number of directors was not required under the provisions of the law. The company also stated in para 2 (a) of the written statement that on 9th April 1969 the appellants had filed their letters of consent to act as directors, if appointed. After receipt of these letters the appellants were appointed as directors. It is mentioned in the written statement that after their appointment as Additional Directors on 10th April 1969, two share-holders delivered to the company notices under Section 257 of the Act intending to propose the appellants as candidates for the office of the directors of respondent 3 company at the next Annual General Meeting of the company. The appellants were not required to file any letters of consent under Section 264 (1) of the Act before their election as directors at the 22nd Annual General Meeting. According to the company the appellants were validly proposed and elected as directors.

6. The appellants between themselves filed one written statement and supported the validity of their appointment on all the grounds alleged by Respondent 3 company. In addition the appellants stated that on their appointment as Additional Directors, the strength of the board was increased to 10 directors. In paragraph 8 of the written statement it is submitted that they were not required to file any letters of consent under Section 264 (1) of the Act before their

appointment as directors at the meeting. Without prejudice to this defence it is also pleaded that they did file the letters of consent on 9th April 1969 with Respondent 3 company. They argued that as Additional Directors, they were persons to whom Section 264 (1) of the Act did not apply. Assuming that there was any such requirement, it is asserted that it was a mere irregularity and that did not disable them from acting or functioning as directors. They made it clear that it was implicit in the two resolutions appointing them as directors that the number of directors was, if necessary, being increased. According to them no separate resolution under Section 258 or Article 169 of the Articles of Association of the company was necessary for increasing the number of directors from 8 to 10. At any rate, the absence of any separate resolution will not affect the validity of the resolution appointing them as directors of Respondent 3 company. They denied that it is mandatory under S. 258 of the Companies Act or under Article 169 of the Articles of Association of the company that before the number of directors is increased, a resolution increasing the number of directors ought to have been duly notified or proposed or passed. There were other allegations made by the appellants against the plaintiffs but for deciding the points raised in this appeal they are not at all relevant. As the parties had not sought any issues on the basis of those allegations, the learned Judge was not called upon to consider whether they were true or false. The substance of those allegations was that according to the appellants the plaintiffs had filed the suit mala fide at a late stage at the instance of one Rasiklal J. Chinai who was defeated in the contest for election of directors at the general meeting of the share-holders of Respondent 3 company.

7. At the trial the learned Judge framed the relevant issues. Parties did not lead any oral evidence. By consent of the parties only documents were exhibited. The defendants had also resisted the suit on the ground that the plaintiffs being share-holders cannot have any grievance against respondent 3 company as the matter in dispute was concerning the internal management of the company and the suit by the two share-holders was not maintainable. Perhaps it was felt by the parties that the issues arising in the suit are purely questions of law and it was not necessary to adduce any oral evidence.

8. The learned Judge, on a consideration of the evidence on record and the submissions of the parties, has recorded his findings. He held that the

present suit is maintainable. He came to the conclusion that the letters of consent under S. 264 (1) of the Act for the appointment of the appellants as directors at the Annual General Meeting were not necessary. In view of this finding he held that whether or not such letters were filed need not be considered. According to him the impugned resolutions Nos. 5 and 6 passed at the Annual General Meeting of the company on 11-6-1969 appointing the appellants as directors of the company were illegal. Consistent with this finding the learned Judge decreed the plaintiffs' suit and granted the injunctions against Respondent No. 3 company and the appellants.

9. As stated above the appellants, aggrieved by the decree, have come to this Court with the present appeal. Mr. Nariman appears for the appellants. Mr. Thakkar with Mr. Mody instructed by M/s. Haridas & Co., appears for respondents 1 and 2, the original plaintiffs. Mr. D. H. Buch with Mr. G. K. Munshi instructed by M/s. Bhaishankar Kanga and Girdharilal, appears for Respondent 3 company. It must be stated at the outset that Respondents 1 and 2 have purported to file cross-objections against the finding recorded by the learned Judge about the consent letters under S. 264 (1) of the Act. Mr. Thakkar conceded that the cross-objections are misconceived but mentioned that he had the right, as an advocate appearing for the respondents, to assail the decree under appeal on any of the grounds decided against him. Therefore, the points for determination in this appeal are:—

(1) Whether the Board of Directors of the Company before and after the Annual General Meeting consisted of ten members or whether at the Annual General Meeting the strength of the Board of Directors was increased from 8 to 10.

(2) Whether the Company can increase the strength of the Board of Directors only by passing a separate and distinct resolution before proceeding to appoint directors by filling the additional sanctioned posts?

(3) Has the Board of Directors contravened the mandatory provisions of Section 173 of the Act by not furnishing any information about the proposed special business or by furnishing information which is hopelessly inadequate or misleading?

(4) Can the plaintiffs rely on the above contravention in any form without specific averments in the Plaint?

(5) Has the learned Judge erred in holding that the Additional Directors, like the retiring directors, are not required to file written consent duly signed before their reappointment as directors by the Company?

(6) Is the suit not competent as the alleged irregularities arise in the course of the internal management of the company?

10. Before I proceed to consider the various points urged before me, it is desirable to refer to the relevant provisions of the Companies Act, 1956 and the Articles of Association of Respondent 3 company.

11. Section 2 (13) of the Companies Act defines "director", as any person occupying the position of director, by whatever name called. Section 255 provides for the appointment of directors and the proportion of those who are to retire by rotation. Section 256 contains provisions for ascertainment of directors retiring by rotation and filling up of the vacancies. Under Section 257 a person who is not a retiring director shall be eligible for appointment to the office of director if he or some member intending to propose him has, not less than fourteen days before the meeting, left at the office of the company a notice in writing under his hand signifying his candidature for the office of director or the intention of such member to propose him as a candidate for that office. The other provisions of Section 257 are not quite relevant and need not be referred to here.

12. Under Section 258 of the Act subject to the provisions of Ss. 252, 255 and 259, a company in general meeting may, by ordinary resolution, increase or reduce the number of its directors within the limits fixed in that behalf by its articles. S. 259 in certain cases requires the sanction or approval of the Central Government for any increase in the number of its directors. Section 260 provides that the Board of Directors, if permitted by the Articles of Association, can appoint additional directors. The Board is to exercise that power so as not to exceed the maximum strength fixed for the Board by the Articles. The first proviso to Section 260 makes it clear that such additional directors shall hold office only upto the date of the next Annual General Meeting of the company. S. 262 deals with the filling of casual vacancies amongst directors. Under Section 263 (1) ordinarily there will be only one resolution for the appointment of one director at the Annual General Meeting of the company. A single resolution is permitted under certain special circumstances for appointing more than one director. Section 263 (2) provides that a resolution moved in contravention of sub-section (1) shall be void, whether or not objection was taken at the time to its being so moved. Section 264 (1) under certain circumstances requires that the candidate for directorship should file his written consent with the company

before his appointment as director at the meeting. Section 264 (2) requires that a person appointed as a director shall not act as a director unless he has within the prescribed time signed and filed his consent with the Registrar to act as such director.

13. Apart from the group of these sections, there are two more sections which assume importance while deciding the points which arise in this appeal. Section 172 requires that every notice of a meeting of a company shall contain certain relevant particulars, leaving the other details, I must only mention that under Section 172 (1) such notice shall contain a statement of the business to be transacted at the meeting. Under Section 173 (1) (a) in the case of an Annual General Meeting, all business to be transacted at the meeting shall be deemed special, with the exception of business relating to four specified items. Item No. 3 deals with the appointment of directors in the place of those retiring. Section 173 (1) (b) makes it clear that in the case of any other meeting, all business shall be deemed special. Section 173 (2) contains a direction that where any items of business to be transacted at the meeting are deemed to be special under sub-section (1), there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business, including in particular the nature of the concern or interest, if any, therein of every director, the managing agent, if any, the secretaries and treasurers, if any, and the manager, if any. The proviso also requires further and better particulars in specified cases. It is not necessary to refer to that proviso at any length.

14. Now it remains to mention the relevant Articles of Association of the company. Under Art. 142, the Directors have power at any time and from time to time to appoint any other qualified person to be a Director as an addition to the Board so that the total number of Directors at any time shall not exceed the maximum fixed. Any person so appointed as an addition to the Board shall retain his office only upto the date of the next Annual General Meeting but shall be eligible for re-election at such meeting. Under Art. 164 at every Annual General Meeting of the Company, one-third of such of the Directors for the time being as are liable to retire by rotation or if their number is not three or a multiple of three, the number nearest to one-third shall retire from office. Article 166 makes it clear that a retiring Director shall be eligible for re-election. It is true that counsel on either side did refer to other sections and articles to elucidate the various points raised by

them, I need not consider them all at this stage.

15. The first point made by Mr. Nariman on behalf of the appellants is about the strength of the Board of Directors of the Company. He objected to the expression "functioning Directors" and "Additional Directors" as used by the plaintiffs in the plaint. He said that there is no warrant for any such distinction. Whether the Directors are appointed at the meeting or by the Board of Directors, they all together constitute the Board. The Directors in that capacity have the same rights, privileges and obligations under the provisions of the Act. He referred to the definition of "director" as contained in Section 2 (13) of the Companies Act. In all other places in the Act the Board of Directors was mentioned as such and he says that the distinction sought to be made by the plaintiffs is without any legal significance. It appears to me that the plaintiffs have used the different expressions only for a better understanding of their case. The appellants were, in the first instance, appointed as Additional Directors and later on they were re-appointed as Directors. But apart from this fine distinction in phraseology, the point of substance made by Mr. Nariman is that the company had not increased the number of Directors from 8 to 10 at the Annual General Meeting by the reappointment of the appellants. When the Board of Directors in exercise of their power under Section 260 of the Act co-opted the appellants, the number of Directors on the Board was increased from 8 to 10. Even at the meeting the number was not reduced. The two Directors retired by rotation and the two Additional Directors ceased to hold office. There were, therefore, four clear vacancies. When the Company passed four resolutions reappointing the four persons as Directors there was no increase and the provisions of Section 258 are not attracted. I find it very difficult to accept this submission. The composition of the Board of Directors with Additional Directors will not be the same as the Board of Directors appointed by the company at the General Meeting. It cannot be said that the company had at any time surrendered its inherent or statutory power to increase the number of directors on the Board when the Board appointed or co-opted Additional Directors. As observed by Lord Hanworth, M. R. in (*Worcester Corsetry Limited v. Witting*) reported in 1936 (1) Chancery 640-648, the power conferred on the Directors to appoint additional Directors is a temporary power vested in them, and this is to be reviewed and perhaps confirmed at the General Meeting. Even the wording of Section 260 underlines the temporary nature of this power conferred on the

Board of Directors. Section 260 first proviso makes it clear that such Directors shall hold office only upto the date of the next Annual General Meeting. It is true that under Art. 142 of the Company, the Board of Directors can appoint any number of Additional Directors at any time and from time to time so as not to exceed the permitted maximum limit. Consistent with the first proviso to Section 260, the Article also makes it clear that the person so appointed as an addition to the Board shall retain his office only upto the date of the next Annual General Meeting. I am of the view that the Board of Directors cannot by the appointment of Additional Directors increase the strength of the Board so as to affect the power of the Company vested in it under Section 258 of the Act.

16. Then Mr. Nariman argued that the learned Judge was not justified in holding that the company can increase the strength of the Board only by passing a separate and distinct resolution before proceeding to appoint Directors by filling the additional sanctioned posts. I have not used the exact words of the learned Judge but in substance that appears to be the finding recorded by him. According to Mr. Nariman all that S. 258 requires is that the company, subject to the other restrictions imposed on it, must resolve to increase or reduce the number of Directors in the General Meeting. The section itself has not prescribed any other formality for effecting the increase or decrease in the number of Directors. Mr. Nariman points out that under the Companies Act, wherever separate resolutions were found necessary, provisions were made in that behalf. He referred to Section 263 of the Act. I have already mentioned above the substance of that section. Ordinarily there will be a separate resolution for appointing a person as a Director at the Annual General Meeting of the Company. Mr. Nariman says that the Company can exercise the power vested in it under Section 258 by passing one or more resolutions and as no form is prescribed, one will have to look at the substance. When there are 8 members on the Board of Directors, the Company can by simply appointing two members in addition increase the number and this can be done without passing a separate resolution. He says that it is implicit in the act of appointing. The company has exercised the power to increase the number.

17. While dealing with this power of the Company to increase the number, Mr. Nariman referred to the corresponding English Law and submitted that the provisions are substantially similar. Mr. Nariman relied on an English case (*Worcester Corsetry Ltd. v. Witting*,

(1936) 1 Ch D 640). The learned Judges were considering the effect of two apparently inconsistent Articles of the company. But as the case also dealt with the power of the company to appoint directors and thereby increase the number, it has some relevance while appreciating the point raised before me. Article 83 of Table A contained the provisions similar to Section 258 of the Indian Companies Act. At page 649 Lawrence, L. J. observes as follows about the existence of the power to increase and its exercise by the company:—

"Art. 83 of Table A shows in the plainest terms that the company has power to increase or reduce the number of its board. It is said that that does not involve the nomination and appointment of particular gentlemen or ladies as directors, but it seems to me that that is necessarily implied in the provision of Art. 83. If, for instance, there have been four directors, within the maximum number of directors, and the board desire that two additional directors shall be appointed, it can convene, in my judgment, a meeting under Art. 83 for the purpose of increasing the number of directors by two named persons, appointing those two persons, and thereby increasing the number of directors".

Slessor, L. J. at page 654 approves the above observations and says:—

"The more natural view of Art. 83 is that it is not redundant or merely introducing unnecessary machinery which is already provided by Art. 12 in dealing with the maximum and minimum, but, as Lawrence L. J. has indicated, is itself conferring a power not only to increase the number but to increase that number by itself appointing directors to the extent to which it is intended to increase the number."

18. About the power of the company to increase the number of directors under its Articles of Association, the learned author in his book 'Pennington's Company Law' 2nd Edn. p. 456-57 sums up the legal position as under:—

"The power to appoint subsequent directors is usually exercisable by the members of the company in general meeting by ordinary resolution. If the articles prescribe the maximum number of directors who may be appointed, appointments in excess of the maximum are void. Usually, however, the members are empowered to increase or reduce the maximum number of directors by ordinary resolution, and then an appointment of a director in excess of the former maximum is taken to be an exercise of the power to increase the number of directors, and is valid".

While making the last-mentioned observation, the learned author in the foot-

note has referred to the abovementioned case. So Mr. Nariman argued that Section 258 was an enabling section which authorised the Company to increase or decrease the number of directors just by an ordinary resolution. As singular includes plural, one has to look at the result and not the number of resolutions to find out whether the company has exercised the power vested in it.

19. Mr. Thakkar, with equal force, stressed the word resolution and said that it was a condition precedent to the valid appointment of directors resulting in the increase of the number of directors. Any other construction, he says, will render Section 258 nugatory or meaningless. Mr. Thakkar tried to distinguish the said decision on certain grounds. He says that Art. 83 construed by the learned Judges refers to a General Meeting. Section 258 of the Companies Act provides that the company may in general meeting by ordinary resolution increase or reduce the number of its directors. In my opinion this distinction is not one of substance. Any such difference in the wording will not affect in any manner the efficacy of the observations made by the learned Judges in the above-mentioned case.

20. Then Mr. Thakkar was at pains to point out that no such point was ever raised and debated in that case. The observations of the Judges quoted above are merely obiter dicta. Mr. Thakkar says that the Judges were reconciling the two apparently conflicting articles which conferred the power of appointing directors on the Board of Directors and the company. He referred to several text books on Company Law, viz. Pennington's Company Law, 2nd Edn. p. 456-57; Modern Company Law by C. B. Gover, 11rd. Edn. p. 21; Palmer's Company Law p. 533; Halsbury's Laws of England Vol. 6, p. 279, Art. 574; Buckley on the Companies Act, 13th Edn. p. 885 and submitted that the abovementioned authority was quoted by the learned author to show that the company had not surrendered its power to appoint directors in favour of the Board of Directors. But the decision is not cited by Mr. Nariman as a binding authority on this Court. Mr. Nariman relies only on the wording of the Article considered by the Judges which resembles the wording of S. 258. Under both the provisions the company has the power to increase the number of directors. When the company at its meeting resolves to appoint additional directors in excess of the present strength of the Board, then it is an instance where the company is exercising its two-fold powers. The company increases the number not by separate resolution but by appointing additional directors. The effect is that the company has increased the number of directors. That appears to be a sensible

construction which can be adopted while interpreting the relevant provisions contained in Section 258 of the Indian Companies Act. In the result, in my opinion, it is not necessary for the company to pass a separate resolution increasing the number of directors before appointing the directors to fill the additional sanctioned posts. In law it is possible for the company to comply with the provisions of Section 258 when it chooses to appoint within the permitted limit additional directors so as to increase the strength of its present Board. The learned Judge was in error in coming to the conclusion that in the absence of a separate resolution the appointment of the appellants as directors of Respondent 3 company was null and void. The legality of the Resolutions Nos. 5 and 6 cannot be challenged on the ground that there was any contravention of the provisions of S. 258 of the Act.

21. Then I propose to consider points Nos. 3 and 4 together as the discussion of law is likely to be overlapping. Point No. 3 will involve the consideration of the provisions of Sections 172 and 173 of the Act and point No. 4 is about the sufficiency or otherwise of the pleadings.

22. I have already set out above the relevant provisions of Section 173 of the Act. Section 173 will have to be read with Section 172 (1) of the Act. Under Section 172 (1) every notice of a meeting of a company, among other things, must contain a statement of the business to be transacted at the meeting. Section 173 (1) contains classification of the business and indicates when the business shall be treated as special. Under Section 173 (2) any items of special business mentioned in the notice must be accompanied by a statement setting out all material facts concerning such items of business.

23. Mr. Nariman for the appellants drew my attention to the notice of the meeting which is produced at Ex. D at p. 90 of the paper book. It is worthwhile to reproduce the material items of business:—

Serial No. 3: To elect a Director in the place of Shri Kasturbhai Lalbhai who retires by rotation under Art. 164 of the Articles of Association of the Company, but being eligible, offers himself for re-election.

Serial No. 4: To elect a Director in the place of Shri Naval H. Tata, who retires by rotation under Art. 164 of the Articles of Association of the Company, but being eligible, offers himself for re-election.

Serial No. 7: To appoint a Director in place of Shri Laljibhai Chhaganlal Kapadia who was appointed an additional Director of the Company by the

Board of Directors on 10th April 1969 and who ceases to hold office under Section 260 of the Companies Act, 1956 on the date of this meeting in respect of whom a notice as required by S. 257 of the Companies Act, 1956 has been received by the Company.

Serial No. 8: To appoint a Director in place of Shri Nimjibhai Chhaganlal Kapadia who was appointed an additional Director of the Company by the Board of Directors on 10th April 1969 and who ceases to hold office under Section 260 of the Companies Act, 1956 on the date of this meeting in respect of whom a notice as required by Section 257 of the Companies Act 1956 has been received by the Company.

24. Items Nos. 3 and 4 constitute ordinary business and Items Nos. 7 and 8 constitute special business within the meaning of Section 173 of the Act. Being special business Items 7 and 8 are followed up by explanatory statements contained in an annexure to the notice. Explanatory statement accompanying Item No. 7 reads as under:—

"Shri Laljibhai Chhaganlal Kapadia was appointed an additional Director on 10th April 1969 by the Board of Directors of the Company and he retains his office as a Director only upto the date of this Annual General Meeting under the provisions of Section 260 of the Companies Act, 1956. As required by Section 257 of the Companies Act, 1956, a notice has been received from a member signifying his intention to propose his appointment as a Director. It is recommended that he be appointed as a Director".

Explanatory Statement accompanying Item No. 8 is identical with the difference that it is in respect of the other additional Director Shri Nimjibhai Chhaganlal Kapadia. Relying on the content of the notice in general and the explanatory notes in particular, Mr. Nairman submits that there is compliance with the requirement of Section 173 of the Act. Mr. Nariman points out that under Art. 164 of the Articles of Association of the Company, at every Annual General Meeting of the Company, one-third of such of the Directors for the time being as are liable to retire by rotation or if their number is not three or a multiple of three, the number nearest to one-third are to retire from office. The strength of the Board was 8 and obviously the number of Directors retiring by rotation will be two. Items Nos. 3 and 4 in the notice in unmistakable terms give an indication of this factual and legal position. As these items of business were not special there was no explanatory statement in the annexure to the notice. Items Nos. 7 and 8 constituted special business. The contents of these items conveyed to the body,

of shareholders sufficient information about the proposal to fill up additional posts. The two persons had acted as additional directors and they ceased to hold office under Section 260 of the Act on the day of the meeting. It is stated that the company had received proposals about their appointment under Section 257 of the Act. It is implicit in this statement that the Board wants the company to consider the appointment of Directors for two additional posts. The explanatory statement contains one important additional particular. The Board of Directors has made a recommendation that the two persons who have acted as additional Directors be appointed Directors at the meeting. According to Mr. Nariman the Board has complied with the provisions of Section 173 of the Act.

25. Then Mr. Nariman argued that in the present state of pleadings, it was not open to the plaintiffs to raise any objection about the non-compliance with the requirement of Section 173 of the Act. He says that the plaint nowhere refers to Section 173 of the Act. A fair reading of the plaint would show that the main grievance of the plaintiffs was that no resolution was proposed or passed under Section 258 of the Companies Act read with Art. 169 of the Articles of Association of the Company about increasing the strength of the Board of Directors. According to the plaintiffs the two resolutions appointing the appellants as directors are not valid as they in effect increased the number of directors from 8 to 10 without an appropriate resolution being passed as required by Section 258 of the Act. This is the only grievance of the plaintiffs about the non-compliance with the condition in Section 258 of the Act. Mr. Nariman says that in view of this specific case made out by the plaintiffs, there was no occasion for the defendants to meet any other case about the illegality resulting from the non-compliance with the provisions of Section 173 of the Act. Mr. Nariman in this connection heavily leaned upon a decision of the Orissa High Court reported in *Kalinga Tubes Ltd. v. Shanti Prasad Jain*, AIR 1963 Orissa 189. The learned Judges of the Division Bench of that High Court had to tackle a similar point about the sufficiency or otherwise of the pleadings. While dealing with issue No. 4 (a) in that proceeding *Misra, J.* at page 202 in para 17 observed as follows:—

"The notice is challenged as fraudulent and contrary to the statute. None of the grounds have been pleaded. For the first time this contention appears to have been advanced in course of argument before Mr. Justice Barman. In none of the affidavits the petitioner swears that the notice was tricky, misleading or insufficient. The question is one of mix-

ed question of fact and law, and it is not permissible to be taken at the stage of hearing for the first time".

The learned Judge certainly refers later on to Section 172 (1) and S. 173 (2) of the Act. At page 214 para 58 *Das, J.* observes as follows:—

"At the outset, I must say that the plea of invalidity of the notice was not taken either in the plaint which was filed in the Court of the Subordinate Judge or in the petitions and affidavits before the Honourable Company Judge of this Court. At a fairly late stage of the case, oral submissions were made challenging the validity of the notice for the extraordinary General Meeting of 29-3-1958. On that ground alone, the point could have been left out of consideration".

However, it must be stated that the learned Judges despite the insufficiency of the pleadings considered the merits of the case, and held that the notice was in compliance with the statutory requirements of Section 173 of the Companies Act, and the meeting held on the basis of such notice and the resolutions passed therein were not in any way invalid. Mr. Nariman says that this authority has acquired additional sanctity as it was in terms approved by the Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, AIR 1965 SC 1535. *Wanchoo, J.* at page 1545 para 24 has observed as follows:—

"It is, however, urged that the notice for the general meeting of the 29th March 1958 was not in accordance with Section 173 and so the proceedings of the meeting must be held to be bad. This objection was, however, not taken in the petition and we have, therefore, not permitted the appellant to raise it before us, as it is a mixed question of fact and law. We may add that though the objection was not taken in the petition, it seems to have been urged before the appeal court. *Das, J.* has dealt with it at length and we would have agreed with him if we had permitted the question to be raised."

Relying on these decisions Mr. Nariman maintained that the resolutions cannot be challenged on the ground that the notice of the meeting and the explanatory statements accompanying the notice were defective in any manner.

26. Mr. Nariman also submitted that the provisions of Section 173 were directory and not mandatory. Strict compliance with Section 173 was not necessary and there was in the present case substantial compliance with the provisions of that section. It is for this reason that, according to Mr. Nariman, any defect in the notice is capable of being waived by the shareholders. The company had unanimously appointed the appellants at the Annual General Meeting. If there were any averments in the plaint setting out

the various defects and irregularities in the drafting of the notice and the explanatory statements, then it was open to the defendants to adduce evidence and satisfy the court that the plaintiffs by their conduct were estopped from objecting to the legality of the resolutions. As an instance of the so-called irregularity Mr. Nariman referred to *In re: Express Engineering Works Ltd.*, (1920) 1 Ch 466. It was a case where the legality of the Company's meeting was challenged on the ground that it was styled a Directors' Meeting and business was transacted as if it was a General Meeting. The issue of debentures at the meeting was challenged as not valid. Younger, L. J. agreed with Lord Sterndale M. R., who held that the share-holders must be deemed to have acted in the meeting as shareholders and not as directors. What is stated by Younger, L. J. at page 471 is to the following effect:—

"I am of the same opinion. I am content to rest my conclusion upon what was said by Lord Davey in Solomon's case that a company is bound in a matter which is *intra vires* by the unanimous agreement of all the incorporators".

But this decision is not of any assistance to us. A syndicate of five persons formed a private company. They were all the directors and also shareholders. They all attended the meeting and transacted business. The objection to the legality of the meeting was rightly overruled.

27. Mr. Nariman then dwelt on the case *In re. Oxted Motor Co. Ltd.*, (1921) 3 KB 32. The Court held that it was not open to a creditor to impeach the validity of a resolution to wind up the company as it was competent to the shareholders of the company acting together to waive the formalities required by Section 69 of the Companies (Consolidation) Act, 1908 as to notice of intention to propose a resolution as an extraordinary resolution. Even this decision will not carry us any further as in the present case everything turns upon the interpretation of the words of S. 173 of the Companies Act.

28. Then Mr. Thakkar for the respondents submitted that Section 173 was in terms mandatory and not directory. He strongly relies upon a decision of the Gujarat High Court in *Mohanlal Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co. Ltd.*, (1964) 1 Com LJ 326 = (AIR 1965 Guj 96). Mr. Thakkar pin-points the following observations of Bhagwati, J. (as he then was) at page 338:—

"The object of enacting Section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can

exercise an intelligent judgment. The provision is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the nature of concern or interest of the management in such item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all material facts and apprised of the interest of the management in any particular action being taken. Having regard to the whole purpose and scope of the provision enacted in Section 173, I am of the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to the nullification of the action taken".

29. Mr. Thakkar reinforced his argument by reference to a Calcutta decision in which it was held that it was incumbent on the directors to disclose in the notice of the General Meeting full facts. Before I refer to the relevant observations of the learned Judges, it is necessary to know in brief the facts of that case. Section 294 (2) of the Companies Act (as amended by Act 65 of 1960) provides that the appointment of a sole selling agent by the Board of Directors shall cease to be valid if it is not approved by the company in the first General Meeting held after the date on which the appointment is made. The Court held that the provision was not directory but mandatory. The mere substantial compliance was not enough but there must be a strict compliance. The impugned agreement about the appointment was referred to in the report of the Directors and the same was adopted in the subsequent adjourned annual general meeting. But the adoption or approval of the report was treated as ordinary business and not as special business. In the circumstances the learned Judges allowed the appeal and granted ad-interim injunction against the company and the directors restraining them from getting passed the resolution in the ensuing Annual General Meeting of the Company. At page 124 of the report (*Shaligram Jhaharia v. National Co. Ltd.*, (1965) 1 Com LJ 112 (Cal). Bose, C. J. has made the following observations after quoting Section 173 (2) and (3) of the Act:—

"So it appears that under S. 173 (2) an explanatory note with regard to the special items of business has to be annexed to the notice of the meeting; but this was not done with regard to the agreement dated the 27th January 1962. Therefore, there was no compliance with the requirements of the Statute inasmuch as

it was incumbent under the section, if any special business was to be transacted at the meeting, to specify the nature of such business in the notice".

Mitter, J. at page 134 dilates as follows on the importance of the statutory provision:—

"The provision for inspection of the agreement at the registered office of the company in terms of Section 173 (3) is not sufficient for the purposes of Section 173 (2). As the legislature has thought it fit to provide that shareholders must approve of the appointment of selling agents the opportunity given to the shareholders must be full and complete and there must be a full and frank disclosure of the salient features of the agency agreement before the shareholders can be asked to give their sanction. The provision for inspection of the document at the registered office of the company is not enough. Few shareholders have either the time or the inclination to go to the registered office to find out what the company is about to do. Moreover such an opportunity is illusory in the case of shareholders who do not live in Calcutta, when the registered office is situate here".

Coming nearer home, Mr. Thakkar quotes a recent decision of this Court reported in *Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd.*, (1971) 41 Com Cas 377 (Bom) Madon, J. reviewed the entire case law on the subject while interpreting Section 173 (2) of the Act. I reproduce the headnote which nearly summarises the conclusions of the learned Judge:—

"Under Section 173 (2) of the Companies Act, where any items of business to be transacted at the meeting are deemed to be special, there shall be annexed to the notice of the meeting, a statement setting out all material facts concerning each such item of business, including, in particular, the nature of the concern or interest, if any, therein, of every director, the managing Agent, if any, the secretaries and treasurers, if any, and the manager, if any. The object underlying Section 173 (2) is that the shareholders may have before them all facts which are material to enable them to form a judgment on the business before them. Any fact which would assist them in making up their mind, one way or the other, would be a material fact under Section 173 (2) and has to be set out in the explanatory statement. This provision is mandatory and not directory and disobedience to its requirements must lead to nullification of the action taken." Then Mr. Thakkar brought to my notice one more decision of the Calcutta High Court in *Shaligram Jhajharia v. National Co. Ltd.*, (1967) 1 Com LJ 29 (Cal). It must be noted that the subject-matter of

the litigation in this case was an impugned selling agency agreement which figured in the Calcutta decision cited earlier by Mr. Thakkar. The plaintiff challenged the legality of the notice of the Annual General Meeting on the ground that the explanatory statement attached to the proposed ordinary resolution was in contravention of Section 173 of the Act. On facts it was held that the explanatory statement was misleading in relation to the facts stated and it did not disclose certain other material facts. While concluding that the explanatory statement in that case was bad and in violation of Section 173 of the Act, A. N. Ray, J. indicated the correct principle of law. He says at page 36:—

"The further question is whether the explanatory statement is in violation of provisions contained in Section 173 of the Companies Act. It depends upon the facts of each case as to whether an explanatory statement is tricky or misleading."

Ray, J. while considering the essentials of a valid notice convening an extraordinary general meeting extracted two broad principles from the authorities cited before him. At page 135 he says:—

"Two broad principles can be extracted from the authorities: first that notice must be fairly and intelligently framed and it must not be misleading or equivocal. A benevolent construction cannot be applied. Secondly, some matters must be brought pointedly to the attention of the shareholders, for example, where the directors are interested in a contract or matter which is to be submitted to a meeting for confirmation or approval, it appears to be desirable and in certain cases absolutely necessary to disclose the fact in the notice convening the meeting or some accompanying circular."

30. In the wake of these various judicial pronouncements, Mr. Thakkar thought it wise to draw upon the comments of the learned author of 'Law and Practice of Meetings' Frank Shackleton, 5th Edn. At page 27 under the Caption 'Special Business must be clearly stated', the following requirements are noted:—

"As to the essentials of a notice, it must state clearly the nature of any special business to be transacted, as no other business can be transacted in addition or otherwise, unless the notice refers to ordinary business which it is competent for the meeting to transact....."

It is, however, always desirable to state clearly the nature of any special business to be transacted, and if the regulations provide for notice of such special business, any resolutions passed without due notice will be invalid."

31. To reiterate with emphasis the importance of the notice of a meeting,

Mr. Thakkar referred to *Grundt v. Great Boulder Proprietary Gold Mines Ltd.*, (1948) 1 All ER 21. Article 102 of the Articles of Association of the Company provided as follows:—

"If at any general meeting at which an election of directors ought to take place the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it shall be determined at any such meeting on due notice to reduce the number of directors in office." The question arose whether the plaintiff, a retiring director, despite his failure to get re-elected, continued in office. His claim was resisted on the ground that the company in effect had at its meeting reduced the number of directors. Cohen, L. J. overruled the contention and held that the number of directors in office cannot be reduced unless there was a specific resolution of the company to that effect after a mention of the general nature of such resolution has been made. The concluding words of Art. 102 require a specific notice to that effect. Lord Greene, M. R. at p. 30 of the report clarifies the legal position in the following words:—

"In the present case counsel for the company argued that the company had, in effect, determined to reduce the number of directors in office (a) by refusing to re-elect the retiring plaintiff, and (b) by not electing anybody to fill that vacancy. I do not accept that argument. It appears to me that the concluding words of Article 102 require a specific resolution, not merely to re-elect A but a specific resolution that nobody shall be elected to fill the vacancy."

32. It must be noted that the absence of due notice and a specific resolution was linked up with certain legal consequences, for instance, continuation of the retiring director in office. It was mostly on account of the peculiar wording of Article 102 that the court held that a proper resolution after due notice of the proposed special business was absolutely necessary.
27-7-1971.

33. Then Mr. Thakkar cited a decision in *Tiessen v. Henderson*, (1899) 1 Ch 861. The relevant part of the head-note of that case may be stated:—

"The notice of an extraordinary general meeting must disclose all facts necessary to enable the share-holder receiving it to determine in his own interest whether or not he ought to attend the meeting; and pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is a material fact for this purpose."

While restraining the company by an ad-interim injunction from acting upon or carrying into effect certain — special resolutions for reconstruction alleged to have been passed and confirmed at its extraordinary general meetings, the learned Judge Kekewich, J. has made rather strong remarks at page 866 of the report:

"The application of the doctrine of (*Foss v. Harbottle*), (1843) 2 Hare 461 to joint stock companies involves as a necessary corollary the proposition that the vote of the majority at a general meeting, as it binds both dissentient and absent share-holders, must be a vote given with the utmost fairness that not only must the matter be fairly put before the meeting, but the meeting itself must be conducted in the fairest possible manner"

Then at pages 870-871 the learned Judge makes a further observation—

"If a meeting properly convened, and properly instructed as to the purpose for which it is convened, chooses to assent to this, there is no reason why it should not do so, but I think it ought to have the opportunity of considering the point. The man I am protecting is not the dissentient, but the absent share-holder — the man who is absent because, having received and with more or less care looked at this circular, he comes to the conclusion that on the whole he will not oppose the scheme, but leave it to the majority. I cannot tell whether he would have left it to the majority of the meeting to decide if he had known the real facts. He did not know the real facts; and, therefore, I think the resolution is not binding upon him."

34. Now, I may sum up what emerges from these various authorities cited by Mr. Thakkar. Bearing in mind the object of the legislature, I must say that Section 173 is mandatory and not directory. It is in the interest of the general body of Share-holders that the legislature has made provisions in Section 173 (2) requiring the notice of a meeting to set out a statement containing all material facts concerning each special item of business. A notice of meeting when it contains items of special business within the meaning of Section 173 (1) (b) must disclose all the material facts. All the share-holders must be in a position to make up their mind in advance whether they will attend the meeting or leave it to the good sense of the majority at the meeting. Any non-compliance with this requirement will nullify the action taken at the meeting. While considering the efficacy of any such notice, a benevolent construction will not be adopted so as to defeat the provisions of the statute. It is also clear

that whether or not a particular notice or an explanatory statement in a given case complies with the statutory requirement is a question of fact. There are two ways in which the mandatory provisions contained in Section 173 may be contravened. It may be a case where no explanatory statement is at all appended to the item of special business, or it may be a case where the statement is incomplete, misleading or tricky. The contravention may be the result of an act of omission or an act of commission. Whatever be the nature of the contravention, the question always is a mixed question of fact and law. When a challenge is made in a court of law the court will have to consider all the facts and circumstances of the case and then decide one way or the other.

35. As the contravention alleged by the plaintiffs in this case is a mixed question of law and fact, the pleadings certainly assume importance. Mr. Nariman has made a point, as stated above, that the pleadings give no indication that the plaintiffs ever alleged any contravention of Section 173. As the resolution is challenged on the ground of breach of Section 258 in particular and the provisions of the Companies Act in general, there is certainly some difficulty in permitting the plaintiffs to raise this point.

36. Mr. Thakkar has not accepted the position that the plaint does not contain sufficient averments. He has pointed out from the plaint and the written statement that the pleadings certainly give an indication that the plaintiffs wanted to challenge the legality of the action on the ground of either want of or a defective resolution. Mr. Thakkar relied upon the averments in para 7 of the plaint. The plaintiffs have averred that before increasing the number of directors under Section 258 of the Act and Article 169 of the Articles of Association, a resolution ought to have been passed after due compliance with the requirements of the provisions of the Companies Act. Mr. Thakkar says that though the plaintiffs have alleged contravention of the Companies Act, they have by implication referred to the requirement of an explanatory statement under Section 173 of the Act. Then Mr. Thakkar also read out portions of the written statement of the appellants, particularly paragraphs 9 and 10, which, according to Mr. Thakkar, show that the defendants were aware of the challenge made by the plaintiffs to the legality of the resolutions on the various grounds. Even apart from the pleadings, according to Mr. Thakkar, the parties were aware of all the relevant facts and the point about the applicability of Section 173 of the Act. In this con-

nection reliance was also placed on the affidavits filed at the interlocutory stage in support of the notice of motion taken out for interim relief. Plaintiffs had in their affidavits referred to the defective explanatory statement and said that there is non-compliance with the requirements of Section 173. A reference was also made to the appeal memo (A. O. No. 436 of 1970) filed by the respondents in this Court against the interlocutory order. After considering all these submissions, I am of the opinion that Mr. Thakkar can at best show in this case that there is no explanatory note at all accompanying the item of special business. But the averments referred to above are certainly insufficient to cover a plea that the explanatory statement appended to the notice of the meeting about the special business is insufficient or misleading. Any such plea about insufficiency of the explanatory statement is very much like the plea of fraud. It is well settled that the plea of fraud must be substantiated by all relevant particulars disclosed in the pleadings.

37. Then I have to deal with the point raised by Mr. Thakkar that in the present case there is no explanatory statement and, therefore, there is a clear contravention of the provisions of S. 173 of the Act. Mr. Thakkar says that there was no proposal in so many words about the increase of the number of directors. There was no such item in the notice. Therefore, there was no occasion for any explanatory statement.

38. I have already referred to the contents of the Items Nos. 3, 4, 7 and 8 in the notice of meeting. Items Nos. 3 and 4 refer to ordinary business inasmuch as the directors retiring by rotation were to be re-elected. The permanent strength of the Board of Directors was 8. Under Article 164 of the Company, the number nearest to one-third had to retire from office. Items Nos. 3 and 4 certainly indicate that the company was to fill up the two vacancies caused by the retirement of the directors by rotation. Now, Items Nos. 7 and 8 state that the Board had appointed two additional directors on 10th April 1969. Those directors will cease to hold office under Section 260 of the Act on the date of the meeting. Notices, as required under Section 257 of the Act, have been received by the company proposing the candidature of these additional directors at the meeting. This information about the item of business has to be considered along with the corresponding explanatory statement. The explanatory statement virtually restates what is contained in Items Nos. 7 and 8. One additional particular is also mentioned and that is the recommendation of the Board of

Directors that the named persons be appointed as directors. Items Nos. 7 and 8 along with the explanatory statement certainly convey to the share-holders that the Board of Directors have made a proposal that two more additional directors be appointed at the meeting and if possible the two named persons be elected to fill up those additional posts. In my opinion this is nothing short of a proposal to increase the strength of the Board of Directors from 8 to 10. Mr. Thakkar tried to show that all this information has nothing to do with the proposal to increase the number of directors. But despite his best efforts he was not in a position to convince me that all this information was in connection with some other intelligible topic. I have not been able to place any other construction on Items Nos. 7 and 8, and in my opinion the plaintiffs have failed to make out a case that there is no information at all about the proposed special business accompanied by the required explanatory statement.

39. Then Mr. Thakkar argued that at any rate the court must hold that the information given along with explanatory note is wholly misleading. Mr. Thakkar pointed out that the Board of Directors has nowhere indicated in the notice or the explanatory statement as to why it had made a proposal for increasing the number of directors.

40. Mr. Nariman, on the other hand, submitted that the Board can only disclose known reasons and it is not in a position to disclose the unknown reasons. I do not find any substance in either of these contentions. In the absence of a pleading in fact, Mr. Thakkar cannot successfully show that there was no reason contained in the statement about the proposed increase. In my opinion the statement is a comprehensive and compendious statement. The Board has in a way indicated the reasons for the increase. It has stated that it was required to appoint two men of their confidence as additional directors. It is implicit in this action and the statement that the company needed their services. This is followed by a recommendation by the Board that the two named persons be appointed to fill up the additional posts. This is sufficient reason for the proposed increase. A share-holder, after reading this information, can certainly form an intelligent judgment and make up his mind one way or the other. He may either choose to attend the meeting or leave it to the good sense of the majority of the voters. As the plaint does not show in what way the explanatory statement is defective, there is no reason to further examine the so-called defect pointed out by Mr. Thakkar. Mr. Nariman's distinction between known

and unknown reasons is also very far from convincing. One acts only for known reasons. Acting without reasons is a leap in the dark and, therefore, there is never any occasion for giving unknown reasons. But I must make it clear that under Section 173 (2) material facts will not necessarily include the reasons. It will all depend upon the nature of the subject-matter which constitutes the special business. Some times the facts stated are sufficiently eloquent and there is no need to justify the proposed action by giving reasons. In the absence of sufficient pleadings, the plaintiffs in the present case cannot challenge the statements contained in the notice and the explanatory statement on the ground that the particulars are insufficient and/or misleading. In the result I disagree with the finding of the learned Judge and hold that there is no contravention of the provisions of Section 173 of the Companies Act.

41. Then Mr. Thakkar argued that the learned Judge was in error in holding that the additional directors, like the retiring directors, are not required to file any written consent duly signed by them before their reappointment by the company. This question involves the interpretation of Section 264 (1) of the Act. Section 264 (1) as it originally stood in 1956 has gone through a process of one or two amendments. Before I consider the point and the various possible interpretations of Section 264, it will be necessary to state a few more facts.

42. On 9-4-1969 there was a move for appointing the appellants as additional directors. On the same day two letters were separately addressed by the appellants to the company. The letters purported to be consent in writing duly signed under Section 264 (1) of the Act. The appellants have indicated their consent to act as directors of the company if appointed. On 10-4-1969 the Board of Directors appointed the appellants as additional directors under Section 260 of the Act. On 10-4-1969 separate proposals by two members were made in favour of the appointment of the appellants as directors at the ensuing meeting. Defendant No. 1 (3?) the company in its written statement, has stated that after the receipt of the letters of consent dated 9-4-1969 the appellants were appointed as additional directors. Mr. Thakkar referred to form No. 29, which was submitted on 26-4-1969, that is, long before the Annual General Meeting of the company. All these facts and circumstances according to Mr. Thakkar show that the letters of consent were, in fact, filed by the appellants in connection with their appointment as additional directors. The learned Judge has accepted this position. But Mr. Nariman for the appellants is challenging

this finding. I may not consider this controversy at this stage.

43. As stated above, it will be necessary to point out the legislative changes before I consider Section 264 in its present form. Section 264 as originally enacted reads as follows:—

"(1) A person who is not a retiring director shall not be capable of being appointed director of a company unless he has himself or by his agent authorised in writing signed and filed with the Registrar a consent in writing to act as such director.

(2) Sub-section (1) shall not apply to a private company unless it is a subsidiary of a public company".

44. The provision as enacted required all persons who desired to be considered for appointment as directors to file a written consent before their appointment. The consent has to be given before the appointment as without such consent the person was not capable of being appointed and he could not be considered a qualified or a fit person for appointment as director. Only one person was exempted from this condition and that was a retiring director. It was not necessary for him to file any consent before his reappointment as a director. Then as a result of the Amending Act 65 of 1960 a new Section 264 was substituted with effect from 28-12-1960. The new section reads as under:—

"264 (2). Every person (other than a person who has left at the office of the company a notice under Section 257 signifying his candidature for the office of a director) proposed as a candidate for the office of a director shall sign and file with the company, his consent in writing to act as a director, if appointed.

(2) A person other than—

(a) a director re-appointed after retirement by rotation or immediately on the expiry of his term of office, shall not act as director of the company unless he has within thirty days of his appointment signed and filed with the Registrar his consent in writing to act as such director.

(3) This section shall not apply to a private company unless it is a subsidiary of a public company".

The significant change in the wording is the deletion of the words "shall not be capable of being appointed". Section 264 (1) dispenses with the formal consent in the case of a person who has proposed himself as a candidate for the office of a director under Section 257 of the Act. Sub-section (2) requires all persons newly appointed as directors to file with the Registrar within 30 days of their appointment a consent in writing to act as a director. Sub-section (2) makes it clear that unless such a consent is filed the person appointed shall not act as a director.

45. Thereafter by Act No. 31 of 1965 the section is substantially amended and I have to consider the section so amended. The section in the present form is as follows:—

"264(1) "Every person (other than a director retiring by rotation or otherwise or a person who has left at the office of the company a notice under Section 257 signifying his candidature for the office of a director) proposed as a candidate for the office of a director shall sign and file with the company, his consent in writing to act as a director, if appointed.

(2) A person other than—

(a) a director re-appointed after retirement by rotation or immediately on the expiry of his term of office, or

(b) an additional or alternate director, or a person filling a casual vacancy in the office of a director under S. 262, appointed as a director or reappointed as an additional or alternate director, immediately on the expiry of his term of office, or

(c) a person named as a director of the company under its articles as first registered, shall not act as a director of the company unless he has within thirty days of his appointment signed and filed with the Registrar his consent in writing to act as such director.

(3) This section shall not apply to a private company unless it is a subsidiary of a public company".

46. The first point debated before me by counsel on either side is whether Section 264 is directory or mandatory. As the point is not covered by any direct authority, the counsel had to rely upon their original submissions and they have also referred to decisions which deal with the construction of statutes.

47. Mr. Thakkar says that the section is mandatory because the condition referred to in the section of filing a written consent is a condition precedent to the valid appointment. The consent required under Section 264 is to be in writing and duly signed. Section 264 (1) provides that the person who is a candidate for the office of a director shall file his consent in the prescribed form to act as a director, if appointed. Mr. Thakkar says that the use of the expression "shall" indicates that the section is mandatory. Mr. Thakkar invited my attention to a number of judicial decisions about the interpretation of statutes. He relied upon a decision of the Supreme Court in *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369 for the proposition that if the specific words used by the legislature are clear then for interpretation the courts could not rely upon the Statement of Objects and Rea-

sons. Patanjali Shastri, C. J. at page 378 (para 32) has made the following observations:—

"As regards the propriety of the reference to the Statement of objects and reasons, it must be remembered that it seeks only to explain what reasons induced the mover to introduce the bill in the House and what objects he sought to achieve. But those objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. The Bill may have undergone radical changes during its passage through the House or Houses, and there is no guarantee that the reasons which led to its introduction and the objects thereby sought to be achieved have remained the same throughout till the Bill emerges from the House as an Act of the Legislature, for they do not form part of the Bill and are not voted upon by the members. We, therefore, consider that the Statement of objects and reasons appended to the Bill should be ruled out as an aid to the construction of a statute".

But Mr. Thakkar admitted that the rigour of the rule laid down in the abovementioned case was relaxed, in a subsequent decision of the Supreme Court in *Commr. of Income-tax, M. P. v. Smt. Sodra Devi*, AIR 1957 SC 832, Bhagwati, J. at page 835 says:—

"It is clear that unless there is any such ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice".

At page 839 a further rule of construction of statute is stated:—

"Though it is not legitimate to refer to the statement of objects and reasons as an aid to the construction or for ascertaining the meaning of any particular word used in the Act or Statute (see *Aswini Kumar Ghose v. Arabinda Bose*, (AIR 1952 SC 369)), nevertheless this Court in the State of West Bengal v. Subhod Gopal Bose, 1954 SCR 587 at p. 628 — (AIR 1954 SC 92) referred to the same for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of evil which he sought to remedy".

Mr. Thakkar says that it is the primary rule of construction that the statute should be interpreted without looking into any other extraneous circumstances. It is only when there is some ambiguity then, as stated by the Supreme Court, re-

ference may be made to the objects and reasons for the limited purpose of finding out the particular reason which prompted the Legislature to pass that enactment.

48. Then Mr. Thakkar referred to the rule which, in the judicial parlance, is recognised as the Golden Rule of construction of statutes. The statement of the rule by Burton, J. in *Warburton v. Loveland*, (1928) 1 Hud & B., 623-648 (IR) is reproduced by the learned author in Bindra's Interpretation of Statutes, 5th Edn. at p. 71 and is to the following effect:—

"I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such inconvenience, but no further".

The following passage in Chapter XIII from Maxwell on the Interpretation of Statutes, 12th Edn. 314 also lays down a sound principle:—

"It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule' said Lord Campbell L. C. 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.' And Lord Penzance said: 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory'".

49. Viewed in the light of these principles, the section, in my opinion, appears to be directory in so far as the person who would desire to be a candidate for the office of a director would be required to file his consent. The object of the legislature is evident when one considers the various amendments made by the Legislature before the section was enacted in the present form. Those who have once acted as directors were only seeking reappointment. It was considered throughout that the formal consent on their part was not necessary. It is very

clear as to why such a condition was found necessary. It may be that a person who is appointed as a director may refuse to act on the ground that he had never consented to act as a director. When such a flaw is discovered later on and the appointment will have to be ignored as ineffective, the company will have to take again further steps for filling the post of such director. Ordinarily a person appointed as a director is not likely to refuse to act. In a rare case he may do so. It is only to avoid the attending inconvenience that the Legislature has prescribed the condition. In the section as originally worded, somewhat strong language was used. It was enacted that a person shall not be capable of being appointed as a director unless he had filed earlier his consent in writing to act as such director. The deletion of these words in the subsequent amended form of the section is not without significance. Perhaps the Legislature thought that the condition was given comparatively more importance when it was introduced in the section. If this is the only object which the Legislature sought to achieve by prescribing a prior consent in writing then there is no reason why the absence of consent in all cases should invalidate the appointment. Even without a consent a person appointed may accept the appointment and prefer to act as a director. This is likely to happen in a majority of cases. Considering the section as a whole and bearing in mind the object of the Legislature, and magnitude of the mischief intended to be avoided I hold that Section 264 (1) is clearly directory and not mandatory. I am only interpreting Section 264 (1) of the Act and it is not necessary to pronounce any opinion about Section 264 (2). Whether it is mandatory or directory will have to be decided in a suitable case. But I cannot help expressing my opinion that the difference in the language has certainly assisted me in reaching my conclusion about the directory nature of S. 264 (1) of the Act. The consent under S. 264 (2) which is to be filed with the Registrar is a condition precedent for acting as a director. The sub-section provides that a person, who is being appointed for the first time as a director, shall not act as a director of the company unless he has filed the consent within the prescribed time. No argument is necessary for saying that the sub-section is mandatory.

50. Then Mr. Thakkar submitted that the learned Judge was in error in holding that there is really no difference between the retiring director and the additional director while considering the application of Section 264 (1) of the Act. As all the relevant points were urged before me I had to consider them and give my decision accordingly. In fact when

I found that the section is directory it is sufficient for the final disposal of the appeal but these are all points of law touching the interpretation of Section 264 (1) as a whole and, therefore, I must consider each point urged by the counsel separately.

51. That takes me to the interpretation of the key words in S. 264 (1) "or otherwise". The learned Judge while considering these words has relied on the dictionary meaning of the expression "retire". A person retires when he ceases to hold a particular office. There is no difference between retiring by rotation and retiring by ceasing to hold office. The additional directors appointed under Section 260 hold office only upto the date of the next Annual General Meeting. In other words they cease to hold office before the date of the next Annual General Meeting. Mr. Thakkar says that the learned Judge was not right in reaching this conclusion. According to Mr. Thakkar there is material difference between the two sets of directors. Mr. Thakkar points out that under Section 256 (1) of the Act certain proportion of directors retire by rotation. Under S. 256 (2) the directors retire by rotation at every Annual General Meeting. Whereas under Section 260 first proviso, the additional director holds office only upto the date of the next Annual General Meeting of the company. In other words, the additional director ceases to hold office earlier and thereafter the retiring director who vacates the office at the meeting remains in office for at least a short duration. Mr. Thakkar says that this distinction between the tenure of the two classes of directors is recognised even under the English Law. Mr. Thakkar has relied on a decision in *Eyre v. Milton Proprietary Ltd.*, (1936) 1 Ch 244. The court in that case was required to consider the exact connotation of two Arts. 85 and 90 of the Articles of Association of the Company. The court had to decide the meaning of the expression "of the whole number of directors" in Art. 85. That was necessary to determine the number of directors who had to retire in a particular year. There was no doubt that the expression "whole number of directors" did not include the Managing Director. Article 90 provided that the Board may from time to time appoint additional directors but any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election. The point for consideration depended for its answer on the words of Art. 85 as compared with the words of Art. 90 and in particular certain latter words of Art. 85. According to the Court there must be some point of time at which it was to be ascertained as to who are the whole number of direc-

tors to whom must be applied the provision relating to retirement. That point of time was to be at the ordinary general meeting. It was clear from Art. 90 that at the annual general meeting the two additional directors will not be in office as they were to hold office only until the next following ordinary general meeting of the company. At the commencement of the ordinary general meeting they will be no longer in office. But the retiring directors and the other continuing directors will act as directors throughout the meeting. In other words, they would constitute the total number of directors, for deciding the proportion of the directors retiring. Romer, L. J. at page 257 sums up the legal position in the following words:—

"I agree that in the circumstances the number of directors to be considered is the number of directors existing at the moment when the ordinary general meeting begins and inasmuch as at the particular moment that it begins the two directors elected under Art. 90 cease to be directors, the number of directors then must be taken to be five and not seven".

Mr. Thakkar relies on this decision for underlining a similar distinction between the directors retiring by rotation at every annual general meeting and the additional directors holding office only upto the date of the next annual general meeting. Mr. Thakkar says that when the Legislature has used the expressions like "retiring" and "holding office" upto a particular point of time, the court will have to interpret the different words in a different way. In support of this rule of interpretation he relies on a decision of this Court in *East and West Insurance Co. Ltd. v. Mrs. Kamala Jayantilal Mehta*, AIR 1956 Bom 537. Chief Justice Chagla, who delivered the judgment of the bench, says at p. 543:—

"Now, the normal canon of construction either of a statute or of articles of association is that when different expressions are used they are intended to connote something different....."

There cannot be any dispute about this rule of interpretation. Giving full effect to the rule it only means that a retiring director ceases to hold office later than the additional director. The difference in the duration of their tenure is brought out by the Legislature by using appropriate expressions. But it will not be correct to carry this distinction too far. While interpreting the words appearing in Section 264, the expression "retiring by rotation" has to be understood in conjunction with or along with the other key words "otherwise". These two expressions certainly are used for covering or for including different set of directors who cease to hold office. We know very

well what is meant by a director retiring by rotation. Section 256 (1) provides that at the first annual general meeting one-third of the directors for the time being as are liable to retire by rotation, or if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office. Then the question arises on a literal interpretation of the words as to who are the other directors who otherwise retire, that is, retire otherwise than by rotation. Mr. Thakkar says that the Articles of Association of a company may provide that all the directors en bloc shall retire and in that case the company might appoint directors to fill up all the vacancies. Mr. Thakkar has not been able to indicate any other class of directors who will be covered by the expression "or otherwise". He maintained that under Section 256 (1) a company may by its articles provide that a certain proportion of directors will ever remain in office and only the remaining directors will wholly retire and it is to cover such a class of directors retiring in this manner that the expression "or otherwise" is used by the Legislature in Section 264 (1) of the Act.

52. It is difficult to accept this interpretation of S. 256 (1). Section 256 (1) provides:—

"..... one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is not three or a multiple of three, then, the number nearest to one-third, shall retire from office".

In the illustration given by Mr. Thakkar, a certain fixed number of directors will remain in office permanently and the others will retire, so as to enable the company to fill up those vacancies. Those who are retiring in this manner are, according to Mr. Thakkar, not retiring by rotation. I am not prepared to accept this interpretation of Section 256 (1) of the Act. When few of the directors retire in the manner indicated in S. 256 (1) of the Act, then they are retiring by rotation. If the articles so provide, all the directors may retire and that retirement certainly will not be covered by the expression "retiring by rotation". On a reference to the *Shorter Oxford Dictionary*, Vol. II-N-Z, 3rd Edn. revised with Addenda, I find that the adverb "otherwise" means in another way or in other ways. Whether the expression "otherwise" would include one or more classes is not clear. At any rate, the expression is somewhat equivocal. In such a case I will be justified in following the dictum laid down by the Supreme Court in *Virji Ram Sutaria v. Nathalal Premji Bhanvadia*, AIR 1970 SC 765. The Supreme Court in that case, while interpreting certain articles of the Constitution, relied upon the statement of objects and reasons,

The Supreme Court had to decide whether certain provisions were directory or mandatory. As the provisions themselves were not clear, reliance was placed on the statement of objects and reasons for finding out the intention of the Legislature. I may reproduce the following passage from the judgment of Mitter, J. which appears at page 769 para 11 of the report:—

"The above cases are sufficient to show that non-compliance with the provisions of a statute or Constitution will not necessarily render a proceeding invalid if by considering its nature, its design and the consequences which follow from its non-observance one is not led to the conclusion that the legislature or the constitution-makers intended that there should be no departure from the strict words used".

So, in other words, while interpreting the words or even while departing from the strict words used, the Court may find out the intention of the legislature by referring to the statement of objects and reasons. Mr. Nariman rightly says, that relying on this decision one can look at the notes on clauses preceding the amendment of Section 264 of the Act. (See Gazette of India, Extraordinary, Part II, Sec. II, 1964 dated 10-2-1964). Clause 32 reads as under:

"Section 264 requires that a person proposed as a candidate for the office of director shall file with the company his consent to act as director, if appointed. It also requires that a person other than a director reappointed after retirement by rotation shall not act as director unless he has filed with the Registrar his consent in writing to act as such. This amendment seeks to exempt persons who have served as directors in the immediate preceding terms from these requirements. It is felt that in the case of such persons the requirement to file their consent in writing is a formality which could well be dispensed with." Clause 32 shows in unmistakable terms as to why the exceptions were enacted to dispense with the filing of consent in certain cases. No such consent either under Section 264 (1) or sub-section (2) was necessary in the case of persons who had immediately before the reappointment acted as directors. Considering the object of the amendment there is no reason why the additional directors who are expressly exempted from the requirement of filing a consent under Section 264 (2) should be excluded while construing a somewhat similar exemption under Section 264 (1) of the Act. In my opinion the expression "otherwise" covers all the other directors who for one reason or the other cease to hold office and are immediately thereafter reappointed as directors.

For these reasons I hold that the learned Judge was right when he recorded a finding that additional directors are not required to file any written consent under Section 264 of the Act, as a condition precedent for the validity of their reappointment.

53-54. Then Mr. Nariman submitted that no such consent under S. 265 (1) is required for appointment of any person as an additional director under S. 260 of the Act. He relies on the wording of Section 264 (1), viz:

"Every person proposed as a candidate for the office of a director shall sign and file with the company, his consent in writing to act as a director, if appointed".

These words, according to Mr. Nariman, indicate that the consent contemplated is referable to the candidature of the person for the office of director. That can only be at the meeting of the company in which directors are appointed by unanimous or majority vote of the shareholders. Mr. Nariman says that S. 260 confers power on the Board of Directors to appoint additional directors when so permitted by the Articles of Association of the Company. Neither in Section 260 nor anywhere in the articles of the Company are there provisions requiring the person to file his consent before his appointment as additional director. A closer reading of Section 264 (1) furnishes one more reason in support of the interpretation suggested by Mr. Nariman. One of the persons, who is exempted from the condition of filing such a consent is one who has left at the office of the company a notice under Section 257 signifying his candidature for the office of a director. This clearly shows that the provision about consent is in connection with the appointment of directors at the meeting of the company. Even the consent that is prescribed is to be in writing to act as a director, if appointed. There are no such words to show that the consent is given to act as a director or an additional director. These various expressions used by the Legislature certainly indicate that Section 264 (1) does not in any manner regulate the appointment of additional directors under Section 260 of the Act.

55. It is not disputed before me nor was there any dispute before the learned Judge about the fact that there is one set of written consent filed in this case on behalf of the appellants. It is not necessary to resolve the controversy whether it was with reference to the appointment as an additional director or with reference to the reappointment as a director. If no consent was required for any appointment under Section 260 that consent, if filed, will be redundant. It is true that the company by its written statement has taken up a contention that

after receipt of these consents the appellants were appointed as additional directors. Mr. Thakkar also submitted that, that may be accepted as a fact in view of the various facts and circumstances mentioned above. But the appellants in their written statement have pleaded that these written consents certainly validated their appointment in the general meeting. Once it is found as a fact that no consent was required for the appellants' appointment as Addl. Directors, then there is no reason why the appellants should not be allowed to rely upon the letters of consent, when the validity of their appointment is challenged by the plaintiffs. Letters of consent were to be filed duly signed by the persons concerned with the company. They are so signed and filed with the company. There are no words used in the letters to indicate that they had given the consent only to act as additional directors, if appointed. In the absence of any such restrictive words, it can be fairly assumed that they gave their consent in writing not only to act as additional directors, if appointed, but also to act as directors, if appointed. In my opinion even for this additional reason the appointment of the appellants cannot be challenged.

56. The last point raised in the present appeal is about the maintainability of the suit. Mr. Nariman, consistent with the appellants' stand in the lower court, submits that the plaintiffs have come to the court with certain grievances about the irregularities committed by the company while appointing the appellants as directors. Mr. Nariman relied upon a decision of this Court in *V. N. Bhajekar v. K. M. Shinkar*, 36 Bom LR 483 = (AIR 1934 Bom 243). It was a suit by the shareholders challenging irregularities committed by the directors. It was held that such a suit was not competent. The headnote indicates that there are certain recognised exceptions to the rule that mere irregularities committed during the course of the management of the internal affairs of the company do not furnish any cause of action to the shareholder or shareholders. The relevant headnote is to the following effect:—

"The supremacy of the majority of shareholders is subject to certain exceptions, viz:

(1) where the act complained of is ultra vires the company;

(2) where the act complained of is a fraud on the minority; and

(3) where there is an absolute necessity to waive the rule in order that there may not be a denial of justice".

Mr. Nariman submits that the present case is not covered by any one of these three exceptions. The appellants were appointed directors by a unanimous re-

solution passed at the meeting of the company. The plaintiffs after a long lapse of time had no reason to rush to the court for any relief. It is not an act which is patently illegal or ultra vires the company. But I find it difficult to accept this contention of Mr. Nariman. I have already held that Section 173 is mandatory and not directory. Any non-compliance with the provisions of S. 173 will result in the nullification of the Act. The plaintiffs have alleged that there was contravention of Section 258 of the Indian Companies Act, as there was no valid resolution proposing the increase in the number of directors. It may be that the plaintiffs have not eventually succeeded in the suit. In view of the findings recorded by me, it cannot be said that the suit as framed is not competent. In my opinion the plaintiffs' case will be covered by the first of the three exceptions mentioned above. The learned Judge was, therefore, right when he held that the suit as framed was maintainable.

57. Mr. Buch with Mr. Munshi, who appeared for Respondent No. 3 Company, submits to the orders of this Court.

58. In the result the appeal is allowed, the judgment and decree of the lower court is set aside and the plaintiffs' suit is dismissed with costs throughout. Respondents 1 and 2 will not be liable to pay the costs of Respondent No. 3 throughout.

Appeal allowed.

AIR 1972 BOMBAY 296 (V 59 C 54)

MODY AND CHANDRACHUD, JJ.

Sabir Ahmed Lal Mohamed, Petitioner v. State of Maharashtra, Respondent.

Criminal Revn. Appln. No. 1101 of 1970, D/- 20-8-1971.

(A) Precedents — Two single Judge rulings taking same view — Their authority cannot be equated to that of a division bench and cannot preclude a reference to another division bench when a subsequent single judge differs from it — (X-Ref:— Constitution of India, Pre.)

(Para 5)

(B) Motor Vehicles Act (1939), S. 17 (1) — Does not offend Art. 20 (2) of the Constitution — (X-Ref:— Constitution of India, Art. 20 (2) — Prosecuted and punished).

The suspension of a motor driver's licence under Section 17 (1) in addition to imposition of fine for conviction of the driver for an offence under the Act in the same prosecution cannot offend Art. 20 (2).

(Para 6)

(C) Motor Vehicles Act (1939), S. 17 (1) — Conviction for contravention of a

GP/GP/D678/72/KSB

rule under Act — Person can be disqualified under Section 17 (1) for holding driver's licence — (X-Ref:— Ss. 21, 112) — (X-Ref:— Bombay Motor Vehicles Rules (1959), R. 26 (34).

A person who contravenes a rule framed under the Act, commits an offence under the Act and on his conviction for that offence, he is liable to be disqualified under S. 17 (1) for holding a driving licence. Cr. R. A. No. 52 of 1971 (Bom) and Cr. R. A. No. 1142 of 1970 (Bom). Overruled. (Para 21)

Section 112 which prescribes punishment takes in breaches of the Act as well as breaches of the rules, with the result that breaches of the rules become offences under Section 112, that is offences under the Act. (Para 12)

The power conferred by sub-section (1) of Section 17 can be exercised even if the breach is of a rule of conduct not directly connected with the act of driving like the one contained in R. 26 (34) Bombay Motor Vehicles Rules. The power to suspend the driving licence is not conditioned by the circumstance that the offender must be guilty of an offence connected directly with the act of driving. (Paras 14, 15)

The word "penalty" is used in Section 112 in the sense of 'sentence' following upon a conviction. The context is that if no other penalty is provided for the offence, the offence would be punishable with a sentence of fine, indicating thereby that if no other sentence is provided, the sentence of fine may be imposed. (Para 19)

Cases Referred: Chronological Paras
 (1971) Criminal Revn. Appln. No. 52 of 1971 (Bom) 1
 (1970) Criminal Revn. Appln. No. 1142 of 1970 (Bom) 1

G. A. Chandra, for Petitioner; S. C. Pratap, Asst. Govt. Pleader, for State.

CHANDRACHUD, J.:— In Criminal Revn. Appln. No. 52 of 1971 (Bom) Vaidya, J. took the view that the power conferred by Section 17 (1) of the Motor Vehicles Act, 1939 (herein, "the act") to disqualify a person for holding a driving licence cannot be exercised in cases where the contravention is of a rule relating to the mere conduct of the driver. Bhasme, J., also sitting singly, took the same view in Criminal Revn. Appln. No. 1142 of 1970 (Bom).

2. A similar question arose before the learned Chief Justice in Criminal Revn. Appln. No. 1101 of 1970. He was inclined to a different view and therefore he has referred for our decision the question as regards the correctness of the two earlier decisions. In his referring judgment on July 16, 1971, the learned Chief Justice has expressed the opinion that the power conferred by Sec-

tion 17 (1) to suspend a driving licence is exercisable even where the conviction is for the breach of a rule governing the conduct of the driver.

3. Only a few facts are relevant. The petitioner is a taxi driver and the prosecution arose out of his refusal to drive the complainant to the desired destination. The complainant got into the taxi when the meter flag was in a vertical position but rather than take him where he wanted to go, the petitioner held him by his legs and threatened to throw him out. For this, the petitioner was convicted by the learned Presidency Magistrate under Section 112 of the Act read with Rule 26 (34) of the Bombay Motor Vehicles Rules, 1959, (hereinafter called "the Rules"). This rule provides that "No driver shall without reasonable excuse refuse to let the cab for hire when the flag is in a vertical position". The Magistrate sentenced the petitioner to pay a fine of Rs. 100/- and under Section 17 (1) he suspended the petitioner's driving licence for a period of two months.

4. The learned Chief Justice has confirmed the order of conviction and the sentence of fine. He was also inclined to confirm the order of suspension but he felt that he could not differ from the view taken by Courts of co-ordinate jurisdiction. He has therefore referred for our consideration the question as regards the correctness of that view.

5. Counsel appearing on behalf of the petitioner has raised two preliminary objections to the reference made by the learned Chief Justice. Counsel says that two single Judges having taken the same view, their judgments are on a par with the judgment of Division Bench and therefore the learned Chief Justice had no power to differ from the view taken by the "Division Bench" and refer the matter to another Division Bench. This objection is untenable. One plus one equals two is plain arithmetic but you cannot roll two judgments of two single Judges into one and give to those judgments the authority of the judgment of a Division Bench. This novel method will bring into being a new class of privileged judgments of "Division Benches", "Full Benches" and "Special Benches" — unknown to the law of precedents. The objection is devoid of merit.

6. Of no different variety is the second preliminary objection that the question referred to us cannot possibly arise as Section 17 (1) of the Act offends against Article 20 (2) of the Constitution. Article 20 (2) provides that no person shall be "prosecuted and punished" for the same offence more than once. Even assuming that the suspension of the petitioner's licence is punishment within the meaning of Article 20 (2), the peti-

tioner has not been prosecuted for the same offence more than once. It is in the prosecution that he is being fined and disqualified for holding a licence. Therefore, this objection must also fail.

7. The question for consideration is whether the power of the Court to disqualify a person for holding a driving licence extends to cases in which the conviction is recorded under S. 112 of the Act for the breach of a Rule made under the Act.

8. Section 17 (1) of the Act is in these terms:

"17. Power of Court to Disqualify.—

(1) Where a person is convicted of an offence under this Act, or of an offence in the commission of which a motor vehicle was used, the Court by which such person is convicted may, subject to the provisions of this section, in addition to imposing any other punishment authorised by law, declare the person so convicted to be disqualified, for such period as the Court may specify, for holding any driving licence or for holding a driving licence to drive a particular class or description of vehicle."

9. Section 21 of the Act confers on the State Government the power to make rules for the purpose of carrying into effect the provisions of Chapter II of the Act, in which Section 17 occurs.

10. Section 112 of the Act provides:

"Whoever contravenes any provision of this Act or any rule made thereunder shall, if no other penalty is provided for the offence, be punishable with fine which may extend to one hundred rupees, or, if having been previously convicted of any offence under this Act he is again convicted of an offence under this Act, with fine which may extend to three hundred rupees."

11. It is urged on behalf of the petitioner that Section 112 makes a distinction between the contravention of a provision of the Act and the contravention of a provision of a rule made under the Act and, therefore, the power conferred by Section 17 (1) to suspend the driving licence of "a person convicted of an offence under this Act" is not available in regard to offenders convicted for breach of a rule. We find it difficult to accede to this contention. Whether the contravention is of a provision of the Act or of the provision of a rule made under the Act, the offence is committed under the Act. Therefore, even if the breach alleged is of a rule, the offence is not committed under the Rules but it is committed under the Act. It is the Act which prescribes punishment and penalties for contravention of the rules, so that offences, though they may consist in breach of rules, can be

committed only under the Act and not under the rules. That is the plain position.

12. Section 112 undoubtedly refers separately to contravention of the provisions of the Act and contravention of any of the rules made under the Act but it does not make a distinction between the two classes of offences. Far from it. It clubs them together and treats them on a par by declaring both classes of contraventions as offences under it and by prescribing the same punishment for both. Section 112 thus takes in breaches of the Act as well as breaches of the rules, with the result that breaches of the rules become offences under Sec. 112, that is, offences under the Act.

13. It is important that the rules framed by the State Government in the exercise of its powers under Section 21 of the Act do not create any offences, assuming that the rule-making power could extend that far. The rules provide for contingencies of diverse kinds like licensing of drivers and conductors, registration and control of motor vehicles, construction, equipment and maintenance of vehicles etc. There is no rule among the 316 rules which are contained in the Rules of 1959, which either creates an offence or prescribes a penalty for any offence. The rules prescribe norms; breaches thereof become offences under the Act and the Act provides for the punishment and penalties for those offences. Thus, the breach of a rule constitutes an offence not under the Rules but under the Act.

14. The relevant pre-condition of Section 17 being that the person who is proposed to be disqualified for holding a driving licence must be convicted of an offence under the Act and as the petitioner was convicted for the contravention of Rule 26 (34), which constitutes an offence under the Act, he was liable to be disqualified under S. 17 (1).

15. The argument that the power to disqualify an offender can be exercised only if he is convicted of an offence directly connected with the act of driving fails to impress us. There is intrinsic evidence in Section 17 itself to show that the power conferred by sub-section (1) can be exercised even if the breach is of a rule of conduct not directly connected with the act of driving. Clause (c) of Section 17 (5) provides that a Court "shall" order disqualification of an offender convicted under Section 123 of the Act unless for special reasons to be recorded in writing it thinks fit to order otherwise. Now, acts which constitute an offence under Section 123 are uncorrelated to the want of care involved in the act of driving. That section makes it an offence to drive an unregistered vehicle or to drive a motor vehicle with-

out the permit required by Section 42 (1) or in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used or a condition relating to the maximum number of passengers or the maximum weight that may be carried on the vehicle. You may drive your vehicle with all the care in the world but if you have transgressed the conditions of your permit, you are liable to be convicted under Section 123 and that conviction entails a disqualification under Section 17 (1) read with Section 17 (5) (c). It is therefore manifest that the power to suspend the driving licence is not conditioned by the circumstance that the offender must be guilty of an offence connected directly with the act of driving.

16. In fact, Section 17 (1) in terms provides that the penalty of disqualification may be imposed even "Where a person is convicted of an offence in the commission of which a motor vehicle was used". To a proposed suspension of a driving licence it is no answer to say: "True, I used my car to transport illicit liquor but I took all the care possible while driving my car." If the car is used in the commission of an offence, the licence is liable to be suspended without more.

17. Section 15 of the Act furnishes some clue to the question whether in order to suspend a driving licence it is necessary that the driver must be guilty of an offence involving the act of driving. That section confers on the "licensing authority" the power to disqualify a person for holding a driving licence, in cases where, inter alia, the driver is a habitual criminal or a habitual drunkard or has used a motor vehicle in the commission of a cognizable offence. If Executive authorities can suspend the driving licence for reasons unconnected with the act of driving, it could not have been intended that Courts of law should possess a lesser power.

18. The petitioner's reliance on Schedule V and Sections 18 and 19 of the Act in support of the submission that the breach of a rule of conduct cannot involve the driver in suspension of his licence, is misplaced. Schedule V specifies "offences on conviction of which an endorsement shall be made on the licence of the person affected". It does not deal with the power to suspend the licence. Section 18 provides for the "Effect of disqualification order," while Section 19 provides, inter alia, for the modes of endorsement. None of these provisions bears out the petitioner's submission.

19. It is urged that Section 112, on its terms, can apply only if "no other penalty is provided for the offence" and

since suspension of a licence is a "penalty", breaches which attract that penalty would stand excluded from the compass of Section 112. The argument proceeds that it could not have been intended that the breach of a Rule could be penalised by suspension of the licence but is not punishable under Section 112. We are unable to agree that disqualification of a driver for holding a driving licence is a "Penalty" within the meaning of S. 112. Chapter IX of the Act is entitled "Offences, Penalties and Procedure" and Section 112 which occurs in that chapter uses the word "penalty" to comprehend the punishments prescribed for diverse offences, as detailed in that chapter. Section 17 occurs in Chapter II called "Licensing of Drivers of Motor Vehicles" and though suspension may involve serious consequences, it is not a "penalty" prescribed for an offence, within the meaning of Section 112. It is clear from the context of that Section that the word "penalty" is used in the sense of "sentence" following upon a conviction. The context is that if no other penalty is provided for the offence, the offence would be punishable with a sentence of fine, indicating thereby that if no other sentence is provided, the sentence of fine may be imposed.

20. Finally, we see no merit in the contention that the words of S. 17 (1) must be construed in the light of the provisions of sub-sections 2 to 5 of Section 17. Section 17 (1) confers on the Courts the power to disqualify a driver for holding a licence. Sub-sections 2 to 5 merely regulate the exercise of that power.

21. We are therefore of the opinion, and we say so with respect to the learned Single Judges who decided to the contrary, that a person who contravenes a rule framed under the Act, commits an offence under the Act and on his conviction for that offence, he is liable to be disqualified under Section 17 (1) for holding a driving licence.

22. The papers may now be sent back to the learned Chief Justice, for passing final orders.

Answer accordingly.

AIR 1972 Bombay 299 (V 59 C 55)

K. K. DESAI, J.

M/s. Chandulal and Co. a firm. Appellants v. Nihalchand Pannaji. Respondent.

A. F. O. D. No. 215 of 1970, D/- 27-4-1971, from decision of Rele, J., City Civil Court, Bombay, D/- 23-1-1970.

Civil P. C. (1908), O. 21, R. 1 — Option to judgment-debtor to make pay-

FF/FP/D247/72/BDB

ment in different ways — Judgment-debtor cannot choose option that makes payment impossible.

The option that a judgment-debtor is given in the scheme of O. 21, R. 1 to pay money in Court may by reason of a consent decree be rendered impossible and unavailable. When a decree directs payment to be made on a particular day when the Courts may be closed, the option of making payment into Court would be entirely impossible and unavailable. There is no reason why in such circumstances the judgment-debtor must be entitled to the benefit of such impossible option. He should be under an obligation to discharge his liabilities under the decree by resorting to other options under O. 21, R. 1. If a judgment debtor opts to choose making payment scheduled on a particular date in Court and if the Court is closed on that date, he cannot be given the advantage of making payment on the day when Court reopens. The judgment-debtor should be treated as a defaulter, and must meet the consequences of the default. AIR 1949 Nag 141 and AIR 1959 Madh Pra 352, Dissented from; AIR 1957 Raj 378 and AIR 1946 Oudh 156, Rel. on.

(Para 4)

Cases Referred: Chronological Paras

AIR 1959 Madh Pra 352 = 1958 Jab LJ 66, Rakhadoo v. Narayan	3
AIR 1957 Raj 378 = ILR (1957) 7 Raj 276, Chimna v. Chunnilal	4
AIR 1949 Nag 141 = 1949 Nag LJ 303, Premchand Bhikabhai v. Ramdeo Sukdeo	3
AIR 1946 Oudh 156 = 1946 OWN 119, Indal v. Ram Nidh	4
A. G. Sabnis, for Appellants; H. V. Chande, for Respondent.	

JUDGMENT:— This is judgment-debtors' appeal against the dismissal of their chamber summons for setting aside the attachment levied under warrant of attachment dated 14-1-1970. The relevant facts are as follows:—

2. On the summons for judgment taken out by the plaintiff, a decree on admission for Rs. 4,529.74 and interest and costs was made against the judgment-debtors. The decree was made payable by monthly instalments of Rupees 200/- with a direction that the first of such instalments be paid on September 23, 1968, and the subsequent instalments on or before the 23rd of each succeeding month. The decree provided that in default of payment of any two instalments, the whole of the decretal balance then due should become payable and accordingly the plaintiff should be at liberty to apply for recovery of the outstanding balance by execution of the decree.

3. Admittedly, the debtors made first default in payment of Rs. 200/- pay-

able on September 23, 1969. The Second default was alleged to have taken place in respect of instalment of Rs. 200/- payable on December 23, 1969. The City Civil Court which had passed the decree was closed for Christmas holidays between December 23, 1969 and January 4, 1970, and the defendants made deposit of Rs. 200/- in Court on January 5, 1970. The plaintiff's case was that by non-payment of Rs. 200/- on December 23, 1969, the defendants had incurred second default in payment of the decretal amount and the whole of the decretal balance then outstanding had become due to the plaintiff on the expiry of December, 23, 1969. The plaintiff accordingly, after instituting an application for execution, got issued the warrant of attachment dated January 14, 1970. Attachment was levied by service of the warrant on January 19, 1970. The defendants thereupon took out the above chamber summons for raising of the attachment. The contention of the defendants in the trial Court was that under Order 21, Rule 1 of the Code of Civil Procedure, all moneys payable under a decree could be at the option of the debtor paid in three different manners as mentioned in sub-rule (1) of Order 21. The money could be paid into Court whose duty it is to execute the decree or by payment to the decree-holder out of Court or otherwise in the manner as the Court which made the decree directs. The submission on behalf of the debtors was that all the previous instalments were paid by depositing the money into Court. Rs. 200/- which was payable on December 23 was at the option of the debtors payable into the City Civil Court. That Court was enjoying December holidays on December 23. The payment made on the reopening day on January 5 was valid payment for satisfaction of the instalment that was payable on December 23. This was so because of the scheme of Order 21, Rule 1. This submission was in consonance with the findings made by the High Court at Nagpur in the case of Premchand Bhikabhai v. Ramdeo Sukdeo, AIR 1949 Nag 141, and the decision of the Madhya Pradesh High Court in the case of Rakhadoo v. Narayan, AIR 1959 Madh Pra 352.

4. Apart from the observations in the above two authorities, it has appeared to me that the option that the judgment-debtor is given in the scheme of Order 21, Rule 1 to pay money in Court may by reason of a scheme of a consent decree be rendered impossible and accordingly unavailable. Thus, when a decree directs payment to be made on a particular day when the Courts may be entirely closed due to holidays and/or vacation, the option for making payment into Court would be entirely impossible.

and unavailable. There is no reason why in those circumstances the judgment-debtor must be entitled to the benefit of such impossible option. On the contrary, in obedience to the provisions of the decree, he should be under an obligation to discharge his liabilities under the decree by resorting to the other possible option as contained in the scheme of Order 21, Rule 1. There is no reason why when payment could be directly made to the decree-holder as mentioned in clause (h) of Rule 1 of Order 21, there should be liberty to the judgment-debtor to select the impossible option of discharging his liability under the decree by payment into Court on entire closed days and/or in vacation. Obligations created by decrees are meant for being carried out and it is difficult to appreciate why a debtor should be entitled to select an option which makes it impossible to carry out the provisions in the decree. Now, it is true that the City Civil Court was in December holidays on December 23. It is at the same time true that the plaintiff who carried on business and had dealings with the defendants was available in Bombay for receiving payment on December 23, the date fixed for payment of instalment in December. It is difficult to appreciate why in those circumstances towards discharging their obligation for making payment on December 23, the judgment-debtors were not bound to go and make payment to the plaintiff himself. It is further necessary to notice that the office of the City Civil Court was open for receiving urgent Civil work and applications even during December holidays. It was, therefore, open to the judgment-debtors to go to the vacation Judge of that Court and inform him that they would be guilty of default in discharging their obligation to make payment on 23rd December if deposit was not received in the Court office. The Judge would have considered that application and made an appropriate order. In connection with the observations of the High Court at Nagpur in the above cited case, it first requires to be noticed that the Court mentioned that different divergent opinions had been expressed on the question involved by different Courts. In *Chimna v. Chunnilal*, AIR 1957 Raj 378, it was held that where the due date for payment under a decree fell during the vacation, but the Court was kept open for urgent work, the payment made on the date the Court reopened was not within the time fixed by the decree. In the case of *Indal v. Ram Nidh*, AIR 1946 Oudh 156, failure of payment of the amount due under the decree on the specified date on the ground that the High Court was then in vacation and payment made on the reopening date was

held to have been made not within the time prescribed by the decree. Now, it appears to me that the findings made in the above two authorities are in consonance with the scheme of Order 21, Rule 1 and I would prefer these authorities to the authorities on which reliance has been placed on behalf of the judgment-debtors.

5. Under the circumstances, the trial Court was right in dismissing the chamber summons taken out by the defendants. The appeal is dismissed with costs. Stay to stand vacated. The amount deposited in the trial Court is directed to be paid over to the decree-holder.

Appeal dismissed.

AIR 1972 BOMBAY 301 (V 59 C 56)

MODY AND S. K. DESAI, JJ.

The Union of India and another, Appellants v. Tata Engineering and Locomotive Co. Ltd. and another, Respondents.

Appeals Nos. 33 and 34 of 1971 (Company Petns. Nos. 159 and 161 of 1970), D/- 22-3-1971.

(A) Monopolies and Restrictive Trade Practices Act (1969), S. 2 (v) — Engagement in provision of service — Held, the old Central Bank was not engaged in provision of service.

A Memorandum of a company registered under the Companies Act, by itself, confers merely a power to carry on business, but whether such power is thereafter exercised for carrying on business is a question of fact. Legal capacity to carry on business must be clearly distinguished from the company being at any particular time actually "engaged in" carrying on the business authorised by its Memorandum. Act No. V of 1970 took away the old Central Bank's entire undertaking including banking and gave to it only compensation. Exercising an option for obtaining such compensation cannot form part of carrying on business. The act of selling the promissory notes and making deposits out of the sale proceeds thereof is also not carrying on business. The mere fact of holding of meetings of the Board of Directors does not, by itself, amount to carrying on business. Allotment of its own shares by a company is not a business. It is only an incidental function of its corporate existence. The old Central Bank was not engaged in production, supply, distribution or control of goods of any description or provision of service of any kind at any material time and it therefore did not fall within the definition of "undertaking" in Cl. (v) of Section 2. (Paras 19, 20, 22, 23)

FP/FP/D450/72/DHZ

(B) Monopolies and Restrictive Trade Practices Act (1969), S. 23 (1) (a) — "Any other undertaking" — Meaning of — (X-Ref:— Interpretation of Statutes — Word defined — Whether to be understood in its dictionary meaning).

It would be possible in law to read a word, even if defined in the Statute, in a modified sense if the context so requires. But nonetheless there must be something in the Act itself, and not dehors the Act, which would make the meaning of a word or phrase statutorily defined by that Act, repugnant in the context in which it is used and furnishes a strong and compelling reason to discard it in favour of its ordinary dictionary meaning. In the phrase "any other undertaking" occurring in sub-section (1) of Section 23 the word "undertaking" is used in the meaning given to it in clause (v) of Section 2 and the context does not require any departure being made from it.

(Paras 24, 38)

Cases Referred: Chronological Paras
AIR 1970 SC 564 = (1970) 3 SCR
580. R. C. Cooper v. Union of India 3

K. H. Bhabha with P. M. Mukhi, for Appellants in both the Appeals; N. A. Palkhiwala with F. S. Nariman and S. P. Bharucha, for Respondents in Appeals Nos. 33 and 34 of 1971.

MODY, J.:— These are two appeals by the Union of India and the Regional Director, Company Law Board, Western Region, Bombay, against a common Judgment but two separate orders passed in Company Petitions Nos. 159 of 1970 and 161 of 1970, the first filed by Tata Engineering and Locomotive Company Ltd., hereinafter referred to as "Telco", and the second by the Central Bank of India Ltd., hereinafter referred to as "the old Central Bank", whereby Mr. Justice Nain as the Companies Judge sanctioned under Sections 391 and 394 of the Companies Act, 1956, an arrangement in the nature of a scheme of amalgamation between the two companies, negating the contentions of the appellants that the Court should not sanction the scheme without prior approval of the Central Government as required under Section 23 (1) of the Monopolies and Restrictive Trade Practices Act, 1969, hereinafter referred to as "the Monopolies Act". We also propose to dispose of these two appeals by a common Judgment as both the matters have been heard together and involve common facts and identical points for consideration.

2. On 1st September 1945 Telco was incorporated as a company under the Indian Companies Act, 1913. Its authorised capital is Rs. 24 crores. Its subscribed capital aggregates to Rupees 18,44,81,325/- composed of Ordinary,

Cumulative Preference and Cumulative Redeemable "A" Preference Shares, all fully paid-up. Its main objects are to carry on the business of manufacturing, selling and dealing in locomotives, motor vehicles, trucks, lorries, omnibuses, machinery, tools etc. One of the objects mentioned in the Memorandum contains ancillary objects, one of which is to amalgamate with any Company or companies. Telco has, in fact, been carrying on the business of manufacturing and selling diesel commercial vehicles, excavators, power shovels, industrial shunters, machine tools, industrial tractors, etc. There is no dispute that its gross assets at the material time well exceeded Rs. 120,00,00,000/- and its net assets exceeded Rs. 97,00,00,000/-.

3. On 21st December 1911 the old Central Bank was incorporated under the Indian Companies Act, 1913. Thereafter it carried on banking business. Its business was nationalised by the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1970, succeeded by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, hereinafter referred to as "Act V of 1970", after an attempt to do so by a prior Ordinance and a prior Act which latter two were struck down by the Supreme Court. Under the provisions of Act V of 1970, a new corporation called "Central Bank of India", hereinafter referred to as "the New Central Bank", was constituted and all the rights and properties, as also the obligations and liabilities, of the old Central Bank got transferred to the new Central Bank. Upon such transfer, as held by the Supreme Court in R. C. Cooper v. Union of India, AIR 1970 SC 564, the totality of the assets and liabilities of the old Central Bank vested in the new Central Bank and the only right which the old Central Bank acquired was the right to receive compensation in the sum of Rs. 17.5 crores. Under sub-section (2) of Section 6 of Act V of 1970, the Old Central Bank had an option to receive that amount of compensation in cash or in four and a half per cent per annum promissory notes repayable after ten years or five and a half per cent per annum promissory notes repayable after thirty years in the manner as mentioned in that sub-section. After such acquisition of its business, the Old Central Bank has ceased to carry on banking business.

4. It may be stated that the business of the Old Central Bank got transferred to and vested in the new Central Bank as from 19th July 1969, being the date of the said first Ordinance. It was on 10th February 1970 that the Supreme Court by its said Judgment struck down the earlier ordinance and the earlier Bank Nationalisation Act. Under the earlier Ordinance and the earlier Bank Nationali-

sation Act the amount of compensation payable to nationalised Banks was not determined as a fixed amount by the Act itself and entailed calculations to be made for that purpose. As the validity of the first Ordinance and the first Bank Nationalisation Act were challenged before the Supreme Court the old Central Bank did not make any move for getting that compensation payable to it ascertained. Then followed the second Ordinance and the Second Bank Nationalisation Act No. V of 1970. The latter Act itself fixed the amount of compensation payable to the various nationalised banks.

5. The second Bank Nationalisation Act came into force on 31st March 1970. The Board of Directors of the old Central Bank considered how the option to receive compensation payable under Act V of 1970 should be exercised. The old Central Bank exercised its option to take its compensation in the form of Rs. 50,000/- in cash and the balance in the form of five and a half per cent per annum promissory notes of the face value of Rs. 17,49,50,000/-. On an inquiry from Mr. Bhabha, the learned Counsel for the Appellants, Mr. Nariman, the learned Counsel for the Respondents, stated that the old Central Bank actually received the said five and a half per cent per annum promissory notes on 8th May 1970.

6. Thereafter, as appearing from the Report of the Board of Directors of the old Central Bank for the year 1969, the Board applied its mind to the future of that company. Various views in that regard had been discussed at some length at the extraordinary general meeting of the old Central Bank held on 13th January 1970. It was thereafter that the Supreme Court gave its said Judgment. Thereafter, after doing some re-thinking, the Board of Directors reached the conclusion that there were three alternatives before the company, the first being a winding-up of the company, the second being the carrying on of fresh business as an investment company or some other activity after obtaining powers by amendment of the company's constitution, and the third being an amalgamation with some other suitable undertaking. The Board then came to the conclusion that amalgamation of the old Central Bank with another company, preferably a large scale industrial undertaking, would be in the best interests of the company and its shareholders because, firstly, it was likely to avoid several implications in regard to the settlement of tax claims of the Company and the shareholders and would enable the carrying on of business pending such settlement; secondly, it would ensure a fair and steady return to the shareholders on their capital along with prospects of reasonable growth; and, thirdly,

if, as was the intention, the amalgamation was with a company whose shares commanded a ready market, the shareholders of the old Central Bank would be able, if they so chose, to liquidate their holding wholly or partially. The Board had thereafter carried on negotiations with the Directors of Telco and evolved a concrete scheme of amalgamation with Telco. As a matter of fact, on 29th July 1970, the Board of Directors of each of the two companies passed a resolution approving the scheme of amalgamation.

7. As a preliminary step to effectuate the said amalgamation, the old Central Bank filed in this Court the Company Application No. 46 of 1970 on 8th September 1970 and Telco filed the Company Application No. 49 of 1970 on 9th September 1970. On 11th September 1970 orders were passed by the Companies Judge on both the said applications calling meetings of the Old Central Bank on 26th October 1970 and of Telco on 27th October 1970. The old Central Bank thereafter issued notices dated 29th September 1970 that such meetings would be held on 29th October 1970. Along with that notice an Explanatory Statement was sent to all its share-holders. In paragraph 5 of the Explanatory Statement it is stated that the Board of Directors had come to the conclusion that it would not be in the best interests of the Company or its share-holders to undertake any other business within the frame work of the Company's Memorandum as, for example, the business of the finance and investment company, because, apart from the difficulties involved in setting up such a unit which would operate in a competitive field, such a business did not appear to ensure prospects of a steady and reasonable return to the share-holders on a par with the return till then yielded on the Company's shares, nor did it inspire any hopes of adequate capital appreciation. It further refers to the proposed amalgamation and the comparative advantage to the Company and its share-holders if the amalgamation became operative.

8. On the same day, i.e., 29th September 1970, the old Central Bank also sent to its share-holders another notice convening an extraordinary general meeting of the share-holders on 26th October 1970 for the purpose of considering and passing of the two resolutions, the first being for amendment of its Memorandum and the second being to authorise its Board of Directors, in pursuance of Section 293 (1) (c) of the Companies Act, 1956, to invest the whole or any part of the amount of compensation of Rs. 17,50,00,000/-, including the sale proceeds of the said five and a half per cent per annum promissory notes, in such

securities, investments and fixed and call deposits, including trustee securities, as the Board of Directors may from time to time think fit. An Explanatory Statement was enclosed with that notice. The Explanatory Statement specifically states that the amendments were being proposed in order to enable the old Central Bank to amalgamate with Telco and that the said Second Resolution, which was a special Resolution, was proposed so as to enable the scheme of amalgamation between the two Companies to fructify and if the said second Resolution was passed and implemented it would yield a better return to the Company, particularly in the event the process of amalgamation of the Company with Telco took some time. The extraordinary general meeting of the old Central Bank was held on 26th October 1970. On 26th October 1970 the extraordinary general meeting of the old Central Bank passed both the Resolutions of which the said Notice had been given, approving the amendments in the Memorandum and investing powers in the Board of Directors about the investment as proposed. Thereafter, on the same day, the statutory meeting was held of the shareholders of the old Central Bank in pursuance of the said Order dt. 11th September 1970 and the scheme of amalgamation was approved at the said meeting.

9. On 27th October 1970, the statutory meeting of the shareholders of Telco was held pursuant to the said Order dated 11th September 1970 at which meeting the said scheme of amalgamation was approved.

10. The Scheme provides that Telco will issue and allot one Ordinary Share and three 9 per cent cumulative Redeemable "A" Preference Shares out of its authorised but unissued capital as also fifteen 7. 3/4 per cent Convertible Debentures to the members of the old Central Bank against every twenty-five shares in its capital held by them.

11. On an inquiry from Mr. Bhabha, Mr. Nariman, has stated that all the said five and a half per cent per annum promissory notes received as compensation, barring those of the face value of Rs. 1,68,20,000/-, were sold after 26th October 1970. Mr. Bhabha stated that he would accept this statement as true.

12. At the hearing of these appeals before us, by consent of parties, a statement of the deposits made by the old Central Bank has been put in as Ex. No. 1. The statement shows particulars of the various amounts of deposits made by the old Central Bank as fixed deposits with diverse banks which aggregate to Rs. 4,96,50,000/- and that with Telco which aggregate to Rs. 11,20,00,000.

13. Telco and the old Central Bank filed the present two Company Peti-

tions on 17th November 1970 and 25th November 1970 respectively. On 8th February 1971 an order was made by the Companies Judge sanctioning the alterations in the Memorandum of the old Central Bank.

14. The Judgment and Orders which are the subject-matter of these appeals were thereafter passed on 17th February 1971.

15. The main dispute between the parties turns on the provisions of S. 23, and particularly of sub-section (1), of the Monopolies Act. Section 23 occurs in Chapter III of the Act, the Chapter heading being "Concentration of Economic Power". There are 11 sections in this Chapter divided under Parts A, B and C. Sections 20 to 26 appear under Part A, Section 27 appears under Part B and Sections 28 to 30 appear under Part C.

16. Section 20 provides:—

"This Part shall apply to—

(a) an undertaking if the total value of

(i) its own assets, or

(ii) its own assets together with the assets of its inter-connected undertakings,

is not less than twenty crores of rupees;

(b) a dominant undertaking—

(i) where it is a single undertaking, the value of its assets, or

(ii) where it consists of more than one undertaking, the sum total of the value of the assets of all the inter-connected undertakings constituting the dominant undertaking,

is not less than one crore of rupees.

x x x x"

Sub-section (1) of Section 23 provides:—

"23(1) Notwithstanding anything contained in any other law for the time being in force,

(a) no scheme of merger or amalgamation of an undertaking to which this Part applies with any other undertaking,

(b) no scheme of merger or amalgamation of two or more undertakings which would have the effect of bringing into existence an undertaking to which clause (a) of clause (b) of Section 20 would apply,

shall be sanctioned by any Court or be recognised for any purpose or be given effect to unless the scheme for such merger or amalgamation has been approved by the Central Government under this Act."

Section 2 contains definitions. Its opening words are "In this Act, unless the context otherwise requires,—"

Clause (d) of Section 2 in so far as it is relevant provides:—

"'dominant undertaking' means an undertaking which either by itself or along with inter-connected undertakings,—

(i) produces, supplies, distributes or otherwise controls not less than one third of the total goods of any description that are produced, supplied or distributed in India or any substantial part thereof, or

(ii) provides or otherwise controls not less than one third of any services that are rendered in India or any substantial part thereof.

x x x x

Clause (g) of Section 2 provides:—

"inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manner, namely:—

(i) if one owns or controls the other,

(ii) where the undertakings are owned by firms, if such firms have one or more common partners,

(iii) where the undertakings are owned by bodies corporate,—

(a) if one manages the other, or

(b) if one is a subsidiary of the other, or

(c) if they are under the same management within the meaning of S. 370 of the Companies Act, 1956, or

(d) if one exercises control over the other in any other manner,

(iv) where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm,—

(a) hold, directly or indirectly, not less than fifty per cent. of the shares, whether preference or equity, of the body corporate, or

(b) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate,

(v) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management within the meaning of the said S. 370,

(vi) if the undertakings are owned or controlled by the same person or group of persons,

(vii) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses."

Clause (r) of Section 2 provides:—

"service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, insurance, transport, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service."

Clause (v) of Section 2 provides:—

"undertaking" means an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind."

17. There is no dispute that Telco. is an undertaking engaged in the production, supply and distribution of goods, that it is an undertaking within the meaning of clause (v) of Section 2, that the total value of its own assets is very much more than Rs. 20 crores and it is therefore an undertaking to which the provisions of Part A of Chapter III of the Monopolies Act apply.

18. Mr. Bhabha contended that the old Central Bank is also an "undertaking" within the meaning thereof under clause (v) of Section 2 of the Monopolies Act. In support of his contention he relied upon several facts. He stated that it is true that after the business of the old Central Bank was nationalised, its then existing banking business got transferred to and vested in the new Central Bank, but that even thereafter the old Central Bank could carry on even banking business by obtaining a licence under Section 22 of the Banking Regulation Act, 1949. He then invited attention to the Memorandum of the old Central Bank as it existed before its amendment in 1970. He contended that under sub-clause (c) of Clause III it can carry on investment business, under sub-clause (d) it can carry on the business of underwriting and under sub-clause (q) it can carry on the business of guaranteeing. He further pointed out that the provision at the very end of Clause III provides that in the interpretation of that clause the meaning of the Company's objects shall not be restricted by a reference to any other object or by the juxtaposition of two or more objects and that in the event of any ambiguity the clause shall be construed in such a way as to widen and not restrict the powers of the company. He contended that this provision requires each of the sub-clauses of Cl. III to be read independently. He contended that therefore although the banking business was acquired as aforesaid, a power survived in the old Central Bank, and it was open to it, to carry on the businesses mentioned, for example, in the said sub-clauses (c), (d) and (q) of clause III of the unamended Memorandum itself. He then contended that as a matter of fact the old Central Bank did carry on business after 19th July 1969. He pointed out that the Balance-sheet of the old Central Bank of the year 1969 shows that its Directors were paid remuneration which indicates that Board meetings were being held and the Directors were acting on behalf of the Old Central Bank. The old Central Bank through its directors acted and ex-

exercised the option as aforesaid and obtained the compensation in the Cash sum of Rs. 50,000/- and in the five and a half per cent per annum promissory notes of the face value of Rs. 17,49,50,000/-. The old Central Bank through its Board also considered the three alternatives for carrying on business for earning profits. It also through its Board carried on negotiations with Telco for amalgamation. He contended that these acts show that the old Central Bank was carrying on business through its Board of Directors. He further relied on the fact that it sought alterations to its Memorandum with a view to make its objects identical with those of Telco. According to him, the very fact of seeking and securing alteration in its Memorandum shows that it carried on an activity and that it had therefore not ceased to exist. He further commented that its Memorandum was already altered and its objects entitled it to carry on the business of production of certain goods and that if the amalgamation with Telco fell through, the old Central Bank would nonetheless remain entitled to carry on all the businesses which were included in the amendments to its Memorandum. He further pointed out that as shown in the said Director's Report for the year 1969 the old Central Bank has, after 18th July 1969, allotted 184 shares to the former share-holders of the Jodhpur Commercial Bank Ltd. and that it proposed to make a further allotment of shares to those of the former share-holders of that Bank who had not exercised the option to receive cash and who had accordingly become entitled to the shares of the old Central Bank of equivalent value. He relied upon the facts that the old Central Bank had also sold most of its said five and a half per cent per annum promissory notes, made deposits out of the sale proceeds thereof and thereby earned profits in the nature of interest earned thereon. Mr. Bhabha concluded that these facts show that the substratum of the old Central Bank had not gone and that under its Memorandum it had power to carry on business and particularly the business of investment, underwriting and guaranteeing under even its original unamended Memorandum and that such business would amount to making "provision of service" within the meaning thereof in clause (v) read with clause (r) of Section 2 of the Monopolies Act. He contended that because of these actual acts of the Old Central Bank it was, at all material times, i.e., at the date of the petition and the order thereon, "engaged in" the provision of service and was therefore an undertaking as defined in the said clause (v) of Section 2.

19. Now it is true that under the Memorandum, before its amendment, the

old Central Bank had the power to carry on the business of investment, underwriting and guaranteeing. It is also true that after the amendment of its Memorandum it has power to carry on business of producing certain kinds of goods. Mr. Bhabha has contended that if the amalgamation does not fructify, the old Central Bank will still remain entitled to carry on the business of producing goods. On the other hand, Mr. Nariman contended that in spite of these amendments having been made, in view of the provisions of Section 17 (1) (g) of the Companies Act, 1956, if the object of amalgamation falls through, the enlarged scope of its objects would not remain operative. In our opinion, it is unnecessary to decide whether the amendments made in its Memorandum would or would not survive the falling through of the proposed amalgamation. It should however, be noted that a Memorandum of a company registered under the Indian Companies Act, by itself, confers merely a power to carry on business, but whether such power is thereafter exercised for carrying on business is a question of fact and only if such facts exist then it can be said that the company, "is engaged in" carrying on business of producing goods or making provision for service. A memorandum is a pre-requisite to the registration of a company under the Companies Act. It is common knowledge that in the case of many companies they do not carry on any business after they are registered for a number of years and sometimes at no time during their entire existence. It is a still more common experience that numerous objects are provided for in the Memorandum but most companies do not carry on all the businesses so provided for. If in the latter case the company carries on only one of such businesses, it cannot be said that the company is, by reason of a mere provision in that behalf in its Memorandum, engaged in carrying on the other businesses so provided for in its Memorandum. Legal capacity to carry on business must be clearly distinguished from the company being at any particular time actually "engaged in" carrying on the business authorised by its Memorandum. It should be noted that Mr. Bhabha has not contended that the old Central Bank is "engaged in" producing goods. All that he has contended is that it "is engaged in" making provision of service because it has power in its Memorandum to do so and because of the aforesaid acts of the old Central Bank relied upon by Mr. Bhabha. Now the act of exercising its option, and obtaining the five and a half per cent per annum promissory notes cannot be treated as a part of investment business. Act No. V of 1970 took away the old Central Bank's entire undertaking includ-

ing banking and gave to it only compensation. Exercising an option for obtaining such compensation cannot form part of carrying on business. The act of selling the promissory notes and making deposits out of the sale proceeds thereof is also not carrying on business. Mr. Bhabha's contention that even under the un-amended Memorandum the old Central Bank could carry on banking business after obtaining the requisite licence is an hypothetical argument, because it has not, as a matter of fact, applied for any such licence. An undertaking which carries on investment business may, of course, carry on the business of inviting deposits to be made with it and/or itself making deposits with outsiders and in such a case it would be carrying on the business of an investment company. But making deposits with banks and other institutions can be made by other persons who have spare money to invest. If a lawyer or a doctor or even a businessman makes deposits out of his savings, it cannot be said that by such investment he is carrying on a business of investment. It would be a question of intention in each case. For illustration, a person may buy shares of Joint Stock Companies and, depending on his intention, which is to be gathered from actual facts of his dealing with shares he buys, he may have done so either as and by way of pure investment or by way of operating in shares by way of business. The distinction in the concepts is clear, although in some cases it may be difficult to ascertain it from a given set of overt acts. In the case of the old Central Bank, on the compulsory acquisition of its business, it had no option left but to take compensation as provided under Act V of 1970. Compensation was payable in certain alternative ways. Exercising an option in selecting the five and a half per cent per annum promissory notes or, for the matter of that, any of the three alternatives provided by that statute, certainly does not disclose an intention to acquire them for doing business as an undertaking carrying on investment business. The old Central Bank subsequently sold the said five and a half per cent promissory notes and made deposits out of the sale proceeds thereof. The intention of so doing has been specifically and clearly stated in the Explanatory Statement which is an annexure to the said notice dated 29th September 1970 convening the extra-ordinary general meeting to be held on 26th October 1970. The Explanatory Statement clearly shows that a change of investment was made only because it was apprehended that the final fructification of the scheme of amalgamation might take some time and it was desired that a little higher return should be secured on the investment. It was

by way of a mere change of investment and not by way of doing business. Under the proposed scheme of amalgamation which has already been approved by both the Companies, the compensation or what was received by way of sale proceeds of the five and a half per cent per annum promissory notes as compensation was to be the property of Telco and the shareholders of the old Central Bank were to be entitled to receive shares of Telco in certain proportion in exchange of the original holding of shares in the old Central Bank. The scheme further provides for payment of dividend on shares so received in exchange from 1st October 1970 and it is but natural that it would be felt that the share-holders of the old Central Bank would participate in the profits of Telco by reason of the acquisition of shares of Telco in exchange who, in their turn, should try to secure the best return on the funds of the old Central Bank which were to go to Telco. The investment by way of deposits was not intended to be of any appreciable duration but only pending the finalisation of the scheme of amalgamation and that it was so is made clearer by the Statement Ex. No. 1 which shows that all the deposits with Banks were for a comparatively short period of 91 days. The fact of selling the promissory notes and making such deposits does not, in our opinion, evince any intention on the part of the old Central Bank to carry on investment business.

20. Mr. Bhabha referred to the said Directors' Report of the old Central Bank for the year 1969 and pointed out that remuneration was paid to the Directors and that it must, therefore, be concluded that the Directors had held meetings and had held a meeting to decide for exercising the option in respect of the taking of compensation and also held meetings in respect of the negotiations with Telco and also in connection with the alteration of the Memorandum. Now, the old Central Bank is a company. It has a corporate existence and the process of making up its mind is by way of a discussion and the passing of a resolution at the meeting mostly of Directors and occasionally of the general body of share-holders. The work done at the Board meeting referred to by Mr. Bhabha is merely in the process of the making up of the company's mind and arriving at a decision. The process is similar to what goes on in the mind of a human being when he considers a problem and arrives at a decision. The mere fact of holding of these meetings of the Board of Directors does not, by itself, amount to carrying on business. What happened at the Board meetings would merely disclose the intention of the company. But in the present case no inten-

tion is disclosed to carry on any activity of the nature of a business.

21. Mr. Bhabha also pointed out from the said Directors' Report of the Old Central Bank for the year 1969 that the Directors had also allotted 184 shares after 18th July 1969. The Statement in the Report, however, clearly shows that these shares were allotted in pursuance of an obligation which existed prior to the nationalisation of its banking business. Allotment of its own shares by a company is not a business. It is only an incidental function of its corporate existence.

22. It is, therefore, clear that old Central Bank was not at any time from the date of the nationalisation of its banking business till the date of the orders under appeal engaged in the provision of service of any kind. A company continuing to exist with power in its Memorandum to do a business is totally different from a company engaging in that business. The facts earlier stated clearly show that the amalgamation was in alternative to the old Central Bank carrying on, by itself, some business. To amalgamate was an alternative to itself carrying on business and the decision which chose the alternative of amalgamation clearly negatives that it itself wanted to carry on any business. The facts further show that till the date of the orders under appeal the old Central Bank intended and, as a matter of fact, made all necessary preparations and even an application to the court for the proposed amalgamation with Telco which discloses a definite intention that on amalgamation materialising it intended to carry on no business, but would, as a matter of fact, even cease to exist as a separate company. Because of the intention of amalgamation the old Central Bank did not consider, much less decide, what it should do if the amalgamation did not for any reason materialise. It was, therefore, not engaged in the provision of service of any kind at any time after bank nationalisation till the date of the petition or the Order thereon. It must, therefore, be held that the old Central Bank was not engaged in production, supply, distribution or control of goods of any description or provision of service of any kind at any material time and that it therefore did not fall within the definition of "undertaking" in clause (v) of Section 2 of the Monopolies Act.

23. Mr. Palkhiwala and Mr. Nariman had argued that in order that an undertaking should fall within clause (v) of Section 2 of the Monopolies Act the undertaking must, firstly, have capacity, i.e., legal competence, to produce goods or render services as mentioned in that clause, as also, secondly, that the under-

taking must be actually engaged in such production of goods or making provision of service. They further contended that the undertaking must have actually engaged in such activity prior to the material time, i.e., the date of the application under Sections 391 and 394 of the Companies Act, 1956, and the order thereon and that although it may not have done so immediately prior to the material time and may not be doing so and may be in hibernation as it were at the material time, it may yet fall within the definition of the said clause (v) if it continued to have a capacity and an intention to do so at a convenient time after the material date. If an undertaking was, as a matter of fact, engaged in production of goods or provision of service but because of some reason like strike, lock-out or non-availability of raw materials, it was not actually so engaged at the material time but it intended to resume such activity in future upon the reason for the cessation of its activity disappearing, it can still be said to fall within the phrase "is engaged in" occurring in the said clause (v) of Section 2 of the Monopolies Act. In short, a legal capacity to carry on the activity and an intention to carry it on on the cessation of the period of inactivity must co-exist. Mr. Bhabha, however, on the other hand, argued that if the capacity, i.e., legal competence, exists, it is sufficient to attract the definition of the said Cl. (v) irrespective of the fact whether the undertaking is or is not carrying on that activity at the material time. We are of the opinion, however, that the existence of mere legal capacity is not sufficient. Such a test would apply only to a company which is a juridical person and its legal capacity to carry on activity is circumscribed by its Memorandum, but an individual or a firm or a Hindu joint family has the capacity, if it has the money, to carry on any business permissible in law. Mere legal capacity by itself cannot be relied upon to be a test whether one "is engaged in" the activity as mentioned in the said clause (v). In view of this conclusion which we have reached, it is unnecessary to refer to authorities cited in connection with construing the phrase "is engaged in" and the effect of the use of the present tense in that phrase. We have held that the investment in fact made by the old Central Bank was not by way of a business activity and that the negotiations and the decision for amalgamation and the steps taken to implement that decision do not amount to being engaged in any activity mentioned in the said clause (v) and it is, therefore, unnecessary to decide whether any activity which was open to the old Central Bank to carry on under its Memo-

randum would amount to service as defined under clause (r) of Section 2. We are of the opinion that a mere capacity or a mere intention to carry on such activity in future without its being so done in the present, i.e., at the material date, nor some time in the past, i.e., before the material date, cannot at all give rise to a consideration whether an undertaking is engaged in any activity as contemplated under the said clause (v). We are not called upon to decide in this case, and we do not decide, in what circumstances activity of the nature mentioned in the said clause (v) would fall within the phrase "is engaged in" if the activity had ceased for some time before the material date.

24. The next point turns on the construction of sub-section (1) of S. 23. In clause (a) of Section 23 (1) occur the words "an undertaking to which this Part applies". It is Section 20 which lays down to which undertakings Part A of Chapter III applies. The word "undertaking" occurs in the said clause (a) of Section 23 first in the said phrase quoted above and thereafter in the phrase "any other undertaking". At an earlier stage Mr. Bhabha contended that the word "undertaking" in the said first phrase has the meaning not as defined in S. 2 (v) but has its common or dictionary meaning. At a later stage he specifically stated that he abandoned that contention and accepted that the word had the same meaning as defined in Section 2 (v). There is no dispute between the parties that Telco is an undertaking to which Part A of Chapter III applies. Mr. Bhabha, however, contended that the word "undertaking" in the said second phrase "any other undertaking" would, if his earlier contention about the construction of the word "undertaking" under S. 2 (v) was not accepted — and we have earlier in this Judgment not accepted it — have its ordinary, i.e., dictionary meaning, because of the context in which it occurs not only in the case of an inclusive definition but also in the case of an exhaustive definition like the one in Section 2 (v). It would be possible in law to read a word, even if defined in the Statute, in a modified sense if the context so requires. He supported this contention by citing authorities. But we do not refer to them, as for the purposes of this case, we accept the principle which he canvasses for. But nonetheless there must be something in the Act itself, and not de hors the Act, which would make the meaning of a word or phrase statutorily defined by that Act, which would be for the purposes of that Act, repugnant in the context in which it is used and furnishes a strong and compelling reason to discard it in favour of what

would be its ordinary dictionary meaning.

25. Mr. Bhabha contended that the provisions of Section 23 (1), like the other provisions in Sections 23 (4), 21, 22 and 24, which all occur in Part A of Chapter III, have the same object and intention of controlling the undertakings defined in Section 20, which he, for the sake of emphasising the concept, referred to as "giants". To ascertain that intention he referred to the preamble of the Monopolies Act and the heading of Chapter III. The preamble reads: "An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto." The first object viz., to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, is the object which is relevant in this case. The Chapter heading of Chapter III, is: "Concentration of economic power". Chapter III contains provisions relating to that object. Chapter IV contains provisions relating to the other objects mentioned in the preamble of controlling monopolistic trade practices and Chapters V and VI deal with the object of controlling certain restrictive trade practices. Mr. Bhabha contended that the object and intention of preventing concentration of economic power require that emphasis should be placed on, and the problem should be viewed in the light of, controlling an undertaking to which Part A applies and that it must be considered that the mention of "any other undertaking" is merely incidental, i.e., to achieve, that object. He contended that in order that, that object may be achieved, the word "undertaking" as occurring in the second phrase "any other undertaking" must be interpreted, not as defined in Section 2 (v) which gives to it a restricted meaning in the way in which we have already construed it, but in its ordinary dictionary meaning, which is wider. He contended that it is to prevent concentration of economic power that clause (a) of Section 20 provides that the provisions of Part A shall apply if the value of the assets of an undertaking is not less than Rs. 20 crores and clause (b), which has to be read with clause (d) of Section 2, provides that such value must be not less than one crore of rupees and then enacts the limitation on such giants as contained mainly in Sections 21, 22, 23 and 24 but also the other provisions of Part A, the provisions of Parts B and C being merely in the nature of machinery sections.

26. Now in Section 20 occur the words "undertaking" and "its assets". "Its assets" must mean the assets of the undertaking. But does it mean the assets of the undertaking itself or does it mean the assets of the owner of the undertaking? An undertaking may be owned by a body corporate, i.e., a company, or by an individual or by a firm or even by some other owner like, for example, an association of individuals. If the company is the owner, the company may be conducting more than one undertaking, in which case can all the assets of the company be treated as the assets of every one of its undertakings? Or are the assets to be apportioned to each of the undertakings according to what assets are, at any particular time, actually used for it? And if the undertaking is owned by an individual, are all the assets of the individual to be deemed to be the assets of the undertaking if he owns but one undertaking? And similarly if the undertaking is owned by a firm, are the assets of all the individual partners to be deemed to be the assets of the undertaking? The definition of "undertaking" in clause (v) of Section 2 suggests that the word "undertaking" is meant to refer to that entity itself which is engaged in production of goods or provision of service. The Monopolies Act, however, does not appear to always distinguish between an "undertaking" and its "owner". As a matter of fact, many provisions of the Monopolies Act are extremely difficult to construe. The language used at a large number of places in the Monopolies Act clearly suggests a distinction between an "undertaking" and its "owner". Examples of it can be found in the following:—

Section 2 (g) (ii), (iii) (a), (b) and (d), (iv), (v) and (vi); Section 3; Section 22 (1); Section 23 (1).

Some other provisions of the Monopolies Act further suggest an undertaking to be itself, an owner, the undertaking being identified with its owner, be the owner one or more human beings or a juridical person like a company. Examples of the latter type are to be found in the following sections:—

Section 20, sub-section (1), when it uses the phrase "its own assets".

(Here does the phrase mean the assets in use of or appertaining — to the undertaking or all the assets of its owner?)

Section 21 (1) which contemplates "issue of fresh capital" by the undertaking and as this phrase is apt in connection with a company it appears to identify the undertaking with the company.

Section 48 (2), Cls. (a), (b) and (c).

Clause (d) of Section 2 provides the test of not less than one-third of the total goods of any description that are

produced in India. Here the reference to the total goods must, because of the qualifying phrase "of any description", mean the goods of a particular kind. If the same owner is producing two different kinds of goods, say, textiles in a factory at Bombay and sanitaryware in another factory at Madras and the latter falls under clause (d) of Section 2, "its assets" under clause (a) of Section 20 would require "its assets" to be interpreted to mean the assets of the undertaking which provides sanitaryware and not the assets of the owner. It would appear that the provisions of clause (b) of Section 20 also would require each of the different activities or businesses of the same owner to be considered separate undertakings.

27. In our opinion, in view of this confusion "undertaking" should not be identified with its owner unless the context in which it occurs requires it to be so construed. In clause (a) of S. 20 "its assets" must be construed in its natural or grammatical sense and the phrase must mean assets employed in the conduct of the activity of a particular undertaking.

28. The avowed object and intention of the Monopolies Act as disclosed in its preamble and the heading of Chapter III is to prevent concentration of economic power. The object is sought to be achieved by the Act mainly by the provisions contained in Sections 20, 21, 22, 23 and 24. Section 20 lays down the tests for determining what Mr. Bhabha referred to as "giant" undertakings. Section 22 prevents such giant undertakings to be brought in existence. Section 23, by clause (a) of its sub-section (1), seeks to exercise control by preventing merger or amalgamation of another undertaking with an existing giant. The object and intention of sub-section (1) of S. 23 under its clause (a) is to exercise control by preventing merger and amalgamation of an existing giant undertaking with another undertaking and under its Clause (b) to prevent a giant undertaking being formed, the object underlying sub-section (4) of Section 23 appears to be to control further acquisition by a giant undertaking so as to prevent it from becoming still larger, although its construction does not appear to be easy, because, if the undertaking is already an undertaking to which Part A applies, how can it again become an undertaking to which Part A applies as contemplated in its clause (a)? The object underlying the provisions of S. 21 is to control the expansion of such a giant undertaking by the issue of fresh capital or by the installation of new machinery or other equipment or in any other manner. The actual provisions of these sections all show that the object sought to be achieved is to prevent concentra-

tion of economic power. But the language used in these sections frequently varies. The obvious inference is that to the extent that the language varies, the extent to which the object is sought to be achieved and the method by which it is sought to be achieved was intended to correspondingly vary. We will proceed to examine the provisions of these sections from this point of view.

29. The phrase "issue of fresh capital" used in sub-section (1) of S. 21 is appropriate to a company. Therefore in the case of a company the provision in this sub-section would apply only when the company proposes to issue fresh capital, but it would not apply when the company obtains funds in any other way, by, for example, taking a loan. Therefore Section 21 (1) does not contemplate any method, other than issue of fresh capital, to control such a giant undertaking acquiring funds and the intention of the Legislature does not appear to be to prevent the company from acquiring funds otherwise than by issue of fresh capital. The reason can be found in the other provision of sub-section (1) of Section 21 by which control is provided for being exercised when such a giant undertaking, be it a company or other than a company, proposes to expand its production of goods or provision of service with such further funds. The conclusion is that Section 21 does not prevent such a giant undertaking from acquiring funds as distinguished from acquiring new machinery or other equipment, which latter only is sought to be controlled by Section 21, and the object of the preamble and the Chapter heading of preventing concentration of economic power is not intended to prevent such a giant undertaking, even when it is a company, from acquiring funds otherwise than by issue of fresh capital. Moreover, "issue of fresh capital" would not be apt in the case of an undertaking which is not owned by a company and the Legislature has not at all controlled, so far as Section 21 is concerned, the acquisition by such an undertaking of further funds and has introduced control only when, with the additional funds, it proposes to instal new machinery or other equipment. The point to be noted is that in sub-section (1) of S. 21 the method of exercising control appears to be, not by controlling, except by issue of fresh capital by a company, the acquisition of more funds which would be only a means to acquire new machinery or other equipments but by controlling the actual installation of new machinery or other equipments which would result in the expansion of its activities.

30. Sub-section (3) of S. 23 provides:—

"Nothing in sub-section (1) of sub-section (2) shall apply to the scheme of merger or amalgamation of such inter-connected undertakings as are not dominant undertakings and as produce the same goods".

The opening words "Nothing in sub-section (1) or sub-section (2) shall apply" show that sub-section (3) carves out an exception out of the general provision which is contained in sub-sections (1) and (2). From the very fact that an exception has been carved out, whatever be the ambit of that exception, shows that in trying to achieve the avowed object and intention of the Monopolies Act, the Act makes a distinction between an undertaking and an undertaking.

31. Now the undertakings to which Part A applies would, under Section 29, read with clause (d) of Section 2, divide themselves into four classes, the four classes being:—

(1) An undertaking which by itself is engaged in producing goods;

(2) An undertaking which along with inter-connected undertakings is engaged in producing goods;

(3) An undertaking which by itself is engaged in provision of service, and

(4) An undertaking which along with inter-connected undertakings is engaged in provision of service.

32. The exception in S. 23 (3) applies to the scheme of merger or amalgamation "of such inter-connected undertakings as". Undertakings only of the second and fourth of the above four classes are inter-connected undertakings and those of the first and third are not and the exception does not apply to the latter two.

33. Thereafter in Section 23 (3) there occurs the phrase "undertakings as are not dominant undertakings and as produce the same goods". This is an additional requirement to make an undertaking to fall within the exception in sub-section (3) of S. 23. It requires, that the undertaking must be an inter-connected undertaking which is a dominant undertaking but must yet not be engaged in the activity of producing goods. It excludes the said second class.

34. Conversely stated, the exception would apply only to an undertaking which is an inter-connected undertaking which is a dominant undertaking engaged in the provision of service, that is, an undertaking of the said fourth class. The language of the sub-section appears to be a little involved but its meaning is clear. Instead of providing affirmatively that the exception applies only to undertakings of the said fourth class, it uses negative language to exclude the said first three classes leaving, as a result, only the said fourth class to fall within the exception. The effect is that from the application of

the general provisions contained in sub-sections (1) and (2) of S. 23, sub-sec. (3) excludes inter-connected undertakings which are dominant undertakings engaged in the provision of service. This interpretation yields the conclusion that although the object and intention of the Legislature, generally speaking, is to prevent concentration of economic power, in making the actual provisions in the statute the method is not identical when dealing with different cases for certain purposes, even when it is identical for other purposes.

35. The above discussion shows that although the preamble and the heading of Chapter III shows the object and intention of the Legislature to be to control concentration of economic power, the Legislature has, while enacting the Monopolies Act, made distinctions between like entities in respect of the application of certain provisions of Chapter III itself at least in the two cases referred to above.

36. Mr. Bhabha wanted us to reject the meaning of "undertaking" as defined in Section 2 (v) on the only ground that the object and intention of the Monopolies Act as gathered from the preamble and Chapter III heading is to control concentration of economic power. That object, however, must be gathered from the actual provisions contained in the Act itself and it would not be permissible to add to or subtract from such actual provisions. One would have been justified in accepting Mr. Bhabha's contention if the actual context so required it by reason of the meaning of "undertaking" as defined in Section 2 (v) creating any repugnancy or inconsistency when it has been used in the phrase "any other undertaking" in S. 23 (1). No repugnancy or inconsistency exists and Mr. Bhabha has not even pointed out any. He had, of course, pointed out that even a company in liquidation can, in view of the provisions of Section 394 of the Companies Act, be a party to a merger or amalgamation with an undertaking to which Part A applies, but the former in most cases would not be "engaged in" production of goods or provision of service and would be excluded from the operation of Section 23 (1) although it may have machinery and equipment for doing so. We are not required to consider such a case. Now it may be that such a case may require it to be held in its case that the context otherwise requires such a company to be included in the phrase "any other undertaking" in S. 23 (1). But there can be another view, which would possibly be a better view to take, that the merger or amalgamation of a company in liquidation is a rarity and the Legislature did not intend to control it.

37. Mr. Bhabha put a poser as to how would the meaning of "undertaking"

as defined in Clause (v) of Section 2 apply in the case of a new undertaking for the purpose of consideration under Section 22 because the undertaking would not at that stage have been established and therefore it cannot be said in the case of such an undertaking that it "is engaged in" production of goods or provision of service. Now the obvious answer is that the context of Section 22 definitely requires that the word "undertaking" as used in Section 22 should not be construed and as a matter of fact cannot be construed to have the same meaning as contained in the definition in clause (v) of Section 2. In Section 22 itself there is overwhelming material to justify holding that the context so otherwise requires, because the words used are not "any undertaking" but are "any new undertaking" in sub-sections (1) and (2) of Section 23 and moreover in sub-s. (2) the adjectival phrase "which is intended to be established" has been used to qualify the phrase "new undertaking". The latter adjectival phrase would clearly show that the use of the phrase "which is intended to be established" would be totally inconsistent with the concept of an undertaking which, as required by Sec. 2 (v), "is engaged in" production of goods or provision of service.

38. We, therefore, reject Mr. Bhabha's present contention under consideration and hold that in the phrase "any other undertaking" occurring in sub-section (1) of S. 23 the word "undertaking" is used in the meaning given to it in clause (v) of S. 2 and that the context does not require any departure being made from it. We further hold that the learned Judge was, therefore, right in according sanction to the scheme, although the merger or amalgamation formulated in the Scheme is not sanctioned by the Central Government under the Monopolies Act. The appeals, therefore, fail and are dismissed with costs.

39. Mr. Bharucha, the learned Counsel for the respondents in both the petitions, states that notwithstanding the order for costs in favour of the respondents the respondents will not enforce that order if the appellants inform the respondents in writing within eight weeks from today that the appellants have not filed and do not intend to file an appeal against this Judgment and Order to the Supreme Court.

40. It is necessary to record that although the Memorandum of Appeal in both the matters makes a grievance against the learned Judge not having ordered the appellants to be made parties to the petitioners, before him, Mr. Palkhiwala stated that the respondents in both the matters waive their objection as to the maintainability of the appeals. In

view of this statement of Mr. Palkhiwala we did not even consider it necessary to grant to the appellants their request to us for granting them leave to file these appeals which they applied for. Mr. Bhabha stated that he made this application because of the reason that they were not parties to the two petitions but only notices had been served upon them. Neither of the parties before us in either of the petitions has argued that point as they did not intend to take a decision on that point. We have therefore not at all dealt with the point and make it clear that the parties have intended and we have accepted that the point should not be deemed to have been decided but is left open and should not serve as a precedent.

41. On Mr. Mukhi's application for stay, after some arguments are advanced, Mr. Bharucha states that the respondents in the two appeals will not take any steps to implement the order sanctioning the scheme of amalgamation on or before the 24th April 1971.

Appeals dismissed.

AIR 1972 BOMBAY 313 (V 59 C 57)

NAIN, J.

Akhil Deshastha Rugvedi Brahmin Madhyawarti Mandal, Appellant v. Joint Charity Commissioner Maharashtra State, Bombay and another, Respondents.

A. F. O. D. No. 348 of 1967, D/- 16-9-1971 against decision of P. C. Kapadia, J. City Civil Court at Bombay in Charity Appeal No. 21 of 1965.

Index Note:— Bombay Public Trusts Act (1950), Ss. 2 (13), 19 — Corporation, registered under Companies Act, owning property in trust for religious and charitable purposes for the benefit of a class of persons, is a public trust liable to registration under the Act.

Brief Note:— A corporation licensed under Section 25 of the Companies Act, 1913, authorised by the object clause in its Memorandum of Association to hold property in trust for public religious or charitable purposes for the benefit of a class of beneficiaries is a public trust within Section 2 (13) of the Bombay Public Trusts Act, 1950 and as such is required to be registered under the said Act. A corporation is a juristic person capable of owning property in its capacity as a trustee.

The memorandum of the Mandal in the instant case expressly provides that it shall act as a trustee in respect of its property for attainment of the charitable objects for which it was formed and that it shall hold such property in trust and

apply the same for the said purposes for the benefit of all the members of the community. The Mandal therefore is a trustee of the property it holds for carrying out the public religious and charitable purposes for which it was expressly formed. There is thus in existence a public trust in the form of a Mandal which is liable also to be registered as such under the Bombay Public Trusts Act, 1950. AIR 1949 Bom 76 and Appeal No. 657 of 1954, D/- 12-7-1956 (Bom), Dist. (Paras 4, 6, 7)

Cases Referred: Chronological Paras

AIR 1965 SC 40 = (1964) 6 SCR	
885, Tata Engineering & Locomotive Co. Ltd. v. State of Bihar	4
AIR 1963 SC 1811 = (1964) 4 SCR	
99, State Trading Corporation of India Ltd. v. Commercial Tax Officer	4
(1956) Appeal No. 657 of 1954, D/- 12-7-1956 (Bom)	9
AIR 1955 SC 74 = 1955 SCR 876, Mrs. Bach. F. Guzedar v. Commr. of Income-tax, Bombay	4
AIR 1949 Bom 76 = 50 Bom LR 612, Bhaskar Sadashiv Joshi v. Registrar Bombay Public Trust Registration Act, 1935	9
1897 AC 22 = 66 LJ Ch 35, Salomon v. Salomon and Co. Ltd.	4

R. W. Adik with W. N. Yande, for Appellant; V. H. Gumaste Govt. Pleader, for Respondent No. 1.

JUDGMENT:— This is an appeal by the original Applicants No. 1 against the order dated 3rd March 1966 of a Judge of the Bombay City Civil Court. The Applicants No. 1 are Akhil Deshastha Rugvedi Brahman Madhyawarti Mandal (hereinafter for the sake of brevity referred to as "the Mandal"). The Mandal is a Company limited by guarantee incorporated under the Indian Companies Act, 1913 and now under the Companies Act, 1956 under a license from the Central Government under Section 26 of the Indian Companies Act, 1913 corresponding the Section 25 of the Companies Act, 1956 dispensing with the word "Limited" in the name of the Mandal. The Respondent No. 1 is the Joint Charity Commissioner, State of Maharashtra. The Respondent No. 2 was formerly the Chairman of the Mandal. The order under appeal held that the Mandal was a public trust and as such was liable to be registered under Section 18 of the Bombay Public Trusts Act, 1950 (hereinafter referred to as "the Public Trusts Act") as a public trust notwithstanding the fact that it was a Corporation.

2. A few facts leading to this litigation may be briefly stated. The Mandal applied for and obtained a license under Section 26 of the Indian Companies Act, 1913 to register itself under the said Act

without the word "limited" added to its name of the representation that it was a non-profit making concern and charitable institution. The Mandal was incorporated on 3rd April 1939 as a company limited by guarantee without the word "limited" added to its name. It appears between 1939 and 1961, the Mandal acquired some property for the objects set out in its Memorandum of Association. On 12th October 1961, the Mandal made an application to the Charity Commissioner for its registration as a public trust under the Public Trusts Act. It is alleged on behalf of the Mandal that this application was made under protest and to find out whether it was liable to be registered under the Public Trusts Act so that it may not be charged with the contravention of the provisions of the Public Trusts Act. On 26th April 1962 as a result of an inquiry the Assistant Charity Commissioner, Bombay, held that the Mandal did not require registration under the Public Trusts Act. It appears the Joint Charity Commissioner, Bombay, was not satisfied with this order. He therefore commenced review proceedings *suo motu* and by an order dated 27th April 1965 set aside the order dated 26th April 1962 of the Assistant Charity Commissioner, held that the Mandal constituted a public trust and remanded the proceedings to the Assistant Charity Commissioner for inquiry and findings on the remaining statutory issues provided for in Section 19 of the Public Trusts Act.

3. Against the decision of the Joint Charity Commissioner the Mandal appealed to the Bombay City Civil Court. By its order dated 3rd March 1966 the Bombay City Civil Court dismissed the appeal and upheld the decision of the Joint Charity Commissioner. It is against the said decision that the present appeal has been filed.

4. As I have stated above the Mandal is a company limited by guarantee registered under a license under Section 26 of the Indian Companies Act, 1913 corresponding to Section 25 of the Companies Act, 1956. It is a corporation and therefore a juristic person and a distinct legal entity. This is a well-established proposition from the time of the decision of the Judicial Committee of the House of Lords in *Salomon v. Salomon & Co. Ltd.*, 1897 AC 22, which has been followed in India by the Supreme Court in *Mrs. Bacha F. Guzedar v. Commr. of Income-tax, Bombay*, AIR 1955 SC 74, *State Trading Corporation of India, Ltd. v. Commercial Tax Officer*, AIR 1963 SC 1811 and *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*, AIR 1965 SC 40. As a juristic person the Mandal can carry on all human activities subject to such limitations as arise from its not being a natural person and the limi-

tations imposed upon its activities by its own charter contained in the Object Clause in the Memorandum of Association. A juristic person cannot marry and procreate, but it is certainly capable of owning property. It is also capable of owning property in its capacity as a trustee. Corporations carrying on the activity of becoming trustees and executors are not unknown. There can therefore be no objection to a Corporation acting as a trustee provided its Object Clause in the Memorandum of Association so permits.

5. On behalf of the Mandal my attention was drawn to the definition of "trust" in Section 3 of the Indian Trusts Act, 1882. This Act does not apply to public trusts, but the definition of "trust" contained in it is nonetheless a proper definition of the word "trust". Section 3 provides that a "trust" is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another The person who reposes or declares the confidence is called the "author of the trust". The person who accepts the confidence is called the "trustee", and the person for whose benefit the confidence is accepted is called the "beneficiary" and the subject-matter of the trust is called "trust property". In my opinion if a Corporation is capable of accepting the ownership of property with an obligation annexed to the ownership for the benefit of another which may be a class of persons, there can be no objection to a Corporation acting as a trustee. The only question is whether in this case the Mandal has accepted such trust.

6. Section 2 (13) of the Public Trusts Act defines a "public trust" as under:—

"'public trust' means an express or constructive trust for either a public religious or charitable purpose or both and includes a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860".

The difference between a private trust and a public trust arises from the difference between the objects. While in the private trust the intention is to benefit an individual or a group of persons and there is no public religious or charitable purpose, in a public trust there is a public religious or charitable purpose. It is expressly provided in the definition of "public trust" that a society formed for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860 is included in the definition of "public trust". There is no reference to a Company incorporated

under the Companies Act but that should not make any difference. If a Company is authorised by its object clauses in its Memorandum of Association to hold property in trust for public religious or charitable purposes, there is no reason why its ownership of property for such purposes should not form a public trust.

7. We must therefore refer to the constitution of the Mandal and find out whether the object clauses and the other provisions in its Memorandum of Association authorise it to hold property for public religious or charitable purposes. We must also see if there are other circumstances if any pointing to the existence of a public trust. Under S. 26 of the Indian Companies Act, 1913 and under Section 25 of the Companies Act, 1956 a license can only be granted by the Central Government if the Company is formed for promoting commerce or science, religion, charity or any other useful purpose and intends to apply its profits if any or other income in promoting its objects and to prohibit the payment of any dividend to its members. In the case of the Mandal the license granted to it by the Central Government provides that the Memorandum of Association shall prohibit payment of any dividend to its members. Now, we come to the object clause in the Memorandum of Association of the Mandal. Several sub-clauses provide for establishment of a home for the use of Akhil Deshastha Rigvedi Brahman community, providing a lecture hall, educational and religious classes, industrial workshops and hospitals etc. The objects also include rendition of medical aid to the members of the said community, scholarships for the education of the members of the said community and provision for gymnasiums, gymkhanas and other recreation. Sub-clauses (11), (12) and (13) of clause 3 provide as under:—

"(11) To accept and undertake any Trust and to act as sole Trustee or Executor in respect of any estate if such acceptance and undertaking is conducive to the attainment of the above objects or any of them.

(12) To accept donations for the purposes aforesaid in cash or in kind.

(13) To hold the property and funds of the Mandal in trust to apply the same and/or the income thereof in promoting the above objects or any one or more of them".

It will thus appear that the object clauses contained in the Memorandum of Association of the Mandal expressly provide that the Mandal shall act as a trustee in respect of its property for the attainment of the objects of the Mandal, and that it shall hold such property in trust and apply the same for the said purposes. The educational and other pur-

poses set out in the Memorandum would in my opinion constitute public religious and charitable purposes. The Mandal is therefore in my opinion a trustee in respect of the property it holds for carrying out the said public religious and charitable purposes and there is in existence a public trust which is liable to be registered under the Public Trusts Act.

8. On behalf of the Mandal it was contended that at the time of incorporation of the Mandal in 1939 there was no property and therefore there could be no public trust. It is true that there is no evidence that in 1939 there was any property of the Mandal and it may be that at that time the object clauses in the Memorandum of Association only contained an intention that when the property came into existence, it would be held by the Mandal in trust for the members of the said community for charitable purposes. But the moment the property came into existence the Mandal became a trustee in respect of the said property, the beneficiary was the community for whose benefit the property was held and the objects are those set out in the Memorandum of Association.

9. The second contention taken was based on two judgments, one of Jahagirdar, J. in the case of Bhaskar Sadashiv Joshi v. Registrar, Bombay Public Trust Registration Act, 1935, 50 Bom LR 612 = (AIR 1949 Bom 76) and the other an unreported judgment D/- 12-7-1956 in Appeal No. 657 of 1954 of a Division Bench of this Court consisting of Chagla, C. J. and Dixit, J. In Bhaskar Joshi's case, (50 Bom LR 612) = (AIR 1949 Bom 76) it was held that a society registered under the Societies Registration Act, 1860, even if it is religious or charitable is exempt from the operation of the Bombay Public Trusts Registration Act, 1935. This may be a correct interpretation of the 1935 Act but it cannot apply to the Bombay Public Trusts Act of 1950 because such a society is now expressly included in the definition of a public trust. Apart from this we are in this case concerned with a company and not with a society. In the case before the Division Bench (Civil Appeal No. 657 of 1954 (Bom)) there was a Panchayat holding property for the benefit not of the members of a particular community but for the benefit of such members of that community who were members of the Panchayat. It was in view of that limitation that the Division Bench held that the Panchayat was not a public trust and was not liable to be registered under the Public Trusts Act. In this case, however, the Memorandum of Association of the Mandal expressly provides for holding property in trust

for the objects specified in the Memorandum, and the beneficiaries are the members of a particular community irrespective of whether they are or are not the members of the Mandal. The Division Bench decision has no application to the facts of this case.

10. Another contention taken on behalf of the Mandal was that if the Mandal was compelled to register itself under Public Trusts Act, it will come under dual control and such dual control will create conflict, the dual control being of the Companies Act and of the Public Trusts Act. In my opinion, there is no substance in this contention. The Mandal is a trustee. With regard to its own constitution, it may be governed by the provisions of the Companies Act. But with regard to property held by it as trustee for public religious and charitable purposes, it will be liable to comply with the provisions of the Public Trusts Act. A company incorporated under the Companies Act has to comply with the other laws of the land applicable to its activities. This does not result in any conflict.

11. The last contention taken was that if the Mandal was compelled to register itself under the Public Trusts Act, and it is removed as a trustee for any breach of trust or other malversation, the trust would come to an end. I find no substance in this contention. It may be that the Mandal may be found guilty of breach of trust or malversation of the property of the trust and may be removed as a trustee. There is no reason why the removal as a trustee of the Mandal should bring an end to the trust. The Charity Commissioner or the Court can always frame scheme for the administration of the trust and the trust can continue with substituted trustees. It would not matter if in that event the Mandal has to be wound up. Many companies find themselves in this position, if their business comes to an end and their substratum is gone. This cannot be a reason for exempting the Mandal from registering itself under the Public Trusts Act.

12. If the contention that a company even if it owns property as a trustee in trust for a class of beneficiaries for public religious and charitable purposes is not required to be registered under the Public Trusts Act were accepted, it would result in large scale evasion of the provisions of the Public Trusts Act. All that the trustees have to do is to register a company under the Companies Act, vest the trust property in the company and become its directors in order to escape the provisions of the Public Trusts Act. Such a construction is not to be favoured.

13. In the result, the appeal fails and is dismissed. The order of the City Civil Court dated 3rd March 1966 is confirmed. In the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

AIR 1972 BOMBAY 316 (V 59 C 58)

K. K. DESAI AND VAIDYA, JJ.

Diwanchand Gupta, Petitioner v. N. M. Shah and others, Respondents.

Special Civil Appln. No. 259 of 1970, (with Spl. C. As. Nos. 744, 745 and 750 of 1970), D/- 1-7-1971.

(A) Bombay Municipal Corporation Act (3 of 1888), S. 354 — Notice to pull down dangerous structures — Subjective satisfaction of authority — Justiciability.

The notice issuing authority under Section 354 has to consider the facts objectively. Its satisfaction is open to challenge only if it has not come to the conclusion honestly and bona fide. AIR 1959 Bom 332, Rel. on. (Paras 7 and 28)

The fact that the building was subjected to some repairs, which were not repairs to the entire building but repairs effected to undo the damage caused while pulling down the rest of the building, or the fact that notwithstanding the lapse of time till now, the building has survived several seasons without any untoward incident happening to the inmates or to the passers-by, cannot be sufficient to interfere with the subjective satisfaction of the authority, who has stated in the notice that a portion of the building was in a ruinous condition, likely to fall and dangerous to persons occupying, resorting to or passing by the same. (Para 8)

(B) Bombay Municipal Corporation Act (3 of 1888), S. 354 — Notice to pull down dangerous structures — Whether becomes inefficacious.

Once a notice is issued under S. 354 to the owner, the owner is liable to be prosecuted for non-compliance with the notice under Section 471 (b), unless he obtains an order under Section 507 directing the occupiers of the building to afford all reasonable facilities to the owner for complying with the notice. (Para 9)

Furthermore, under Section 471 (b) the occupants, who refuse to vacate the premises or afford reasonable facility to the owner are themselves liable to be punished for each such offence of non-compliance with the requisitions. Therefore, it is idle to contend that the notice issued by the Authority under Sec. 354 has become inefficacious or the order passed by the Chief Judge with reference to that notice has no relevance to

the present conditions affecting the legal rights and obligations of the owners and occupiers of the building in respect of which the notice is given. (Para 9)

(C) Bombay Municipal Corporation Act (3 of 1888), S. 354 — Power to issue notice to pull down dangerous structures to owner or occupier — Exercise of, whether violated principles of natural justice, (Const. Arts. 19 and 226).

There is nothing expressed in the section itself which requires a notice to be given to the occupants of a building when the notice is given to the owner thereof. AIR 1959 Bom 332 and AIR 1971 SC 40, Rel. on. (Para 11)

The power conferred by the section is a power in the public interest. The power must be considered as a reasonable restriction on the right of property as well as the right to carry on trade or business within the meaning of Art. 19 (1) (f) and (g) read with Art. 19 (5) and (6) of the Constitution. (Para 14)

Where the authority issuing the notice to owner had not only satisfied himself about the ruinous condition of the building but a portion of the building collapsed and a major portion of the building had been pulled down in pursuance of the notice, and although the owners had made applications against all the tenants and occupants, the grievance was made against the order only by six of them.

Held, that question of violation of principle of natural justice before issuing a notice under Section 354 was entirely irrelevant. (Para 15)

The facts and circumstances clearly indicated that it was unreasonable to expect a notice to be given to the occupants of the dilapidated building with a view to comply with principles of natural justice. (Para 15)

(D) Bombay Municipal Corporation Act (3 of 1888), Ss. 56 (3) and 354 — Power of Commissioner to issue notice to pull down dangerous structure — Delegation of power by Deputy Commissioner to Assistant Engineer — Validity.

As under Section 56 (3) all acts and things performed and done by a Deputy Commissioner during the tenure of his office and in virtue thereof shall for all purposes be deemed to have been performed and done by the Commissioner, the Deputy Commissioner has a statutory authority or permission to delegate the powers of the Commissioner under Section 354 to the Assistant Engineer. The maxim delegatus non potest delegare cannot be invoked where the statute has permitted the delegation. AIR 1968 SC 822, Distinguished. (Paras 18, 19)

(E) Bombay Municipal Corporation Act (3 of 1888), S. 354 — Discretion to issue notice to pull down dangerous

structures — Exercise of — Whether mala fide.

Section 354 does not confer an unfettered discretion on the authorities to pick and choose and indulge in unfair discrimination against the citizens and issue notice to whomsoever they like. (Para 21)

It is obviously impossible for the authority to inspect all structures that are suspected of being dangerous. Therefore, it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person it is open to the owner to prove that, that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken. (1908) 10 Bom LR 821, Rel. on. (Para 21)

Where the owners had not only not challenged the notice but had already partially complied with the notice, it was held that it could not be said that the discretion was exercised unfairly or capriciously or mala fide. (Para 21)

Moreover it was not for the Court to satisfy itself whether the building was in a dangerous condition when the notice was issued. The fact that part of the building had been already pulled down and the majority of the occupants had no grievance against the pulling down itself further indicated that the allegation of mala fides made against the authority was baseless. 1905 A. C. 426 Rel. on. (Para 23)

(F) Bombay Municipal Corporation Act (3 of 1888), S. 507 — Jurisdiction of Chief Judge under — Not taken away by Section 13 (1) (hhh) or S. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act (1947).

There is nothing in Section 13 (1) (hhh) or Section 28 of the Bombay Rent Act which takes away the jurisdiction of the Chief Judge under S. 507 of the Bombay Municipal Corporation Act. (1958) 60 Bom LR 1096, Rel. on; AIR 1971 SC 1495, Distinguished. (Para 26)

It is only in respect of suits or proceedings between landlords and tenants relating to recovery of rent or possession of any premises to which Rent Act applied and in respect of applications made under that Act or any claim or question arising out of the Act or any of its provisions that the jurisdiction of other Courts is excluded under S. 28 of the Rent Act. The application made by the owners under Section 507 of the Municipal Corporation Act does not fall under any of the categories of suits or proceedings referred to in Section 28 (1) of the Rent Act. It cannot be said that an application under Section 507 relates

to the recovery of possession of the premises because Section 507 empowers the Chief Judge to make a written order "requiring the occupier of the building or land to afford all reasonable facilities to the owner for complying with the notice."

(Para 24)

(G) **Bombay Municipal Corporation Act (3 of 1888), S. 507 (2) — Power to require the occupiers "to afford all reasonable facilities to the owner" — Extent of.**

The power includes a power to order the occupants to vacate the premises if that is necessary for giving reasonable facility to the owner. (Para 27)

Cases Referred: Chronological Paras

AIR 1971 SC 40 = 1971 Lab IC 8,

Union of India v. J. N. Sinha 13

AIR 1971 SC 1495 = 73 Bom LR

320, Sushila Kashinath Dhonde

v. Harilal Govindji Bhogani 25

AIR 1970 SC 150 = (1970) 1 SCR

457, A. K. Kraipak v. Union of

India 13

AIR 1968 SC 822 = 70 Bom LR 745

= 1968 Cri LJ 979, Mangulal

Chunilal v. Mannilal Maganlal 19

AIR 1959 Bom 332 = 60 Bom LR

515, Nathubhai Dhulaji v. Municipal Corporation, Bombay 7, 10, 12

(1958) 60 Bom LR 1096, Mohmed

Haji Noormohamed v. Mona Vicaji

Javeri 24

AIR 1954 Bom 33 = 55 Bom LR

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v. M. D. Lalkaka 27

AIR 1950 SC 222 = 53 Bom LR 1,

Province of Bombay v. Khushal-

das S. Advani 10, 13

(1908) 10 Bom LR 821 = ILR 33

Bom 334, Lalbhai Tricamlal v.

The Municipal Commr. for City

of Bombay 21

(1905) AC 426, Westminster Cor-

poration v. London and North

Western Railway 23

VAIDYA, J.:— The above four peti-

tions under Article 227 of the Constitu-

tion of India are directed against an

order dated November 28, 1969 passed

by the Chief Judge of the Court of Small

Causes at Bombay in two applications

filed under Section 507 of the Bombay

Municipal Corporation Act, 1888. The

said two applications were filed by res-

pondent Nos. 2 to 8 in special civil ap-

plication No. 259 of 1970, who own the

premises bearing No. 61, Clive Road,

Danabunder, Bombay No. 9 consisting of

a ground floor and two upper floors.

Municipal Application No. 174/M of 1966

was filed against 17 tenants, one of whom

is the petitioner in special civil applica-

tion No. 259 of 1970. He was respon-

dent No. 15 in the application. Municipal

application No. 175/M of 1966 was

filed against 16 respondents mentioned

therein, of whom the petitioners in spe-

cial civil application Nos. 744, 745 and 750 were some of the respondents. They were described as occupants, who were not the tenants of the owners.

2. In both the applications respondents Nos. 2 to 8 in special civil application No. 259 of 1970 (who will be hereinafter described as "the owners") stated that they were served with a notice bearing No. 18 dated June 11, 1965 from the Assistant Engineer, Division B, Bombay Municipal Corporation, which is as follows:—

"BOMBAY MUNICIPAL CORPORATION

Notice under Section 354 of the Bombay Municipal Corporation Act, No. BN/18 of 1965-1966.

Bombay,
Dt. 11-6-1965.

To
Shri Parasram Dhanpat,
The Owner of the Building

Whereas it appears to me that the certain structure, to wit, a portion of the building on premises No. 61 situate at Clive Road, of which you are the owner is in a ruinous condition, likely to fall and dangerous to any person occupying, resorting to, or passing-by the same, I hereby require you, under Section 354 of the Bombay Municipal Corporation Act to

To pull down the whole building upto ground level.

Time limit 30 days.

Note: The building is presumed to face Clive Road, on east and to prevent all cause of danger therefrom, I further hereby require you, under the aforesaid section of the Municipal Corporation Act, forthwith before proceeding to pull down, and secure the said structure to set up a proper and sufficient board or fence for the protection of passers-by and other persons. I give you notice that, if within 30 days from the service or receipt hereof this requisition be not complied with you will render yourself liable to prosecution under Section 471 of the said Act and I may thereafter, pursuant to the provisions of Section 489 of the said Act take such measures or cause such work to be executed or such thing to be done as shall in my opinion be necessary for giving due effect to this requisition and you will be liable for the expenses thereof which will be recovered from you in the manner provided by Section 491 of the said Act. No portion of the structure within the regular line of the street may be reconstructed nor may anything within the scope of Section 342 of the said Municipal Corporation Act, other than the work which you are expressly required by this notice to do, be made or done without previously giving notice

thereof as required by Section 342 aforesaid.

Sd/- (Illegible)
S. E. B. South

Sd/- Coutinho
Assistant Engineer
Division B

Bombay Municipal Corporation

Note: Under S. 68 of the Bombay Municipal Corporation Act the Municipal Commissioner for Greater Bombay has empowered the Asstt. Engineer Division B to exercise perform and discharge all the powers duties and functions conferred and imposed upon and vested in the Commissioner by Sections 354 and 489 of the said Act".

It was alleged by the owners that although the owners were called upon by the said notice to pull down the said building upto the ground level as the building stood in a ruinous condition, the petitioners in these special civil applications and the other tenants and occupants (who will be all hereinafter described as "occupiers") failed to vacate the premises and made it impossible for the owners to comply with the notice, which was given under Section 354 of the Bombay Municipal Corporation Act and rendered respondent No. 2 in special civil application No. 259 of 1970, Parasram Dhanpat, liable for prosecution by the Bombay Municipal Corporation. It was alleged that a case bearing No. 563 of 1965 was filed against respondent No. 2, one of the owners, in the Court of the Presidency Magistrate, 28th Court, Esplanade, Bombay and he was convicted and sentenced to pay a fine of Rs. 50/- in the said case on February 22, 1966. The owners further alleged that thereafter a portion of the wall supporting the staircase leading to the second floor of the building in the premises referred to above collapsed, resulting in further deterioration of the structural condition of the building. The Municipal authorities then warned some of the occupants to vacate the premises immediately. The owners further called upon the occupants by a notice through their Advocate dated June 6, 1966 to vacate the premises occupied by them forthwith. In spite of this, the occupants failed and neglected to vacate the premises and refused to afford necessary facilities to the owners to pull down the building as required by the aforesaid notice dated June 11, 1965. It is in these circumstances that the two applications mentioned above were filed by the owners on July 13, 1966 under Section 507 of the Bombay Municipal Corporation Act.

3. The petitioners in these special civil applications resisted the owners' applications by filing affidavits in reply to the applications contending inter alia that the applications were not properly filed, that they were belated and mala fide, that the owners had got the notice issued in collusion with Municipal offi-

cials with a view to get rid of the petitioners and other occupiers and thereafter to sell the plot as an open plot fetching a fabulous price or to reconstruct on it and let the same out to others free of any claim of the tenants, that the aforesaid notice purported to have been issued by the Assistant Engineer was invalid inasmuch as the signatory to the notice had no legal and valid authority to issue it and the notice was arbitrary, capricious and mala fide and that it was not expedient to pull down the tenements let out to the petitioners.

4. The learned Chief Judge allowed the parties to lead evidence and after considering the oral and documentary evidence before him and the contentions raised by the occupants passed the impugned order referred to above granting the applications of the owners. In Municipal Application No. 174 of 1956, all the respondents including Diwanchand Gupta, the petitioner in special civil application No. 259 of 1970 were directed to remove themselves from the premises in their occupation by January 31, 1970 in order to afford facilities to respondent No. 2 to enable him to comply with the requisition in the aforesaid notice and the tenants were directed to pay to respondent No. 2 court costs. The application was dismissed so far as respondents Nos. 3 to 8 were concerned as they were minors and it was respondent No. 2 alone who fell within the definition of the word 'owner' in Section 3, clause (m) of the Bombay Municipal Corporation Act. In Municipal Application No. 175 of 1966, also, the occupants were directed to remove themselves from the premises in their occupation before January 31, 1970 in order to afford facilities to respondent No. 2 to enable him to comply with the notice. That application was also dismissed so far as respondents Nos. 3 to 8 were concerned.

5. Feeling aggrieved by the said decision of the Chief Judge, the tenant Diwanchand Gupta has filed special civil application No. 259 of 1970. Special Civil Applications Nos. 744, 745 and 750 of 1970 are filed by some of the occupants aggrieved by the said order, praying for quashing the notice dated June 11, 1965 and the aforesaid order passed by the Chief Judge of the Small Causes Court.

6. In support of the petition the first contention raised by Mr. Chagla, the learned Counsel for the petitioner in special civil application No. 259 of 1970, was that the notice having been issued as far back as June 11, 1965 had lost its effect or efficacy firstly because of the lapse of time from the date of its receipt till now, secondly because although the owners could have filed a suit to recover possession of the premises under S. 13

(1) (bhh) of the Bombay Rents, Hotel and Lodging House Rates Control Act, they had failed and neglected to do so; thirdly because although part of the premises were pulled down, the petitioners were occupying the remaining premises which at present admittedly consist of two rooms on the first floor and the entire ground floor without anything untoward happening to any of them or to any member of the public since 1965, and fourthly that after pulling down the rest of the premises, certain repairs of the building have been carried out and the building had ceased to be dangerous or liable to be pulled down under the notice. Mr. Shah, the learned Counsel for the remaining petitioners, further urged that the efficacy of the notice ought to have been judged by the learned Chief Judge with reference to the time of the making of the application or the time of the making of the order by him; and as he had not done so, the order of the learned Chief Judge was liable to be set aside.

7. We do not find any substance in any of these contentions in view of the scheme of the provisions contained in Sections 354 and 507. The scheme of these provisions was considered by a Division Bench of this Court in *Nathubhai Dhulaji v. Municipal Corporation, Bombay*, 60 Bom LR 515 = (AIR 1959 Bom 332). The said case arose out of suits filed in the City Civil Court by tenants of a building in respect of which a pulling down notice under Section 354 was issued to the landlord, who was sued by the tenant as defendant No. 1 in those suits. One of the contentions raised before this Court in that case was that the notice issued to defendant No. 1 under Section 354 was mala fide both in fact and in law. The Division Bench consisting of Dixit and Tarkunde, JJ. observed at page 520 after quoting the provisions of Section 354 as follows:—

"The title under which this section occurs is 'Dangerous Structures,' and one has only to read the section to realize that the intention of the section is to secure public safety. The authority issuing notice under Section 354 has to objectively consider certain facts. After having ascertained the facts objectively, he has to satisfy himself as to whether or not he would issue a notice under Section 354. First, he has to consider whether a building is in a ruinous condition or is likely to fall or is in any way dangerous to any person occupying, resorting to or passing by such structure. This embraces not merely the persons who occupy the building but also those who go to the building and also those who happen to pass by the building. Therefore, the authority issuing notice under Section 354 has to ascertain these facts objectively. He has then to consi-

der another fact objectively, which is, having regard to the state of the property, what is the degree of risk to the public safety, and having ascertained this, he has then to consider whether he would issue a notice to the owner or occupier requiring him either to pull down the building or to repair it. It is quite clear, therefore, that the authority issuing notice under Section 354 has to ascertain certain facts objectively and then to satisfy himself. In other words, the satisfaction is his own satisfaction, i.e., the subjective satisfaction of the authority issuing notice under Section 354."

Having regard to the facts of that case, they hold that all that the authority had to do was to act bona fide and not to act capriciously or with an improper motive. But if he considers the facts objectively and comes to a particular conclusion, his satisfaction would not then be open to challenge, provided he has come to the conclusion honestly and bona fide. They also observed:

"A building which needed repairing in 1954 may in conceivable circumstances, require pulling down in 1956. But whether the building should be pulled down or repaired is a matter of which the authority is the sole judge, and so long as the authority keeps himself within the limits of the authority given to him by Section 354, his discretion is absolute."

With respect, we are bound by this view enunciated about the scope and effect of Section 354.

8. It was not even argued before us that the impugned notice was issued mala fide by the Assistant Engineer. The fact that the building was subjected to some repairs, which were not repairs to the entire building but repairs effected to undo the damage caused while pulling down the rest of the building, or the fact that notwithstanding the lapse of time till now, the building has survived several seasons without any untoward incident happening to the inmates or to the passers-by, cannot be sufficient to interfere with the subjective satisfaction of the Assistant Engineer, who has stated in the notice that a portion of the building on premises No. 61 was in a ruinous condition, likely to fall and dangerous to persons occupying, resorting to or passing by the same. The satisfaction on these facts is the satisfaction of the authorized officer under Section 354. It is not open to the Court or any other authority, unless empowered by law, to sit in judgment over that satisfaction.

9. Moreover, the above arguments urged by Mr. Chagla and Mr. Shah in support of their contention that the notice has ceased to be efficacious are all without any substance. This is particularly so because once a notice is issued under

Section 354 to the owner, the owner is liable to be prosecuted for non-compliance with the notice under Section 471 (b), unless he obtains an order under S. 507 directing the occupiers of the building to afford all reasonable facilities to the owner for complying with the notice. Section 507 (3) further lays down:—

"After eight days from the date of any such order, it shall be incumbent on the said occupier to afford all such reasonable facilities to the owner for the purpose aforesaid as shall be prescribed in the said order; and in the event of his continued refusal so to do, the owner shall be discharged, during the continuance of such refusal, from any liability which he would otherwise incur by reason of his failure to comply with the said provision or requisition".

Furthermore, under Section 471 (b) the occupants, who refuse to vacate the premises or afford reasonable facility to the owner are themselves liable to be punished for each such offence of non-compliance with the requisition. In our opinion, therefore, it is idle to contend that the notice issued by the Assistant Engineer under Section 354 has become inefficacious or the order passed by the Chief Judge with reference to that notice has no relevance to the present conditions affecting the legal rights and obligations of the owners and occupiers of the building in respect of which the notice is given.

10. The second and the most important contention raised by Mr. Chagla was that the notice under Section 354 calling upon the owners to pull down the building not only threatened the rights of the petitioners to occupy the building but affected his client's right to carry on business of a hotel in the said building; and before so prejudicing the rights or threatening the rights of his client, the authority issuing a notice under S. 354 was bound to give notice to his client. In other words, notwithstanding the absence of any express provision requiring a show cause notice to be issued under Section 354, it was incumbent on the authority consistent with principles of natural justice and fairplay, to give a notice of the proposed order of pulling down under Section 354. It must be noted that although this plea of violation of principles of natural justice was taken in some of the affidavits in reply filed by some of the occupants, the point does not appear to have been pressed at the hearing of the applications before the learned Chief Judge. Mr. Chagla contended that notwithstanding this, it is open to this Court in exercise of its powers under Art. 227 of the Constitution to decide whether the authority issuing a notice under Section 354 should issue a show cause notice and give an opportunity of

hearing to the occupants of a building in respect of which the notice is issued. He submitted that although a Division Bench of this Court in the aforesaid case of 60 Bom LR 515 = (AIR 1959 Bom 332) had negatived this contention, that view was based on the earlier decisions of the Supreme Court following the decision in *Province of Bombay v. Khushaldas S. Advani*, 53 Bom LR 1 = (AIR 1950 SC 222). But that view was displaced by subsequent decisions of the Supreme Court, which, according to Mr. Chagla, laid down that irrespective of whether the decision was an administrative or quasi-judicial one, the concept of rule of law will lose its vitality if the instrumentalities of the State were not charged with the duty of discharging their functions in a fair and just manner. In other words, Mr. Chagla submitted that we should not follow the decision of this Court in *Nathubhai's* case in view of the later decisions of the Supreme Court which have applied principles of natural justice to even administrative decisions.

11. Even assuming that this point could be urged for the first time in this petition under Art. 227 of the Constitution by the petitioners, though it is not dealt with by the learned Chief Judge in the impugned order, we do not find any substance in the contentions raised by Mr. Chagla on the basis of the principles of natural justice in the context of Section 354. Section 354, no doubt, empowers the Commissioner to issue a notice under that section either to the owner or to the occupier. In the present case, notice has been issued only to the owners. The owners do not have any grievances of violation of principles of natural justice. The section does not require a notice to be given to the occupiers in all cases where owners are given notice. Mr. Chagla had to concede that there is nothing expressed in the section itself which requires a notice to be given to the occupants of a building when the notice is given to the owner thereof. But what he contends is that as the notice is a threat to the right of the occupants to continue to occupy the building and to carry on business in the building, it would be unreasonable to prejudice their rights without giving notice to them. For this purpose, he relied on the provisions contained in Article 19 (f) and (g) and submitted that the occupants' right to hold the property and carry on the business in the property would be jeopardized if a notice is given to the owner without any opportunity being given to the occupants. He rightly conceded that he could not rely on Article 31 (1) as Article 31 (1) lays down no such protection and it merely says that no person shall be deprived of his property save by authority of law.

12. This very argument was, however, negated by this Court in Nathubhai's case, 60 Bom LR 515 = (AIR 1959 Bom 332) with the following observations at page 520:—

"The contention which has been taken by Mr. Phadke is that Section 354 does not make provision for the right of a person to be heard. The short answer to this contention is that Section 354 does not provide for a hearing to be given to persons such as the plaintiffs in this case. When the contention is that the authority must act judicially, what the Court is concerned with is to see whether the section under which the right is claimed requires a hearing to be given. If the section of a statute requires that a hearing should be given, then surely the approach of the authority must be a judicial approach. But the alternative argument which has been advanced by Mr. Phadke is that even if the authority may not be bound to act judicially, the principles of natural justice require that a party should be heard before his rights are affected in any way. So far as the judicial approach is concerned, there is no difficulty in holding that the notice issued under Section 354 is an executive act or an executive order, and when by statute a provision is not made for hearing, it is impossible to accept the contention that the authority is bound to act judicially; nor is, in my opinion, the contention tenable that although the section does not provide for a hearing, the rules of natural justice require that a party should be heard before his rights are affected".

13. Now, it is true that in arriving at the above conclusion, this Court relied on the principles laid down by the Supreme Court in 53 Bom LR 1 = (AIR 1950 SC 222). It is also true that in *A. K. Kraipak v. Union of India*, AIR 1970 SC 150 the view taken is that the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated; and that what was considered as an administrative power some years back is now being considered as a quasi-judicial power; and further that with the increase of the power of the administrative bodies, it has become necessary to provide guidelines for the just exercise of their power. The Supreme Court, therefore, remarked that to prevent the abuse of that power and to see that it does not become a new despotism courts are gradually evolving the principles to be observed while exercising such powers. But at the same time the Supreme Court observed that the scope of the application of principles of natural justice to the exercise of executive power was qualified with reference to the statute

under which the said powers were exercised. In *Union of India v. J. N. Sinha*, AIR 1971 SC 40, Hegde, J. speaking for the Court reviewed the earlier case law and laid down

"Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in *Kraipak v. Union of India*, AIR 1970 SC 150, "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it". It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power".

14. Applying, therefore, these principles to the facts of the present case, we find that the power conferred under Section 354 is a power in the public interest. The section gives power to the Commissioner. If it shall at any time appear to him that any structure (including any building, wall or other structure and anything affixed to or projecting from any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure to pull down, secure or repair such structure, and to prevent all cause of danger therefrom. Such a power must be considered as a reasonable restriction on the right of property as well as the right to carry on trade or business within the meaning of Art. 19 (1) (f) and (g) read with Art. 19 (5) and (6) of the Constitution which empowers the State to make any law imposing, in the interests of the general public, reasonable restrictions.

15. In the facts of the present case, we find that the authority issuing the notice has not only satisfied himself about the ruinous condition of the building, but a portion of the building collapsed and a major portion of the building has been pulled down in pursuance of the notice; and although the owners had made applications against all the tenants and occupants, as stated above, the grievance is made against the order only by six of them. Having regard to these facts and circumstances, we are, therefore, of the opinion that the question of violation of principles of natural justice before issuing a notice under Section 354 is entirely irrelevant. The section did not require a notice to be given. The facts and circumstances clearly show that it was unreasonable to expect a notice to be given to the occupants of this dilapidated building with a view to comply with principles of natural justice. The contention of the Counsel for the petitioners that the notice violated the principles of natural justice must, therefore, fail.

16. It was next contended that the authority, who issued the notice, was delegated the power to issue the notice under Section 354 by the Deputy Commissioner who was himself a deputy of the Municipal Commissioner and this violated the principle contained in the maxim *delegatus non potest delegare*. The law on this point is succinctly stated in Allen on Law and Orders, 2nd edition at page 204 as follows:—

"With regard to executive functions, it is clear, on the one hand, that any administrator, whether of Ministerial degree or below it, must be allowed a reasonable amount of delegation in ordinary routine duties; but, on the other hand, if certain specific executive functions are committed to him, he cannot, without authority, entrust them to a deputy of his own choice".

Wade on Administrative Law, 2nd edition, 1967, at page 59 has stated the law as follows:—

"Although, therefore, the Courts are strict in requiring that statutory power shall be exercised by the persons on whom it is conferred, and by no one else, they make liberal allowance for the working of the official hierarchy, at least so far as it operates within the sphere of responsibility of ministers of the Crown. Powers, conferred upon special statutory bodies are more jealously watched, as we have noticed. Yet the maxim *delegatus non potest delegare*, like so many of the other rules of administrative law, turns out to be no more than a qualified rule for the interpretation of Parliament's intentions".

17. It is, therefore, necessary for us to consider whether in enacting the

relevant provisions of the Bombay Municipal Corporation Act, the legislature had intended that the Deputy Commissioner, to whom powers of the Commissioner were delegated, had no power to delegate the powers to the Assistant Engineer, who, in the present case, issued the notice.

18. The learned Chief Judge considered the proceedings of the Municipal Corporation of Greater Bombay at Ex. L relating to the Corporation resolution No. 820 dated October 28, 1958 and the Corporation resolution No. 331 dated May 16, 1960, which refers to the information given by the Commissioner under Section 56 (2) (b) and proviso to S. 56-B (1) of the Bombay Municipal Corporation Act, stating that the Commissioner had deputed *inter alia* to the Deputy Municipal Commissioner Mr. S. M. Y. Shastri the powers under Section 354. He also considered Ex. H, which records the deputation of the powers to the Deputy Commissioner as well as Ex. G under which powers were delegated on September 26, 1960 to the Assistant Engineer Mr. Coutinho (who issued the impugned notice) including the powers to issue notice under Section 354, and held that in view of the provisions of S. 56 (3) of the Bombay Municipal Corporation Act, the Deputy Commissioner Mr. Shastri could validly delegate his powers under Section 68 to Mr. Coutinho, the Assistant Engineer. In effect, he held that as under Section 56 (3) all acts and things performed and done by a Deputy Commissioner during the tenure of his office and in virtue thereof shall for all purposes be deemed to have been performed and done by the Commr., the Deputy Commissioner Mr. Shastri had a statutory authority or permission to delegate the powers of the Commissioner under Section 354 to Mr. Coutinho, the Assistant Engineer. We find no reason to disagree with the view taken by the learned Chief Judge.

19. Mr. Chagla, however, contended relying on a decision of the Supreme Court in *Mangal Chuni Lal v. Manilal Maganlal*, 70 Bom LR 745 = (AIR 1968 SC 822) that in view of the principles laid down in that case, the second delegation of powers by the Deputy Commissioner to the Assistant Engineer in the present case was invalid. This very case was cited before the learned Chief Judge and the learned Chief Judge rightly distinguished the case as one to be read in the context of the provisions of the Bombay Provincial Municipal Corporation Act, 1949 and the facts of that case; because the facts in that case were that the complaint had been filed by the Licence Inspector whereas the delegation under Section 59 in that Act was to the Deputy Health Officer to take proceedings as pro-

vided in Section 481 of that Act. There was no delegation of any power under any section of the Act by the Deputy Health Officer to the Licence Inspector. It is in view of those facts that the Supreme Court, with respect, rightly held that the Licence Inspector had no valid authority to file the complaint. In the present case, however, under Ex. G the power was validly delegated to the Assistant Engineer to issue the notice; and, as stated above, the maxim *delegatus non potest delegare* cannot be invoked where the statute has permitted the delegation. The contention of the petitioners that the notice was not validly issued by the Assistant Engineer must be, therefore, rejected.

20. In view of this, Mr. Chagla could not press his contention that merely because the notice mentioned in a footnote that the Assistant Engineer was delegated the power by the Municipal Commissioner contrary to the real facts, which showed that it was the Deputy Commissioner who had delegated the powers to the Assistant Engineer, the notice was invalid. It must be noted that it has been repeatedly pointed out by this Court that the Municipal Corporation should state the correct facts in the footnote and not mislead the recipient of the notice about the delegation. But the mere mis-statement by the Municipal Corporation, which unfortunately is persisted in in spite of observations made from time to time by this Court, is not sufficient to invalidate the notice because under Section 56 (3) the Deputy Commissioner is deemed to be a Commissioner for all purposes of the Act, as stated therein.

21. It was next contended that Section 354 conferred an unfettered discretion on the authorities which empowered them to pick and choose and indulge in unfair discrimination against the citizens and issue notice to whomsoever they like. This argument must be rejected not only because it is an erroneous contention in view of the provisions contained in the section but also because the principles on which the discretion has to be exercised have been laid down by this Court in *Lalbbhai Tricamlal v. The Municipal Commr. for the City of Bombay*, (1908) 10 Bom LR 821. In that case it is laid down that the word 'appear' in the section does not involve "appears to the eye", but it was sufficient if it appeared to the Commissioner on the representations of a competent officer whose duty it was to make such representations, and it was also laid down:—

"But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. He does

not satisfy this test, where he merely signs the notice which is sent to him by the Executive Engineer because it has previously been signed by that officer. It is only by aid of a fiction that it can be said that a notice signed in this way by the Commissioner complies with the section which should be considered as a notice to show cause.....

Discretion must not be arbitrary.....

The legislature has vested in the Commissioner a discretion in the matter (Section 354), and the Court would not interfere in his exercise merely because the object in view might be carried out in some other way nor would it lightly impute to him bad faith. But the Court is, in the first instance, entitled to inquire whether the discretion has been exercised. The discretion has to be exercised first in coming to a conclusion as to the state of the structure and then in fixing upon the remedy.

It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore, it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken".

With respect, we agree with these principles and it is unnecessary for purposes of this case to state anything more with regard to the scope and effect of the discretion conferred on the Commissioner or anyone acting in exercise of the powers of the Commissioner delegated to him under Section 354. There are no allegations in this case of any capricious exercise of power by the Assistant Engineer or any unfair discrimination against the landlord. In fact, as stated above, the owners have not only not challenged the notice but have already partially complied with the notice. In these circumstances, it cannot be said that the discretion exercised by the Assistant Engineer was exercised unfairly or capriciously or mala fide.

22. It is, however, contended on behalf of the occupants that the landlord himself had colluded with the Assistant Engineer. But apart from the allegation, there is nothing on the record to show that the Assistant Engineer had colluded with the landlord. It is true that the learned Chief Judge did not allow the petitioners to lead any evidence on the point. Six of the owners are minors and we find no reason whatsoever for the Assistant Engineer to collude with respondent No. 2. No allegations were made

against the Assistant Engineer himself, apart from the vague allegation that he colluded with the owners. It is not sufficient to hold that the Assistant Engineer had acted mala fide in issuing the notice.

23. Moreover, it is not for the Court to satisfy itself whether the building was in a dangerous condition when the notice was issued. The fact that part of the building has been already pulled down and the majority of the occupants have no grievance against the pulling down itself further shows that the allegations of mala fides made against the Assistant Engineer is baseless. The criterion of the building being in a ruinous condition or dangerous to the occupants and to the passers-by, as required by Section 354, has been applied by the Assistant Engineer in the notice which mentions that the building "is in a ruinous condition, likely to fall and dangerous to any person occupying, resorting to, or passing by the same". As Lord Halsbury stated in *Westminster Corporation v. London and North Western Railway*, 1905 AC 426.

"Where the legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion".

In the absence of anything to show abuse of the discretion or mala fide or capricious exercise of the discretion, it must, therefore be held that the contention of the petitioners that there was an unfair discrimination against them as citizens in violation of their right under Art. 14 of the Constitution of India is without any foundation.

24. The next contention urged on behalf of the petitioners is that the learned Chief Judge had no jurisdiction to entertain the applications under Section 507 as the owners had a special remedy under the special statute, viz., the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 for recovering possession of the premises in the possession of the tenants if the Court under that Act is satisfied under Section 13 (1) (hhh) that the premises are required for the immediate purpose of demolition ordered by any local authority or other competent authority. Apart from authority, in our opinion, the contention must be rejected, because it is only in respect of suits or proceedings between landlords and tenants relating to recovery of rent or possession of any premises to which Bombay Rent Act applied and in respect of applications made under that Act or any claim or question arising out of the Act or any of its provisions that the jurisdiction of other Courts is excluded under Section 28 of the Bombay Rent Act. The application made by the owners under Section 507 of the Bombay Municipal Corporation Act does not fall under any of

the categories of suits or proceedings referred to in Section 28 (1) of the Bombay Rent Act. It cannot be said that an application under Section 507 relates to the recovery of possession of the premises because Section 507 empowers the Chief Judge to make a written order "requiring the occupier of the building or land to afford all reasonable facilities to the owner for complying with the notice". Section 507 is not concerned with the termination of the tenancy or recovery of the possession of the premises but only with providing reasonable facilities to the owner to comply with a notice issued to him under the provisions of the Bombay Municipal Corporation Act. Such a question cannot be said to be a claim or question arising out of the Bombay Rent Act or any of its provisions. The tenancy is not terminated before or by making an application under Section 507. Section 507 enables the owner to get an order from the Chief Judge directing the occupants to give reasonable facilities and merely states that if the occupiers fail to afford the facilities after 8 days from the date of the order, the owner shall be discharged, during the continuance of such refusal, from any liability which he would otherwise incur by reason of his failure to comply with the said provision or requisition. It is true that the consequence of the refusal is that the occupants made themselves liable to be prosecuted under Section 471, as stated above. But this is not a question or claim arising out of any provisions of the Bombay Rent Act and we find nothing conflicting between S. 13 (1) (hhh) and Section 28 of the Bombay Rent Act and Section 507 of the Bombay Municipal Corporation Act from which we could infer an implied repeal of Section 354 of the Bombay Municipal Corporation Act. On the contrary, having regard to the nature and purpose of these provisions, it is clear that these sections can exist together and the applications made by the owners under Section 507 were maintainable notwithstanding Section 28 of the Bombay Rent Act. In *Mohmed Haji Noormohamed v. Mona Vicaji Javeri*, (1958) 60 Bom LR 1096 Miabhoy, J. as he then was, was concerned with a contention which was the reverse of the contention raised before us. In that case, a suit filed under Section 13 (1) (hhh) in the Small Causes Court was contested on the ground that it was not maintainable in view of the provisions of Section 507 and, with respect, he rightly held that when the owner of the building had availed himself of the remedy given in Section 507 of the Bombay Municipal Corporation Act, he was not disentitled to the further remedy provided to him under Section 13 (1) (hhh) of the Bombay Rent Act, 1947.

25. However, Mr. Shah submitted that this view will be contrary to the view taken by the Supreme Court in *Sushila Kashinath Dhone v. Harilal Govindji Bhogani*, 73 Bom LR 320 = (AIR 1971 SC 1495). This submission, in our opinion, must be rejected because all that is laid down by the Supreme Court in that case, with respect, was that if a suit involved reliefs to be granted to the plaintiff based on claims or questions arising out of the Bombay Rent Act, the suit could be dealt with only by the special Court constituted under S. 28 of the Act. In that case under a written agreement, the plaintiff gave a loan to the defendants for the purpose of financing the erection of a building on land held by the defendants as owners. The agreement was registered and it included the various conditions referred to in S. 18 (3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In a suit by the plaintiff filed against the defendants in the Court of Small Causes, Bombay the reliefs asked for were a declaration that the sum advanced as loan be a charge on the building and land on which it was constructed and that the plaintiff was entitled to recover the amounts mentioned in the agreement. In view of these facts, with respect, the Supreme Court rightly held that the reliefs claimed were all claims or questions arising out of the Act.

26. As stated above, the reliefs under Section 507 of the Bombay Municipal Corporation Act have nothing in common or similar to the claims or questions which arise under the Bombay Rent Act and hence, the said decision relied on by Mr. Shah has no application to the facts of the present case. It must, therefore, be held that there is nothing in Section 13 (1) (hhh) or S. 28 of the Bombay Rent Act which takes away the jurisdiction of the Chief Judge under Section 507 of the Bombay Municipal Corporation Act.

27. Mr. Shah, who appeared for some of the petitioners, urged two further points in support of the petition. The first of them was that under Section 507 the learned Chief Judge could not have ordered the occupants to vacate the premises. In support of his argument Mr. Shah relied on the decision in *Ahmedalli Abdulhusein Kaka v. M. D. Lalkaka*, 55 Bom LR 573 = (AIR 1954 Bom 33) which lays down the principles which should be followed by the Chief Judge when dealing with the cases under Section 507 and gives him a discretion to decide whether the occupants should be asked to vacate the entire building or a portion of the building. But, in our opinion, there is no substance in this contention of Mr. Shah because all that the learned Chief Judge has ordered in

the present case is that the occupants should remove themselves "in order to afford facilities to respondent No. 1 to enable him to comply with the notice". The said order is consistent with the provisions of Section 507 (2) which empowers the Chief Judge to require the occupiers "to afford all reasonable facilities to the owner". The powers here are wide enough to include a power to order the occupant to vacate the premises if that is necessary for giving a reasonable facility to the owner.

28. The second contention urged by Mr. Shah is that the learned Chief Judge failed to exercise his mind on the question as to whether the building was really in a ruinous condition, as alleged in the notice. As stated above, the question rested on the subjective satisfaction of the authority exercising the power under Section 354 and the learned Chief Judge was, therefore, right in not going into that question. Moreover, it is difficult to see how a Court of law can decide such a question. The municipal authorities are satisfied that the building is in a ruinous condition. The statute does not provide for a right of appeal to the Court against the said satisfaction. The Court of law cannot, therefore, sit in judgment over the decision of the municipal authorities.

29. For these reasons, all the contentions raised by the petitioners fail. The rule in all the petitions discharged with costs. Costs of the Municipal Corporation fixed at Rs. 400/- in one petition. Costs of the respondents quantified at Rs. 300/- in each of the petitions.

Rule discharged.

AIR 1972 BOMBAY 326 (V 59 C 59)

(AT NAGPUR)

FULL BENCH

KOTWAL, C. J., TULZAPURKAR AND CHANDURKAR, JJ.

Shankarlal Laxminarayan Rathi and others. Appellants v. Gangabisen, Maniklal Sikchi and another. Respondents.

F. A. F. O. D. Nos. 12 and 19 of 1970. D/- 19-2-1972 against order of N. S. Huzurbazar Civil J. Sr. Divn. at Amravati, D/- 31-10-1969.

Index Note:— (A) Civil P. C. (1908), O. 2, Rr. 2 and 4 — Interpretation of — First suit for damages stipulated in lease against lessee holding over after expiry of lease — Second suit for possession on basis of title as owner and damages for period subsequent to first suit — Causes of action for two suits being entirely different O. 2, R. 2 does not apply — Suit is maintainable under O. 2, R. 4.

HP/HP/E419/72/KSB

Brief Note:— (A) G executed a lease of his theatre in favour of the defendant for a period of 10 years expiring on 19-1-1955: on a monthly rental of Rs. 741/- with an option to renew the lease for a further period of 5 years on the same terms by giving 3 months notice before the expiry of the lease. The defendant lessee was to vacate the theatre as soon as the period of lease was over and in case he continued in possession after the expiry of the period of lease he was bound to pay Rs. 20/- per day as penalty in addition to the rent. The defendant continued in possession after the expiry of 10 years without duly exercising the option to renew the lease. G filed a civil suit 36-B of 1955 on 19-12-1955 claiming only damages at the rate of 1341 Rs. p.m. from 20-1-1955 to 19-11-1955 as stipulated in the lease. This suit was finally decided in second appeal holding that the defendant had ceased to be a tenant of the theatre but no relief regarding possession or ejectment was asked for or granted. G filed a second suit on 21-1-1960 claiming possession of the theatre from the defendant as a trespasser and damages at the rate of Rs. 1341/- for the period 19-11-1955 to 20-1-1960. The question was whether the second suit was maintainable.

Held that the second suit was maintainable having regard to the provisions of Order 2, Rule 2 and Order 2, Rule 4, Civil P. C. The plaintiff was seeking to enforce in the subsequent suit his general title as owner and not his title to get back the property under the contract of lease. The second suit was based on a distinct and separate cause of action from that of the previous suit of 1955 and as such the bar under Order 2, Rule 2 could not apply. AIR 1931 Pat 233 & (1888) 11 Mad 210 & AIR 1966 Andh Pra 325, Rel. on; AIR 1935 Bom 306, Distinguished; AIR 1942 Bom 338, Distinguished but doubted. (Paras 29, 34, 37)

Order 2, Rule 2 is intended to deal with the vice of splitting a cause of action. The applicability of the rule depends upon there being established one and the same cause of action in the two suits. The defendant who raises the plea must establish that the second suit was in respect of the same cause of action as the previous suit. AIR 1931 PC 229, Rel. on. (Para 17)

The expression 'claims' in Cls. (a), (b) and (c) of Order 2, Rule 4 must be construed as equivalent to 'cause of action' used in the opening part of that Rule. The different words are used only in order to avoid repetition and for convenience of expression specially having regard to the language of Cl. (c). (Para 21)

Though Order 2, Rule 4, is in part an exception to the general principle laid

down in Order 2, Rule 3, it is also an exception to Order 2, Rules 2 (1) and 2 (3). Order 2, Rule 4 cannot be regarded as only an exception to Order 2, Rule 3, and completely divorced from Order 2, Rule 2. Order 2, Rule 2 must therefore be read along with Order 2, Rule 4.

(Paras 24, 25)

Claims for damages and claim for mesne profits are regarded as distinct and separate causes of action from the cause of action for recovery of immovable property, and Order 2, Rule 4, says that they may be joined together, whereas otherwise they could not be joined together because of the general principle contained in the opening words of O. 2, R. 4.

(Para 27)

Cases Referred: Chronological Paras

AIR 1966 Andh Pra 325 = (1965)	
2 Andh WR 226, Rangamma v. Venupurnachandra Rao	36
AIR 1964 SC 1810 = (1964) 7 SCR 831, Gurubux Singh v. Bhooralal	39
AIR 1949 PC 78 = 75 Ind App 121, Mohd. Khalil Khan v. Mohbub Ali Mian	18, 19, 28
AIR 1942 Bom 338 = 44 Bom LR 735, Channappa Girimalappa v. Bagalkot Bank	1, 38
AIR 1940 Pat 76 = ILR 18 Pat 789, Sheokumar Singh v. Bechan Singh	18, 19
AIR 1935 Bom 306 = 37 Bom LR 336, Rama Kallappa Pujari v. Saidappa Sidrama Pujari	1, 38
AIR 1931 PC 229 = 61 Mad LJ 294, Naba Kumar v. Radhashyam	17, 38
AIR 1931 All 429 = 1931 All LJ 673 (SB), Ram Karan Singh v. Nakchhad Ahir	38
AIR 1931 Cal 788 = ILR 58 Cal 1040, Kalidas Rakshit v. Keshab-lal Majumdar	38
AIR 1931 Pat 233 = 12 Pat LT 540, Loknath v. Dwarika	34
AIR 1915 Mad 912 = ILR 38 Mad 829 (FB), Ponnammal v. Ramamindha Ayyar	38
AIR 1915 Sind 35 = 9 Sind LR 23, Hiromel v. Faridkhan	18
(1904) ILR 31 Cal 274 = 8 Cal WN 207, Deep Narain Singh v. Dictert	18
(1903) ILR 26 Mad 760 = 13 Mad LJ 448, Ramaswami Ayyar v. Vaithinatha Ayyar	14
(1889) ILR 16 Cal 98 = 16 Ind App 156 (PC), Chand Kaur v. Partap Singh	18, 19
(1888) ILR 11 Mad 151, Venkoba v. Subbanna	35
(1888) ILR 11 Mad 210, Tirupatl v. Narasimha	35
(1873) 8 CP 107 = 42 LJCP 98, Cook v. Gill	18
(1867) 11 Moo Ind App 551 (PC), Moonsthee Buzloor Raheem v. Shumsoonissa Begam	28

In F. A. F. O. D. No. 12 of 1970:—

P. P. Deo, W. G. Deo, V. R. Manohar and K. G. Chendke, for Appellants; A. S. Bobde, B. A. Udhoji and M. L. Vaidya, for Respondent.

In F. A. F. O. D. No. 19 of 1970:—

A. S. Bobde, B. A. Udhoji and M. L. Vaidya, for Appellant; P. P. Deo, W. G. Deo, V. R. Manohar and K. G. Chendke, for Respondents.

KOTWAL, C. J.:— (This reference to a Full Bench has been occasioned by a conflict of decisions of this Court in Channappa Girimalappa v. Bagalkot Bank, AIR 1942 Bom 338 and Rama Kallappa Pujari v. Saidappa Sidrama Pujari, AIR 1935 Bom 306). In both the cases the judgment is that of Sir John Beaumont, Chief Justice. The original question referred simply posed for our determination the conflict between these two decisions, in short which of them was right but after some preliminary discussion and with the consent of counsel for both the parties, we have reframed the question in order to bring out the real controversy between the parties in the litigation from which these two appeals have been filed. The question that we have now to determine is:—

Is the plaintiff's suit maintainable having regard to the provisions of O. 2, R. 2 and O. 2, R. 4, of the Code of Civil Procedure?

2. The question arises upon the following facts: Gangabisen Sikchi was the owner of Kamal Theatre in Amravati town. He leased it out on 20-1-1945 to Shankarlal Rathl. The lease was for a period of ten years commencing from 20-1-1945 and is evidenced by a registered rent note dated 6-1-1946 (Ex. P-3). In 1949 there was a litigation between Gangabisen and Shankarlal. It was a suit (Civil Suit No. 40-A of 1949) filed by Gangabisen for the ejectment of Shankarlal in the Court of the Second Additional District Judge, Amravati (Mr. B. V. Patwardhan). The suit ended in a compromise and by the compromise decree the agreement of lease dated 20-1-1945 was modified in two respects:—

(1) Instead of the amount of Rs. 525/- per month the rent originally fixed, the lessee agreed to pay Rs. 741/- per month. (2) By the agreement a second lessee was introduced namely, Saroj Screens (Pvt.) Ltd. This company was recognised along with Shankarlal as a co-lessee. In all other respects the agreement dated 6-1-1946 continued to operate.

3. In 1955 Gangabisen filed a suit for declaration of his title only (Civil Suit No. 26-A of 1955) but later on decided to withdraw it and an order of withdrawal was passed on 28-8-1956 by Mr. B. B. Shrivastava, First Civil Judge, Class

II, Amravati. No permission to bring another suit was asked for or granted.

4. The lease which was for ten years from 20-1-1945 expired on 19-1-55. On that date the defendant, Shankarlal Rathl and Saroj Screens (Pvt.) Ltd., were in arrears of rent, and according to the plaintiff, the lease had terminated by virtue of the operation of clause 7 of the rent note dated 6-1-1946. Clause 7 provided that the lessees will vacate the theatre as soon as the lease period was over, and in case the lessees continued in occupation of the theatre after the lease period was over, they would be bound to pay Rs. 20/- per day as penalty to the plaintiff Gangabisen in addition to the amount of rent, namely Rs. 741/-. Therefore, Civil Suit No. 36-B of 1955 was filed on 19-12-1955. Therein the plaintiff Gangabisen claimed damages from the defendant for the period from 20-1-1955 to 19-11-1955 at the rate of Rs. 1341/- per month. The amount of Rs. 1341/- was comprised of two items, namely, Rs. 741/- the revised rent per month fixed and Rs. 600/- per month at the rate of Rs. 20/- per day, being the penalty. This suit substantially came to be dismissed (except for a small amount of Rs. 1210/5/0) in the Court of Mr. N. M. Koyal, Civil Judge No. 2 Amravati, who was also at that time an Additional District Judge at Amravati. The trial Court's judgment was however reversed by the District Judge, Amravati, Mr. M. S. Apte (now Mr. Justice Apte) in Civil Appeal No. 17-B of 1958 by the judgment dated 29-7-1959. A second appeal was filed and in that second appeal there was first a remand order by the High Court and after the issue remanded was determined, that litigation came to be finally decided by this Court on 10-8-1965. (Second Appeal No. 396 of 1959). Thus it was finally determined that the defendants had ceased to be the tenants of Kamal Theatre, but no relief was asked for or granted as regards ejectment or possession of the theatre in this suit.

5. The present suit for possession was instituted on 21-1-1960. That is Civil Suit No. 3-B of 1960 out of which the two appeals in which the present reference before us arises. In this suit, in addition to possession the plaintiff Gangabisen has also asked for damages from the two erstwhile lessees who are the defendants. The damages claimed are again at the rate of Rs. 1341/- per month from 19-11-1955 to 20-1-1960, i.e. commencing from the next succeeding date up to which damages had been claimed in the earlier suit, that is to say, civil Suit No. 36-B of 1955, and up to the date of the filing of the present suit. The Civil Judge, Senior Division, Amravati Mr. N. S. Huzurbazar, decreed the claim for possession and damages and also

ordered future mesne profits to be determined under Order 20, Rule 12 (e) of the Code of Civil Procedure.

6. Among other defences to this suit, the defendants raised the plea that the suit for possession was barred under the provisions of Order 2, Rule 2 of the Code of Civil Procedure, because Civil Suit No. 36-B of 1955 had been filed earlier between the same parties and the plaintiff had failed to include the whole of his claim which he was entitled to make in respect of one and the same cause of action. Therefore, he had incurred the penalty prescribed under O. 2, R. 2. According to the defendants the plaintiff must be held to have omitted to sue in respect of the claim for possession, or, at any rate, intentionally relinquished it and that therefore he cannot be allowed to sue in the present suit for possession. This plea is reflected in the following two issues before the Court:

"2. Is present suit for possession barred by Order 2, Rule 2 of Civil P. C. in view of C. S. No. 36-B/55

3. Did plaintiff's right to possession become extinguished On 19-12-1955 due to C. S. 36-B/55?"

The portions which we have omitted from these issues relate to similar other objections taken on the basis that Civil Suit No. 26-A of 1955 had been earlier filed and Civil Appeal No. 17-B of 1958 had been filed, and yet no relief for possession had been asked for and the present suit was barred on that account. These latter pleas, though raised, do not form the subject-matter of the reference before us though they may still be live issues between the parties. Against the judgment of the Civil Judge, Senior Division, the defendants were aggrieved by the substantial part of the decree awarding possession and the decree for Rs. 25,815/- as damages, with interest. The defendants have therefore filed First Appeal No. 12 of 1970 in this Court. The plaintiff on his part was aggrieved by the trial Court's decree in so far as the full amount of damages claimed was not awarded but a lesser amount. He filed First Appeal No. 19 of 1970 and claimed the difference. In both these appeals, therefore, the issue does arise: Is the plaintiff's suit maintainable having regard to the provisions of Order 2, Rule 2, and Order 2, Rule 4 of the Code of Civil Procedure? and that is the question upon which the reference has been made.

7. In order to determine this issue, it is necessary first of all to see what were the provisions of the rent note dated 6-1-1946 which was originally the contract between the plaintiff and the first defendant and was subsequently adopted also as the contract between the plaintiff and the second defendant,

with a modification in the amount of the rent. The lease deed provides that Gangabisen has given on lease his theatre known as Kamal Theatre with furniture, electric fixtures etc. that is to say duly furnished, to Shankarlal from 20-1-1945 for a period of ten years, with an option to Shankarlal to renew the lease for a further period of five years on the same terms and conditions provided a three months' notice was given by Shankarlal to Gangabisen before ten years expired, i.e. before 19-1-1955.

8. The conditions of the lease which are material for our consideration were that the amount of rent payable was Rs. 525/- per month (subsequently Rs. 741/-) and it was to be paid in the first week of each next month. Then there was the following provision as to default:

"The party No. 2 (Shankarlal) will be paying the rent regularly to party No. 1 (Gangabisen). In case the party No. 2 fails to pay the rent for three months, then the party No. 1 may get party No. 2 ejected; in spite of any law." Clause 7 provided for ejection and penalty as follows:

"Party No. 2 will vacate the theatre as soon as the lease period is over. In case party No. 2 continues in occupation of the Theatre after the lease period is over he will be bound to pay Rs. 20/- per day as penalty to party No. 1 in addition to the amount of rent."

9. Now, the present contention is based only on the fact of filing of Civil Suit No. 36-B of 1955. The plea raised in paragraph 6 of the written statement was as follows:—

"It is respectfully further submitted that it was imperative that in C. S. No. 36-B of 1955 the plaintiff had to include the whole claim which he was entitled to make on 19-12-1955 in respect of the cause of action which was the determination of lease on 19-1-1955 by efflux of the time limited thereby and the consequent wrongful possession of the defendants thereafter. However the plaintiff omitted to sue in respect of a portion of his claim i.e., his claim for possession of the demised property. He is, therefore, precluded under Order 2, Rule 2, C. P. Code, from instituting this suit for possession of the said property. It is further submitted that this suit for possession having become barred on 19-12-1955, this suit for mesne profits for the period subsequent on 19-12-1955 is also barred having regard to Order 2, Rule 3, C. P. Code."

10. The plea is clear enough but it is based upon one assumption that the cause of action for the filing of Civil Suit No. 36-B of 1955 for mesne profits or damages as the case may be (there is a dispute as to that) is the same as the

cause of action for the subsequent suit for possession, namely, Civil Suit No. 3-B of 1960. If it is the same, then it will be barred under Order 2, Rule 2. The further point raised by the plea is that if on 21-1-1960, the date of Civil Suit No. 3-B of 1960, the right to claim possession itself was barred, then the claim for damages of mesne profits for that period would also be barred because no one can claim mesne profits or damages who is not entitled to possession in the first place. The contention of counsel on behalf of the lessees has been precisely the same, also namely, that though the relief claimed in the earlier suit was only for mesne profits or damages, the cause of action for that suit and the cause of action for the present suit for ejectment and possession is the same. The cause of action is the determination of the lease. It was submitted that in case of both the reliefs, namely, for mesne profits or damages and for ejectment, the cause of action arose on 20-1-1955 when the ten years' period of lease expired. In both the cases, therefore, the cause of action was the same and arose on the same day. Secondly, the cause of action arose out of one and the same contract. Clauses 1 and 7 of the contract which we have referred to above were relied upon. It was further submitted that under the law also the cause of action for mesne profits and for possession of one and the same property are not different cause of action but one and the same cause of action, and if so, the whole of the claim, namely, for mesne profits and/or damages as well as for possession ought to have been made in Civil Suit No. 36-B of 1955, and if it was not so made, Order 2, Rule 2 is decisive of the point and bars the claim in the present suit. In this connection, counsel also pointed to the history of legislation and how Order 2, Rule 2 and Order 2, Rule 4 came to be enacted. He relied upon the provision of the earlier Acts, the Code of Civil Procedure of 1859 (Act No. 8 of 1859) and the Code of Civil Procedure of 1882 (Act No. 14 of 1882), and pointed out that in the Act of 1859, by fiction, a suit for recovery of land and a claim for mesne profits of such land were deemed to be distinct causes of action. That was by Section 10 of that Act, but that section has been dropped and there is no equivalent section in the present Code and therefore it must be held that what was there deemed distinct by the fiction of the law is no longer distinct and therefore a claim for recovery of land and a claim for mesne profits are one and the same cause of action.

11. On behalf of Gangabisen, the owner of the property, the answer to these contentions was that Order 2, Rule 2 only applies where the cause of action

is one and the same and that it cannot apply where the causes of action are different, and the cause of action in Civil Suit No. 36-B of 1955 was separate and distinct from the cause of action in Civil Suit No. 3-B of 1960. Therefore, there is no scope for the application of O. 2, R. 2. It was pointed out that in Civil Suit No. 36-B of 1955 the claim was a claim upon the personal covenant to pay damages by way of penalty contained in clause 7 of the lease deed. It was a claim which had nothing to do with the claim for the possession of the property. The claim for the possession of the property, even assuming that it was under the same contract, was a claim on a separate cause of action which is radically different from the cause of action for mesne profits or damages. Reliance was placed upon the provision of O. 2, R. 4, and it was urged that clauses (a) and (b) of that provision of the Code shows that a claim for mesne profits or for damages is found upon a different cause of action from the cause of action for recovery of immoveable property. To the latter argument the reply of Mr. Deo on behalf of the lessees was that Order 2, Rule 4, is merely an exception to O. 2, R. 3, which prescribes when several causes of action may be joined and that an exception couched as an exception cannot be construed to alter the nature of the cause of action. It was also urged that Order 2, Rule 4, only applies where the cause of action is one and the same and it cannot apply where the cause of action is different.

12. Order 2, Rules 1, 2 and 4 of the Code of Civil Procedure run as follows:—

"Frame of Suit.— Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2. (1) Suit to include the whole claim.— Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.— Where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.— A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards

sue for any relief so omitted, or relinquished.

Explanation:— For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.— A lets a house to B at a yearly rent of Rs. 1,200/-. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

4. Only certain claims to be joined for recovery of immovable property.— No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held and

(c) claims in which the relief sought is based on the same cause of action; provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property."

13. All these rules are to be found in Order 2 which is entitled "Frame of suit," and that is precisely also the subject of Order 2, Rule 1. Order 2, Rule 1 merely prescribes a general rule that as far as practicable every suit shall be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. This is more in the nature of a general policy statement than a mandatory provision. It lays down the principle which underlies the subsequent Rules 2, 3 and 4. The words "as far as practicable" indicate that in each case the Court will have to see whether it was practicable for the plaintiff, so to frame his suit as to include a cause of action which he had omitted or intentionally relinquished. The words "subjects in dispute" may also be noted. In the subsequent three rules there are several different expressions used such as "cause of action," "claim", and "relief", and "obligation" and it seems to us that only in Order 2, Rule 1, was the generic expression "subjects in dispute" deliberately used because Rule 1 was intended to lay down only a general statement as to the policy of the law. Though some of the causes have in considering this expression equated it with "cause of action," it seems to us that this generic expression

"subjects in dispute" would equally comprise within it "cause of action" or "relief" or "claim," as the context may require.

14. The case we have in mind where the expression "subjects in dispute" was equated with "cause of action" is to be found in Ramaswami Ayyar v. Vythinatha Ayyar, (1903) ILR 26 Mad 760, where the learned Judges put it thus:

"In our opinion the expression 'the subject in dispute' signifies the jural relation between the parties to the suit, for the determination of which the suit is brought. In other words, the object of Section 42 (They were dealing with the Act of 1882. Section 42 is the same as Order 2, Rule 1) is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the corpus or object-matter of the suit."

15. Turning to Order 2, Rule 2, sub-rule (2) gives an option to a plaintiff to relinquish any portion of his claim, but if he so relinquishes, then he incurs a penalty. The provisions of Order 2, Rule 2, sub-rule (2), would come into play and the penalty prescribed therein is that "he shall not afterwards sue in respect of the portion so omitted or relinquished." Apart from this option, Order 2, Rule 2, sub-rule (1), lays down the mandatory principle that every suit must include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Sub-rule (3) of Order 2, Rule 2, speaks of more than one relief in respect of the same cause of action in contrast with sub-rule (1) which speaks of the whole of the claim in respect of a cause of action. It is clear that the combined effect of these sub-rules is (a) that where there is one and the same cause of action, the plaintiff must sue in one suit for the enforcement of the whole of that cause of action, and if he relinquishes or omits to sue in respect of any part of that cause of action, then he cannot subsequently sue for the part so relinquished or omitted in any other suit, and (b) that although there may be one and the same cause of action, there may in respect of that cause of action be several reliefs claimable. If there are several reliefs then they must all be sued for in one and the same suit, unless leave of the court is obtained. If there is an omission to sue for any relief arising out of the same cause of action, then the plaintiff "shall not afterwards sue in respect of the portion so omitted or relinquished."

16. The fundamental postulate for the application of Order 2, Rule 2, therefore, is that there must be one and only one cause of action in fact before its several provisions can apply. Of course, the Explanation creates by fiction one and the same cause of action in the case of successive claims arising under the same obligation. Obviously these successive claims, although arising under the same obligation, will normally give rise to different cause of action but the explanation says that they are to be deemed to constitute but one cause of action. The illustration itself to Order 2, Rule 2, also makes this clear. The rents for the three years 1905, 1906 and 1907 which are due and unpaid would obviously and normally be regarded as different cause of action having arisen at the end of each of those respective years, but because of the Explanation they being successive claims arising under the same obligation, they would be regarded as one and the same cause of action.

17. Order 2, Rule 2, does not require that when a transaction gives rise to several causes of action they should all be combined in one suit, or that the plaintiff must, if necessary, lay his claim alternatively in the same suit for these different causes of action. All that O. 2, R. 2, provides is that where there is one and the same cause of action, the plaintiff cannot split up his cause of action and sue for one part in one suit and for another part in another suit. As the Privy Council put it in *Naba Kumar v. Radhashyam*, AIR 1931 PC 229, "the rule in question is intended to deal with the vice of splitting a cause of action". Thus, the applicability of O. 2, R. 2, depends upon there being established one and the same cause of action in the two suits. The defendant who raises the plea must establish that the second suit was in respect of the same cause of action as the previous suit. Therefore, in the present suit, all we have to determine in order to settle the disputes referred is whether the cause of action for the subsequent suit for possession was the same as the cause of action for mesne profits or damages in the first suit (Civil Suit No. 36-B of 1955).

18. What is a cause of action is now settled beyond any doubt. The classic definition of that expression is that of Lord Justice Brett in *Cook v. Gill*, (1873) 8 CP 107.

"Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, — every fact which the defendant would have a right to traverse."

Lord Justice Fry put it in the negative by saying, "Everything which, if not

proved, gives the defendant an immediate right to judgment, must be part of the cause of action." This definition is the basis of all subsequent decisions containing an interpretation of the expression "cause of action." It was accepted in *Deep Narain Singh v. Dietert*, ILR 31 Cal 274 at p. 282 and by the Privy Council in *Mohammad Khalil Khan v. Mohibub Ali Mian*, AIR 1949 PC 78 at p. 86, para 61 point No. 2. This has been referred to in several cases as the media upon which the plaintiff asks the Court to arrive at the conclusion in his favour: see the Privy Council case *Chand Kour v. Partab Singh*, (1889) ILR 16 Cal 98 at p. 102 (PC) and in *Hiromal v. Faridkhan*, AIR 1915 Sind 35 at p. 36, a case upon which Mr. Deo, strongly relied and in *Sheokumar Singh v. Bechan Singh*, AIR 1940 Pat 76, by Rowland, J. at p. 79.

19. These cases also make it clear that the cause of action in a suit has no reference to the defence taken in the suit, nor is it related to the evidence by which that cause of action is established. In *Mohammad Khalil Khan's* case, AIR 1949 PC 78 to which we have referred above, this point is made in the Judgment of the Privy Council in para. 61, point No. (5), as follows:—

"The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour." The Privy Council followed their earlier decision in (1889) ILR 16 Cal 98 (PC). This decision has been relied upon also in AIR 1940 Pat 76 at p. 79. Secondly the cause of action must be distinguished from the evidence upon which that cause of action is proved and though the one has no relation to the other, still the nature of the cause of action may be indicated by the nature of the evidence by which it is supported. This again is made clear in *Mohammad Khalil Khan's* case para. 61 at p. 86 in points Nos. 3 and 4 which are put as follows:—

"(3) If the evidence to support the two claims is different, then the causes of action are also different

(4) The cause of action in the two suits may be considered to be the same if in substance they are identical....."

20. Now Order 2, Rule 4 was strongly relied upon on behalf of the plaintiff in order to show that the cause of action upon a suit for the recovery of immovable property is different from the cause of action for either mesne profits or damages. Undoubtedly, O. 2, R. 4, opens with a clause which lays down a general principle that no cause of action shall, unless with the leave of the Court,

be joined with a suit for the recovery of immovable property. It has been explained in the authorities that that was a rule which was a rule of Common Law in England, the rule being a salutary rule that a claim to property should not be complicated by joinder of other causes of action except by leave of the Court. But that rule is subject to the three exceptions mentioned in clauses (a), (b) and (c) of O. 2, R. 4. Those authorities explain what was the result of the engraftment of equitable principles upon the Common Law doctrine. Equity went thus far and no further, in that, it recognised that a claim for mesne profits or arrears of rent could be joined with the claim for recovery of the immovable property from which it arises or that a claim for damages for breach of any contract could be joined with a suit for recovery of that immovable property or any part of it which is held under a contract from which the claim for damages for its breach arises.

21. Rule 4 uses the expression "cause of action" in the opening part, and the word 'claims' in clauses (a), (b) and (c) which form the exceptions, and this difference in the two expressions appears to have been made only for the purpose of avoiding confusion and for the sake of clarity of language. It is not possible to hold that an exception refers to a different subject from the general rule to which it is an exception. It cannot be that the exceptions refer to claims while the general rule to which they are exceptions refers to cause of action. Necessarily, it seems to us that we must construe "claims" in clauses (a), (b) and (c) of Rule 4 to be equivalent to "cause of action" in that rule. The different words are used only in order to avoid repetition and for convenience of expression, specially having regard to the language of clause (c).

22. Now, it is clear upon a plain reading of Order 2, Rule 4, that it regards the cause of action or claim for mesne profits or for damages as different from the cause of action for the recovery of immovable property. If it was the same, then there was no need to state the exceptions in clauses (a), (b) and (c), because Order 2, Rules 1 and 2, make ample provision for the same cause of action. It seems to us therefore that there is the amplest indication in O. 2, R. 4, that the cause of action for a suit for recovery of immovable property is not the same as the cause of action for damages for breach of any contract under which the property or any part thereof is held. We will hereafter confine ourselves only to a case for damages for breach of contract because, as we shall presently show, the plaintiff's suit, Civil Suit No. 36-B of 1955, was a suit for

damages only and not a suit for mesne profits, and the same was the case with the claim in the subsequent suit, Civil Suit No. 3-B of 1960.

23. Mr. Deo on behalf of the lessees has urged that first of all Order 2, Rule 4, cannot be read along with O. 2, R. 2. He says that Order 2, Rule 4 applies only where there is one cause of action and so read it is nothing more and nothing less than a mere exception to Order 2, Rule 3. Order 2, Rule 2, sub-rules (1) and (2) deal with cases where there are several causes of action or several reliefs but Order 2, Rule 4 deals with only one and the same cause of action. Therefore they cannot be read together. Order 2, Rule 3, provides for the joinder of several causes of action and says that a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly or several plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants jointly may unite them in one suit (we need not refer to the second part). This Rule is prefixed by the words "Save as otherwise provided," and it is clear that it is *inter alia* 'otherwise provided' in Order 2, Rule 4. Therefore, counsel urged that Order 2, Rule 4, must only be read with Order 2, Rule 3 and cannot be read as qualifying any part of Order 2, Rule 2 which deals with more than one cause of action or more than one relief.

24. We cannot read O. 2, R. 4 as entirely divorced from Order 2, Rule 2. No doubt Order 2, Rule 4 is an exception to Order 2, Rule 3 but it does not therefore follow that it has nothing to do with Order 2, Rule 2. On the other hand, it seems to us that Order 2, Rule 4, forms an important qualification to both Order 2, Rule 2, and Order 2, Rule 3. Order 2, Rule 2 (1) as we have already said, lays down the general principle that a suit must include the whole claim which the plaintiff is entitled to make in respect of a cause of action, and if he does not, then he is visited with the penalty in Order 2, Rule 2 (2). Similarly, Order 2, Rule 2 (3) provides that all reliefs arising out of the same cause of action shall be sued for in one and the same suit and again attaches a penalty if the plaintiff omits to do so. Thus Order 2, Rule 2, deals with one and the same cause of action. Order 2, Rule 3, on the other hand, deals with several causes of action and makes the contrary provision. It permits the plaintiff to unite several causes of action in one suit under certain circumstances. Where Order 2, Rule 2, deals with the same cause of action and prohibits its splitting, O. 2, R. 3, provides for the joinder of several causes of action. Therefore, *inter alia*

they deal with two different aspects of the same subject viz. joinder of causes of action. Now, no doubt an exception to Order 2, Rules 2 and 3 is created by Order 2, Rule 4. Its opening part says that no cause of action shall be joined with a suit for the recovery of immovable property. To that extent this provision is an exception to Rule 2 (1) and Rule 2 (3) which respectively enjoin that a plaintiff must include his whole claim in respect of a cause of action and claim all the reliefs he is entitled to in respect of the same cause of action. It is also an exception to Order 2, Rule 3 (1) which permits several causes of action to be joined by the plaintiff against the same defendant or the same defendants jointly. Clauses (a), (b) and (c) of Order 2, Rule 4 create further exceptions to the general principle laid down in the opening part of Order 2, Rule 4; Order 2, Rule 4, therefore, deals with a specific subject, namely, claims which could be joined in a suit for the recovery of immovable property, and to the extent that special provision is so made on a special topic, its provisions qualify the general provision of both Order 2, Rule 2 and Order 2, Rule 3. In fact, Order 2, Rule 3, is expressly made subject to the O. 2, R. 4 by the use of the words "save as otherwise provided". Thus, though Order 2, Rule 4, is in part an exception to the general principle laid down in Order 2, Rule 3, it is also an exception to O. 2, Rr. 2 (1) and 2 (3). We cannot regard it as only an exception to Order 2, Rule 3, and completely divorced from Order 2, Rule 2.

25. Order 2, Rule 2 must therefore be read along with Order 2, Rule 4. We have already shown how in Order 2, Rule 4 claims for mesne profits and claims for damages are contrasted and contradistinguished from the cause of action for the recovery of immoveable property, and in so far as they are contradistinguished, it is clear that the law regards the two as different claims or causes of action. We have already shown that there is no difference between the words "cause of action" and "claims".

26. This brings us to the historical argument urged by Mr. Deo. It is based upon the provisions of the Code of Civil Procedure of 1859 (Act No. 8 of 1859). The provisions of Sections 7, 8, 9 and 10 of that Act were subsequently re-enacted with considerable modification in Ss. 42, 43, 44 and 45 of the Civil P. Codes of 1877 and 1882 (Acts No. 10 of 1877 and No. 14 of 1882 respectively). These provisions were in their turn recast and re-enacted in Order 2, Rules 1 to 6 of the present Code. Sections 8 to 10 of the Code of Civil Procedure of 1859 were as follows:—

8. Joinder of causes of action in the same suit.— "Causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit," provided the entire claim in respect of the amount or value of the property in suit do not exceed the jurisdiction of such Court.

9. Court may in certain cases order separate trials of such causes of action.— If two or more causes of action be joined in one suit and the Court shall be of opinion that they cannot conveniently be tried together, the Court may order separate trials of such causes of action to be held.

10. Claim for recovery of land for mesne profits to be deemed distinct causes of action.— A claim for recovery of land and claim for mesne profits of such land shall be deemed to be distinct causes of action within the meaning of the last two preceding sections".

Section 10 made provisions analogous to Order 2, Rule 4, of the present Code. It says that a claim for recovery of land and a claim for mesne profits of such land "shall be deemed to be distinct causes of action". This is the provision which was stressed before us. It was urged that by the word "deemed" there was created a fiction by which the cause of action for recovery of land and the cause of action for mesne profits were deemed to be distinct causes of action. The creation of such a fiction necessarily implies that that state of affairs which is postulated in the fiction is not so in facts. Therefore, it was urged that but for that fiction a claim for recovery of land and a claim for mesne profits was in fact one and the same cause of action but were only deemed to be distinct causes of action by virtue of the fiction. The next stage of this argument is that this fiction was omitted when the Code of 1877 was enacted. It was also omitted in the Code of 1882 and in the present Code. The historical background thus shows that from the very inception the law regarded a suit for recovery of land and a claim for mesne profits as founded upon one and the same cause of action. It was only a distinct and separate cause of action by the creation of a fiction, and if that fiction is not re-enacted into the present Code, then its original nature as one and the same cause of action revives.

27. We are quite unable to accept this argument. We have already referred to the provisions of Order 2, Rule 4, and we have shown that it clearly mentions 'a suit for recovery of immovable property' contrapuntally with "claims for mesne profits" or "claim for damages". That necessarily implies that they are separate and distinct causes of action. Thus, what was enacted in the Code of 1859 is in the present Code assumed by

the law itself. It was not considered necessary to say so explicitly. The whole basis of assumption of Order 2, Rule 4, is that they are two separate and distinct causes of action. If it were necessary to go as far as that, we would say that the law has read that fiction of Section 10 of the Code of 1859 into Order 2, Rule 4. At any rate, a historical argument like this cannot prevail against the plain reading of the words of Order 2, Rule 4. We think that it is clear beyond any doubt that claims for damages and claim for mesne profits are regarded as distinct and separate causes of action from the cause of action for recovery of immovable property, and Order 2, Rule 4, says that they may be joined together, whereas otherwise they could not be joined together because of the general principle contained in the opening words of O. 2, R. 4.

28. So much for the law on the subject. We now turn to apply these provisions of the law to the present case. The test for the application of Order 2, Rule 2, was laid down by the Privy Council in AIR 1949 PC 78 at p. 86, point No. 1 as follows:

"(1) The correct test in cases falling under Order 2, Rule 2, is 'whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit'. *Moonshee Buzloor Raheem v. Shumsunnissa Begum*, 1867-11 Moo Ind App 551....."

It was also pointed out there that if the evidence to support the two claims is different, then the cause of action is different. But the cause of action in the two suits may be considered the same if in substance they are identical. In the light of these tests, we turn to examine the plaints in the two suits in question.

29. The plaint in Civil Suit No. 36-B of 1955 is at Ex. D-32 and it claimed only an amount of Rs. 7,129/4/9 as damages. It seems that there was a dispute between the plaintiff and the defendants as to whether the defendants had validly exercised the option of renewal of the lease for a further period of five years and therefore the plaintiff made an alternative claim in the relief clause of the plaint by adding the words "or even rent as put forth by the defendant holding that there is no exercise of the option about renewal for the further 5 years from 20-1-1955". Include in this claim was either the rent as rent or as damages at the rate of Rs. 741/- per month plus the penalty of Rs. 20/- per day as stipulated in clause 7 of the lease deed. In paragraph 7 of the plaint, the plaintiff stated:

"That consequently the defendants have no right to occupy the theatre from

20-1-1955 onwards. They ought to have vacated the theatre by the end of 19th January 1955 as the lease expired on that day and that there is no renewal. They failed to vacate the theatre, but have continued in occupation of the same. Hence the condition No. 7 has come into operation and the defendants are bound to pay Rs. 20/- per day in addition to rent of Rs. 741/- per month agreed to and substituted for Rs. 525/-."

Thus, the cause of action in the first suit (Civil Suit No. 36-B of 1955) is one purely for damages on the ground that the defendants are continuing in possession of the plaintiff's property without right. In Civil Suit No. 3-B of 1960 the plaintiff also prayed for damages but for a future period from the date of Civil Suit No. 36-B of 1955 namely, the period from 19-11-1955 to 20-1-1960 at the same rate of Rs. 741/- per month but also Rs. 20/- per day, being the penalty under Cl. 7. But it is not this part of the claim on which the bar of Order 2, Rule 2, is pleaded. It is on the claim for possession of the theatre contained in clause (i) of the relief clause of the plaint. This claim was stated in the body of the plaint in paragraph 6 as follows:—

"So from 20-1-1955 the defendants are trespassers and the plaintiff is entitled to get possession and the further damages on the basis of his title, particularly as the defendants have not got any registered lease deed of the so-called renewal. The defendants are all the more trespassers inasmuch as even the period of the 5 years for which the defendants could have claimed a renewal, if at all, has, by now expired and that too without any registered lease deed and in any case the plaintiff is entitled to get the possession and damages".

Now, it is patent upon these pleadings contained in the two plaints that the causes of action in the two suits were radically distinct and separate. In the first suit, the plaintiff alleged that the term of the lease having determined, clause 7 came into operation because the defendants continued in possession although they were bound to give back possession to the plaintiff. Whatever was the claim, whether for damages or for rent, it was a claim under the contract between the parties dated 20-1-1945 and embodied in the registered rent note dated 6-1-1946. But the claim for possession in the subsequent suit was not a claim under the terms of the contract at all. It was a claim made by the plaintiff on the basis of his own title as the owner of the property. The plaintiff could claim possession under two titles, (1) as a lessor under the contract of lease and (2) as the owner of the property claiming title to it as such. He could claim possession under his right to get

back possession on the terms of the contract of lease. The defendants had clearly stipulated that "party No. 2 (defendants) will vacate the theatre as soon as the lease period is over". The plaintiff could have sued upon this document and the claim in that case would have been under the contract. But the plaintiff in the subsequent suit did not sue upon the contract but he sued upon his general title as the owner of the property. He alleged that the defendants were trespassers and that the plaintiff was entitled to get possession and further damages on the basis of his title as stated in the passage we have quoted above. Therefore, the plaintiff was claiming in the second suit on the basis not of a title arising under the contract but de hors the contract. In other words, the plaintiff was seeking to enforce in the subsequent suit his general title as owner and not his title to get back the property under the contract of lease. It is clear therefore that this title was superior to the contract between the parties and it was by virtue of this superior title that the plaintiff claimed in the second suit. The respective causes of action in the earlier suit and in the subsequent suit were therefore entirely distinct and separate.

30. Mr. Deo however urged that nonetheless the plaintiff's cause of action in the second suit was the same as in the first suit because, as he put it, the foundation of the claim in both the suits was the termination or determination of the lease and the determination took place on 20-1-1955, from which date he could claim possession as well as mesne profits or damages. He claimed damages in the first suit and therefore he could not claim possession in the second suit. He also pointed out that both the amounts claimed in the second suit of Rs. 741/- per month and Rs. 20/- per day as penalty are amounts stipulated under the contract.

31. The error in the argument lies in regarding the second suit as a suit filed on the basis of the lease deed. We have already shown how the plaintiff pleaded his cause of action in paragraph 6 of the plaint, and in the passage which we have quoted he clearly and unequivocally said that the defendants were trespassers and that he was claiming damages on the basis of his title. He also added "particularly as the defendants have not got any registered lease-deed of the so-called renewal". In other words, the plaintiff, for the purposes of his second suit, decided simply to ignore the cause of action upon the lease, and its determination. He merely said that he was the owner and under his title as owner he was entitled to possession. No doubt, there had been a lease but that lease

had determined and the plaintiff merely ignored it for the purposes of his suit. If that was the shape of the suit, then the cause of action pleaded was not the cause of action arising under the contract.

32. The mere fact that the plaintiff chose to adopt the same measure of damages as he might have got under the contract will make no difference, because even in a title suit the plaintiff can always assess his own damages and in this case he chose to assess them at the same rate as agreed upon between the parties. That does not mean that the suit was on the basis of that agreement.

33. Even assuming however that it was a suit arising upon the same contract as the claim for damages, we do not think that the two causes of action would be the same. The claim in the first suit was for damages and it was therefore a recurring cause of action arising from month to month unlike the second suit where it arose once and for all on 20-1-1955. No doubt, the commencement of both the causes of action under the contract would be on the same date and would depend upon the determination of the lease and that has enabled counsel on behalf of the lessees to show some similarity in the causes of action. But the basic nature of the claim for damages and/or mesne profits and the claim for possession as a landlord is different.

34. To take this very case, on 20-1-1955 the lease was determined. The plaintiff could on the morning of that very day have filed a suit for possession under the contract, but he could not at the commencement of that day have filed any suit for damages because no damages had accrued. It was only after either the first day or the first month, as the case may be, had elapsed under the wrongful occupation by the defendant-lessees that the claim for damages would accrue. Thus, the claim for damages depended upon proof of some other facts in addition to the mere determination of the lease on a particular day. The plaintiff would have to allege that the defendants wrongfully continued in occupation after 20-1-1955 and only then would he be entitled to claim the relief of damages. That shows that the cause of action for possession and the cause of action for claiming damages were not the same. The terms of the document itself indicate this. The right to damages would rest upon the provisions of Cl. 7 and but for that clause the right to the additional Rs. 20/- per day as penalty would not arise in favour of the plaintiff, although the right to take possession would still arise. It was a completely different stipulation which was the foundation of the claim for damages in the

first suit and a different stipulation in the contract on which the claim for possession could be founded. This is clear from the penultimate part of clause 1 of the document which says:

"In case the party No. 2 fails to pay the rent for three months, then the Party No. 1 may get party No. 2 ejected; in spite of any law".

The distinction is well brought out (and we say so with great respect) in a passage in *Loknath v. Dwarika*, AIR 1931 Pat 233, col. 2:—

"Now claims for mesne profits and ejectment are distinct reliefs and may or may not arise out of the same cause of action. The right to eject the defendant arises the moment the possession of the defendant becomes unlawful. The right to mesne profits arises at different times when the profits accrue to the defendant. The date of the cause of action for ejectment is one fixed date, whereas the dates of the cause of action for mesne profits are several. Order 2, Rule 4, to my mind distinctly recognises that the cause of action for ejectment is distinct from the cause of action for mesne profits, for unless they were two distinct and separate entities there was no necessity for providing in the aforesaid rule for their uniting together in one single claim against the defendant".

35. Another decision which takes the same view and which was relied upon in the same judgment also confirm the view we have taken, and is reported in *Tirupati v. Narsimha*, (1888) ILR 11 Mad 210. That was a case which turned upon the provisions of Section 43 of the Code of 1877 which is substantially the same as Order 2, Rule 2, and the facts in that case were also very similar to the facts in the present case. The plaintiff in that case had sued the defendant, his lessee, for mesne profits for three years but did not claim possession of the land. The suit came to be dismissed on a preliminary point (what that preliminary point was is not clear). Then in the second suit the plaintiff sought to recover possession of the land leased and further mesne profits and the plea was taken that the second suit was barred under the provisions of Section 43 of the then Code of Civil Procedure. In that case also the Explanation to Section 43 which was in the same terms as the Explanation to Order 2, Rule 2, was invoked, but the Division Bench held at page 211:

"Though it is true that claims, such as those mentioned in the illustration to Section 43, are referable to the same cause of action on the ground that, when the rent remains unpaid for several years, the debts due, though consisting of several items, are so connected as to form

one entire demand, yet it cannot be held that, when the causes of action are distinct and independent, the plaintiff is bound to unite all the claims founded upon them in one suit. We are of opinion that the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of Sec. 43, and that if mesne profits are alone claimed in the first suit as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land.....It would be preposterous to say, as is suggested for the appellants, that, assuming that the respondent succeeded in the former suit and obtained a decree for mesne profits, he would still be precluded from claiming possession of the land".

This decision was strongly attacked by Mr. Deo on the ground that in an earlier case reported in the same volume, the same two Judges had taken a contrary view. That case is to be found in *Venkoba v. Subbanna*, (1888) ILR 11 Mad 151. Some of the remarks there made undoubtedly suggest a contrary view, but the position in that suit was exactly contrary to the position in the present suit and in (1888) ILR 11 Mad 210 (cit. sup.). The question in that case was whether a plaintiff who sued for possession of land only without suing for mesne profits in respect of the same land which he could have done in the same suit is entitled to bring another suit to recover the said mesne profits and the Division Bench held that Section 43 was a bar to the subsequent suit for such mesne profits. This and several similar other cases which were cited before us are the reverse of the position in the present case. In all those cases, there was first a suit for possession simpliciter and then a suit for mesne profits in respect of that property. It may be that in determining whether in such cases the two causes of action can be combined some consideration of the Explanation to Order 2, Rule 2 would not arise in so far as it lays down that successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action. That category of cases however is distinguishable from the case as here, where first a suit for damages or mesne profits simpliciter is filed and then a suit for possession. However, we must not be understood to imply that we endorse anything decided in (1888) ILR 11 Mad 151. In our opinion, the present case is squarely governed by the decision in (1888) ILR 11 Mad 210.

36. A similar view has also been taken in *Rangamma v. Venupurnachandra Rao*, AIR 1966 Andh Pra 325 where the Division Bench held:

"The irresistible conclusion, therefore, which must follow from the said set of Rules, is that a cause of action for recovery of immovable property is distinct and separate from a cause of action for mesne profits of the property claimed". In that case also after earlier suits for mesne profits a suit for recovery of possession had been filed and the bar of Order 2, Rule 2, was thus negatived.

37. Thus we hold that the second suit in the case before us (Civil Suit No. 3-B of 1960) was based on a distinct and separate cause of action upon a plain reading of the plaints in the two cases. For the application of Order 2, Rule 2, the cause of action must be one and the same and since here we have found upon the facts that the two suits were founded upon two distinct and separate causes of action, the question raised in this reference must be answered in the affirmative.

38. This would be sufficient to dispose of the reference before us, but the original of the controversy, namely, the different views taken in AIR 1942 Bom 338 and AIR 1935 Bom 306 still remains. However, since both these decisions are distinguishable from the instant case, it is unnecessary, in our view, to resolve the controversy. In view of the construction which we are placing on the relevant provisions of the Code of Civil Procedure, we would however like to observe that we very much doubt if the decision in Channappa's case is a correct decision. It relied on the Privy Council decision in AIR 1931 PC 229. In that case in the first suit the plaintiffs had asked only for a declaratory relief in respect of a certain mortgage decree that had belonged to them. They subsequently amended that plaint and prayed for its assignment. This prayer was granted to them by the learned trial Judge, but in the High Court at their instance the decree was varied giving them a decree for the conveyance of the properties "with a necessary accounts" and the High Court also ordered that the property should be conveyed to them. After this had happened, in the second suit the plaintiffs asked for an account of the rents and profits which the defendants had received while they were in possession of the property for some time. Thus, the second suit was not a suit for either mesne profits or damages at all, but a suit to take an account from a person who had been illegally realising rents and profits on behalf of the plaintiffs. This is clear from the following passage in the judgment at p. 230:

"The present suit of the respondents is based upon the allegation that after the execution purchase of the properties by the appellants the latter were for some time in receipt of the rents and

profits for which they have not accounted, and the prayer of the plaint is for account and payment".

(the underlining is ours)

It was on this very ground also that the Privy Council held the subsequent suit barred because it held that both the first suit and the second suit were for accounts. Their Lordships held:

"The relief which the respondents claim in the present suit is an account of the rents and profits of these properties received by the appellants after their purchase and before the conveyance to the respondents. It is, their Lordships think, equally clear that this relief could have been claimed in the previous suit". It is this decision which was said to support the view taken in AIR 1942 Bom 338. We do not think that the Privy Council case could support the decision of the Divisional Bench. Order 2, Rule 4, was sought to be explained away by reference to the Rules of the Supreme Court in England. Order 14, Rule 2, of the Rules of the Supreme Court, 1883, was referred to, though we suppose that more appropriately the reference was to Order 18, Rule 2. But we are unable to see how the reference to any English Rules of the Supreme Court could make any difference, nor is it explained why they would make any difference. The other reason in that case that the cause of action under Order 2, Rule 2, has a wider meaning than the expression in Order 2, Rule 4, is not supported by any reasoning nor by any consideration of Order 2, Rule 2 read with O. 2, R. 4. The remark that the provision in O. 2, R. 4, may have been inserted *ex abundanti cautela* does not advance the case any further because the contention of Mr. Deo in the present case has been that clauses (a), (b) and (c) of Order 2, Rule 4 were really superfluous and not that they were inserted *ex abundanti cautela*. Lastly, the same learned Chief Justice took a contrary view in AIR 1935 Bom 306 wherein he followed the decisions in *Ram Karan Singh v. Nakchhed Ahir*, AIR 1931 All 429 (SB); *Ponnammal v. Ramamirde Ayyar*, AIR 1915 Mad 912 = ILR 38 Mad 829 (FB) and *Kalidas Rakshit v. Keshab-lal Majumdar*, AIR 1931 Cal 788 = ILR 58 Cal 1040 and there the learned Chief Justice rightly remarked that Order 2, Rule 2, "deals with claims arising under the same cause of action, and it does not require the joinder of different causes of action". As regards Order 2, Rule 4, the Division Bench in that case held:—

"The language of Order 2, Rule 4, which provides that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except '(a) claims for mesne profits or arrears of rent in

respect of the property claimed or any part thereof,' certainly suggests that the legislature regarded a claim for possession of immovable property, and a claim for mesne profits in respect of that property as being separate causes of action. And the language of Order 20, Rule 12, rather suggests the same conclusion.....

In the face of these remarks which, we think, were correctly made (and we say so with great respect), we fail to see how it could be held in the subsequent case in AIR 1942 Bom 338 that the provision in Order 2, Rule 4, "may have been inserted ex abundanti cautela without intending to lay down that the causes of action for possession and for mesne profits or arrears of rent accruing were distinct". However, as we have said, both these Bombay cases do not directly apply to the present case, much less so would they apply upon the finding which we have given that in the present case the cause of action on which the second suit was founded was entirely different from the cause of action in the first suit.

39. Several other decisions were relied upon on both the sides to suggest that the cause of action in a suit for possession and the cause of action in a suit for mesne profits are entirely different or are one and the same. None of these cases is upon identical facts and is in any case distinguishable from the facts of the present case. None of these cases moreover, was a case where first a suit for damages was filed and then a suit for possession. We need not refer to each of these cases individually, because in our opinion, they do not apply to the facts of the present case. In Gurubux Singh v. Bhooralal, AIR 1964 SC 1810 the Supreme Court in fact entertained a suit for possession and mesne profits after a previous suit for recovery of mesne profits only. The bar of Order 2, Rule 2, was urged, but the Supreme Court did not consider it because the defendant "had not placed before the Court material for the purpose of founding a plea of O. 2, R. 2, Civil P. C." That in itself would show that it is not in every case as a matter of law that the claim for mesne profits and the claim for possession would be either one and the same cause of action or different causes of action. It is a matter which falls to be decided upon the claim made in each case and the nature of the cause of action therein pleaded.

(The rest of the judgment is not material for this report).

Answered in the affirmative.

AIR 1972 BOMBAY 339 (V 59 C 60)

PADHYE AND HAJARNAVIS, JJ.

Punjaram Mithu Kirad, Petitioner v. M/s. Khandelwal Ferro Alloys Ltd. and others, Respondents.

Special Civil Appln. No. 1494 of 1971, D/- 26-4-1972, from order passed by D. H. Deshmukh Commr., Nagpur Division, Nagpur, D/- 30-3-1971.

Index Note:— (A) Constitution of India, Art. 226 — Writ petition for quashing order of Commissioner rejecting application for revision — Non-availability of alternative remedy — Petition maintainable — (X-Ref:— Maharashtra Land Revenue Code (1966), Ss. 249 (2) and 252 (b)). (Para 5)

Brief Note:— It was the ultimate order that had to be looked into. Where the impugned order was passed in a proceeding which was treated as a revision proceeding by the Commissioner. No appeal could lie against such an order in view of the provisions of Sections 249 (2) and 252 (b) of the Maharashtra Land Revenue Code. As the aggrieved person could not have availed himself of the remedy of appeal, writ petition for quashing the order was maintainable.

(Para 5)

Index Note:— (B) Maharashtra Land Revenue Code (1966), Section 48 — Mining lease — Fixation of compensation to owner of land from which minerals are to be extracted — Delegation of powers is not a precondition. (Para 10)

Brief Note:— Reading sub-ss. (1) to (6) of S. 48 together it is clear that for an assignee of mining rights to enter the land where the minerals are situated, the only condition that is required to be fulfilled under Section 48 (5) is either determination of compensation under S. 48 (4) and tender thereof to persons whose rights are infringed or a previous sanction of the Collector. For purposes of fixing compensation itself to the owner of land where mining and quarrying operations are to be carried, any delegation as contemplated by Section 48 (3) of the Code is not necessary. If no such delegation is necessary then no question of any notice to the persons having rights in such land is necessary. The delegation of powers to assignee under S. 48 (3) relates only to lands other than the lands from which minerals are to be extracted and for this purpose the proviso to Section 48 (3) as regards notice to concerned persons had to be complied with. Various sub-sections of Section 48 analysed. (Paras 7, 8, 9 and 10)

T. L. Junankar, for Petitioner; M. N. Phadke and V. G. Palshikar, (for No. 1) and C. S. Dharmadhikari, Addl. Govt.

Pleader (for Nos. 3 and 4), for Respondents.

PADHYE, J.:— The petitioner challenges the order dated 30-3-1971 passed by the Sub-Divisional Officer, with powers of the Collector and the order dated 31-7-1971 passed by the Commissioner, Nagpur Division, in an appeal which was treated as a revision by the Commissioner. The petitioner claims to be the owner of Khasras 1 and 5 of Mouza Mahadulla, tahsil Ramtek, district Nagpur on the death of the original owner Mahipat son of Madhao Mahajan and his widow Sarjabai. The State Government granted a mining lease in favour of the respondent No. 1 in respect of this piece of land and the Collector by his letter dated 24th March, 1969 asked the Sub-Divisional Officer, Ramtek to fix the compensation under Section 48 (4) of the Maharashtra Land Revenue Code, 1966 and to arrange to tender the amount to the land owner. The Sub-Divisional Officer by his order dated 30-3-1971 determined the compensation at the rate of Rs. 1,000/- per acre and fixed the price accordingly on consideration of the material before him.

2. Before the revision application was decided by the Commissioner, the Collector had granted a working permission to the respondent No. 1 by his order dated 13-5-1971, but this permission was set aside by the Commissioner by his order dated 18th August 1971 on the ground that there was no order of delegation in favour of the respondent No. 1 and no notices were given to the aggrieved persons. The orders of the Sub-Divisional Officer dated 30-3-1971 and of the Commissioner dated 31-7-1971 have been challenged by the petitioner by this writ petition.

3. During the pendency of this writ petition, the Collector again granted working permission to the respondent No. 1 on 27-10-1971 and this again was challenged before the Commissioner and the Commissioner by his order dated 14-1-1972 cancelled the working permission granted by the order dated 27-10-1971. Against this order of the Commissioner, the respondent No. 1 has filed an appeal to the State Government which is said to be pending before the State Government. In this petition we are not in fact concerned with the grant of the working permission and the appeal therefrom. The matter regarding the working permission is pending before the State Government who is the competent authority to decide the appeal and we are not called upon by this petition to decide that matter which is pending before the State Government. Nothing that may be said in this judgment will pre-

judice the appeal which is pending before the State Government.

4. The challenge to the orders dated 30-3-1971 of the Sub-Divisional Officer and 31-7-1971 of the Commissioner is on the ground that before the compensation could be fixed there must be a delegation of power by the State Government in favour of the assignee and such a delegation cannot be made unless notice is given to the person concerned, namely, the land owner, whose rights are affected. In fact, there has been no delegation made at all in the case and, therefore, the Sub-Divisional Officer has no authority or power to fix the compensation in the present case and the order passed by the Sub-Divisional Officer, is, therefore, non est.

5. A preliminary objection was raised on behalf of the respondent No. 1 that the writ petition should not be entertained as there was an alternative and adequate remedy of appeal to the State Government challenging the order of the Commissioner and since this step has not been taken by the petitioner, the writ petition is liable to be thrown out on this ground alone. The learned Counsel for the respondent No. 1 relies upon the provisions of Section 248 of the Maharashtra Land Revenue Code which provides for the appeal to the State Government. Section 248 makes the order passed by a Commissioner in an appeal against an order of the officer subordinate to him, appealable to the State Government, but Section 252 of the Code specifically prohibits an appeal from an order rejecting an application for revision. In matters of revision, the only exception is to be found in Section 249 (2), that where an order passed in revision varies or reverses any order, it shall be appealable as if it was an order passed by the revisional authority in appeal. In view of the provisions of Section 249 (2) and Section 252 (b) of the Code no appeal could lie to the State Government against the order of the Commissioner dated 31-7-1971. It is, however, contended on behalf of the respondent No. 1 that the petitioner had initially filed the appeal before the Commissioner challenging the order of the Sub-Divisional Officer dated 30-3-1971 and the conversion of that appeal into revision by the Commissioner will not deprive the petitioner of his right of appeal to the State Government. We are not able to accept this contention. It is the ultimate order that has to be looked to and the order dated 31-7-71 is passed in a proceeding which was treated as a revision proceeding by the Commissioner. We do not, therefore, think that the petitioner could have availed himself of the remedy of appeal to the State Government as contended on behalf of the respondent No. 1.

6. Considering the merits of the petition, the petitioner relies upon the provisions of Section 48 of the Maharashtra Land Revenue Code, and more particularly of sub-section (3) thereof. Section 48 (1) defines the rights of the State Government to all minerals at whatever place found, whether on surface or underground, including all derelict or working mines and quarries, old dumps, pits, fields, bandhas, nallas, creeks, river-beds and such other places and it declares that the rights to all these are expressly reserved and shall vest in the State Government. It also provides that the State Government shall have all powers necessary for the proper enjoyment of such rights. It is also further provided under sub-section (1) that nothing in this Code shall be deemed to affect any subsisting rights of any person in respect of such mines or minerals in his land. Sub-section (2) then gives further rights which are ancillary to the rights to the minerals and it provides that the right to all mines and quarries includes the right of access to land for the purpose of mining and quarrying and the right to occupy such other land as may be necessary for purposes subsidiary thereto including the erection of offices, workmen's dwellings and machinery, the stacking of minerals and deposit of refuse, the construction of roads, railways, or tram-line and any other purposes which the State Government may declare to be subsidiary to mining and quarrying. These are the rights which are declared by statute to be the rights of the Government under Section 48 (1) and (2) of the Code. The State Government has not only the right to all the minerals at whatever place found, but the right to all the mines and quarries which includes also the right of access to land for the purpose of mining and quarrying and also the right to occupy such other land as may be necessary for purposes subsidiary thereto as has been stated in sub-section (2) of S. 48. These rights can be exercised by the State Government itself or these rights can be assigned by the State Government to any other person. Whenever such rights over any minerals, mines or quarries are assigned to any person and if for the proper enjoyment of such right, it is necessary that all or any of the powers specified in sub-sections (1) and (2) should be exercised, then the Collector is authorised to delegate such powers to the person to whom the right has been assigned and while making this delegation the Collector has to serve notices on all persons having rights in the land affected, hear them and consider their objections.

7. The learned counsel for the petitioner contends that the rights given

to the State Government under sub-section (2) of S. 48 covers also the right to disturb the area wherein minerals are found and for mining and quarrying that area. It is urged on behalf of the petitioner that unless the Collector delegates the powers to the person to whom the right has been assigned, which are specified in sub-sections (1) and (2), the assignee does not get any right whatsoever and such delegation cannot be made by the Collector except upon a notice to the person having rights in the land affected and without hearing and considering their objections, if any. Sub-section (2) of S. 48 in our view relates to those other lands besides the land containing the minerals over which a right of access to the land under minerals for the purposes of mining and quarrying is necessary and also relates to such other land not being the land to be mined or quarried, the occupation of which may become necessary for the purposes subsidiary to the mining and quarrying operations such as erection of offices, workmen's dwellings and machinery, roads, railways, trams etc. These rights which are conferred on the Government under sub-section (2) of S. 48 are rights over the lands other than the land in which the mining and quarrying has to be done. It is these powers over other lands that are required to be delegated by the Collector under sub-section (3) of S. 48 for which purpose the proviso to sub-section (3) has to be complied with.

8. We then come to sub-s. (4) of S. 48 which provides for fixation of compensation with respect to the land of which the surface is to be disturbed for the purposes of mining or quarrying. It provides that if, in the exercise of the right herein referred to over any land the rights of any persons are infringed by the occupation or disturbance of the surface of such land, the State Government or its assignee shall pay to such persons compensation for such infringement and the amount of such compensation shall, in the absence of agreements, be determined by the Collector or if his award is not accepted, by the Civil Court in accordance with the provisions of the Land Acquisition Act. This refers not only to the lands which contain the minerals and require mining and quarrying operations and which are required to be occupied or disturbed, but also to the lands which are required for the purposes subsidiary to the above operations. In either case the State Government or its assignee has to pay compensation to the person concerned for such infringement while exercising the rights under Section 48 (1) and (2). Before, however, the assignee of the State Government can enter or occupy the surface of the land

from which minerals are to be extracted, one of the two conditions given in sub-section (5) of S. 48 of the Code has to be fulfilled. Under sub-section (5) the assignee of the State Government can enter or occupy the surface of any land from which minerals are to be extracted only on getting prior sanction of the Collector or a compensation being determined and tendered to the person whose rights are infringed. If compensation is determined and tendered, then the assignee can straightway enter or occupy the surface of the land even without the previous sanction of the Collector. No question of any delegation of powers in such cases arises. The delegation of powers arises only in a case where as in sub-section (2) lands of any other persons besides the lands where there are minerals are affected for the proper enjoyment of the rights which are assigned by the State Government in favour of the assignee. So far as the State Government is concerned, even those powers are vested in the State Government and those affected persons have only a right of compensation without there being any obstruction to the State Government to use such other lands necessary for the purposes of mining and quarrying.

9. So far as the assignee is concerned, this latter right or power of the State to enter on other lands has to be delegated by the Collector by an order in writing in favour of the assignee and before making such delegation a notice has to be duly served on all those persons whose rights in those lands stand affected, they are heard and their objections considered. But this delegation of power is only for the purposes of exercising the powers which are necessary to be exercised for the purposes subsidiary to mining and quarrying. This has nothing to do with the fixation of compensation for the land which is occupied or disturbed by the assignee in exercise of the right over any land.

10. Here, we are not concerned with the infringement of rights of any third persons whose rights in the lands are affected for the proper enjoyment of the right to the minerals. Here the petitioner claims to be the owner of the land where the mining and quarrying operations are to be carried on. So far as this land is concerned, the delegation of the powers for the proper enjoyment of that right does not come in, as such delegation of powers relates only to lands other than the lands from which the minerals are to be extracted. Sub-section (4) of Sec. 48 only places an obligation on the State Government and its assignee to pay compensation for the infringement of the rights of the owners

of the land by the occupation or disturbance of the surface of such land and this compensation can be fixed up by agreement between the parties and in its absence, to be determined by the Collector. If the delegation so far as the other land is concerned is not made by the Collector, then the assignee may not have powers to occupy or disturb such land. That does not, however, apply to the lands containing the minerals themselves. In fact so far as the land from which the minerals are to be extracted is concerned, sub-section (6) of S. 48 makes it quite clear that even without the payment of compensation provided previous sanction of the Collector is obtained under sub-section (5), the assignee can enter and occupy that land and the Collector is empowered to recover the compensation from the assignee as if it were an arrears of land revenue. This would show that the fixation of the compensation or the payment thereof has nothing to do with the delegation of the powers as contemplated by sub-section (3) of Sec. 48. Such a delegation need not precede the fixation of any compensation whatsoever so far as the land from which the minerals are to be extracted. If the contention on behalf of the petitioner were to be accepted, then sub-section (5) of S. 48 will have no meaning and unless there is a delegation of powers even in respect of the land from which the minerals are to be extracted, the assignee would not be able to enter or occupy the surface of that land even on the payment of compensation or even with the previous sanction of the Collector. We must give effect to all the provisions of the Code and reading these provisions together we find that for entering the land where the minerals are situated, the only condition that is required to be fulfilled is either determination of the compensation and tender thereof to the persons whose rights are infringed or a previous sanction of the Collector. We do not, therefore, think on the reading of those provisions together that for the purposes of fixing the compensation itself in respect of the rights in the land, surface of which is to be occupied or disturbed for the purposes of extracting minerals from that land any delegation as contemplated by sub-section (3) of S. 48 of the Code is necessary. If no such delegation is necessary then no question of any notice to the persons having rights in such land, such as the petitioner is, necessary. Whether, therefore, there is any delegation or not, the fixation of the compensation by the Sub-Divisional Officer with powers of the Collector, of the land said to be belonging to the petitioner from which minerals are to be extracted, cannot be said to be without jurisdiction.

If the owner of the land is aggrieved by the fixation of the amount of compensation, then he has his remedy to approach the Civil Court which will determine the proper compensation in accordance with the provisions of the Land Acquisition Act. We are unable to agree with the learned counsel for the petitioner that the delegation of powers, as contended, is a pre-condition to the determination of the compensation of the land of the petitioner, the land from which the minerals themselves are to be extracted.

11. We are, therefore, of the opinion that the view taken by the Commissioner, Nagpur Division, Nagpur by his order dated 31-7-1971 cannot be said to be incorrect. We also do not see how the order of the Sub-Divisional Officer can be said to be without jurisdiction. We are not here concerned with the other matter regarding the working permission which is already pending before the State Government. We do not see any reason to interfere with the order passed by the Sub-Divisional Officer dated 30-3-1971 and by the Commissioner dated 31-7-1971. The petition accordingly fails and is dismissed with costs.

Petition dismissed.

AIR 1972 BOMBAY 343 (V 59 C 61)

APTE, J.

Dr. K. R. Agarwal, Petitioner v. Balkrishna Jawar and another, Respondents.

Criminal Revn. Appln. No. 592 of 1970, D/- 21-9-1971.

Index Note:— (A) Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act (45 of 1963), S. 2 (a) — 'Flat' — Meaning of — Conditions requisite to constitute a flat — Building divided into independent and separate units by common party wall — Each unit constitutes a flat irrespective of its ownership.

Brief Note:— (A) Where a building is divided into four equal, separate and independent units by common party walls each apartment falls within the definition of 'flat' under the Act. Whether the purchaser is an independent owner or not, is entirely irrelevant in order to determine whether premises are a flat or not. (Paras 7, 8)

The legislature having defined the expression 'flat' in Section 2 (a) of the Act it is not permissible to go beyond

that definition for determining the scope of that expression. (Para 10)

S. P. Kanga for N. H. Pardashani, for Petitioner; G. N. Khare, for Respondent No. 1; S. C. Pratap, Asst. Government Pleader, for the State.

ORDER:— This revision by the original complainant is directed against the order passed by the Presidency Magistrate 27th Court, Mulund, Greater Bombay dismissing the complaint filed by the Petitioner against respondent No. 1 and one V. K. Jawar, alleging offences under the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "the Act"), on a preliminary ground that the premises in dispute were not covered by the Act, inasmuch as they were not a "flat" within the meaning of that term as defined in the Act.

2. Few facts which it is necessary to state for the purposes of this application, are these:

3. The accused, who are brothers and were partners of a concern styled as M/s. Korbusiers, widely advertised a housing scheme which was called "Mini Land". It appears that the accused had acquired about 45,831 Sq. yards of open plot of land from M/s. Orient Corporation on lease for a period of ninety-nine years with a renewal clause and they proposed to divide this land in different plots and offered housing accommodation in these plots. It appears the scheme was that on each plot accommodation consisting of ground-floor and two other floors was offered to each purchaser. It seems that one building was to be constructed on each plot, but that building was to be divided into four parts by putting walls length and breadth-wise exactly in such a way as to divide it into four different buildings touching each other. Several persons purchased the housing accommodation in this Scheme and it is common ground that the accused actually constructed such buildings and even delivered possession to the purchaser. One of the terms of the agreement was to form a co-operative society promoted by the accused. The accused not having done that, the present complaint out of which this revision petition arises was filed by the petitioner who is one of the purchasers of one of the portions of a building, called a bungalow type building. The number of the bungalow type accommodation given to him is 5-B. The complainant alleged various breaches of the provisions of the Act by the Accused.

4. The accused contended that the accommodation offered was an independent bungalow type accommodation and

that each purchaser became absolute owner of the ground and two floors standing thereon, and that therefore, it was not a flat within the meaning of that expression as defined in the Act. This contention was upheld by the learned Magistrate and he dismissed the complaint. The learned Magistrate, however, while dismissing the complaint, observed that since the premises in question were not a "flat" under the Act, he had no jurisdiction to deal with them. It is difficult to follow this part of the reasoning of the learned Magistrate, because even assuming for a moment that the premises in dispute do not fall under the definition of a "flat" contained in the Act, that will not affect the jurisdiction of the Magistrate to deal with the complaint.

5. The only question that arises on this revision, therefore, is whether the premises, which were sold by the accused to the complainant satisfied the requirements of the definition of expression "flat" as contained in the Act. Clause (a) of Section 2 defines the expression "flat" as meaning a separate and self contained set of premises used or intended to be used for residence, or office, or show-room or shop or godown (and includes a garage) the premises forming part of a building and includes an apartment. In order that premises, therefore, should come under this definition, the following requirements must be fulfilled:—

1. the premises must be separate and self contained set of premises; and

2. must be such as can be used or intended to be used for residence, shop or godown or garage.

3. the premises must form part of a building.

6. It is not disputed in the present case that the first two requirements are satisfied. It is not denied that the premises in question are a separate and self contained set of premises and that they are intended to be used for residence. The controversy, however, centres round the last requirement, viz. whether the premises form part of a building or not? If the answer to this question is in the affirmative, then, obviously, the premises in question must be held to be a "flat" within the meaning of this definition. On the other hand, if the answer to the question is in the negative, then, obviously, the premises in question cannot be regarded as "flat" and then the provisions of the Act would not be applicable.

7. Now, in order to determine whether the premises form part of a building or not, the actual construction erected will have to be taken into account. It appears that the entire area of 45,831 sq. yards, which was taken on

lease by the accused was divided into several plots, each plot admeasuring 500 square yards. On each plot a bungalow type construction having four apartments divided by common party-wall east-west and south-north was erected, so that each part became a separate unit having separate entrance and opening on two sides. Each portion has a ground-floor and two storeys. Each part has common wall on two sides — back side and one other side. To illustrate this point further on the plot in question building No. 5 was constructed and that building was divided into four parts by putting party-walls exactly in the middle length-wise and breadthwise, and each portion was given a separate No. as 5-A, 5-B and 5-C and 5-D. The complainant in this case purchased the portion bearing No. 5-B. It is, therefore obvious that although each portion is an independent unit, it forms part of larger building which has been divided into four portions.

8. It was contended on behalf of the accused-respondent that the purchaser of each of the four portions in the building became an independent owner of the building as well as of the ground below it. It was also submitted that each purchaser was an absolute owner of the portion purchased by him and was free to sell it or to dispose of it in any manner he liked, and therefore, each unit must be regarded as a separate bungalow. It is however, difficult to accept this contention for the simple reason that the element of ownership does not enter into the definition of the expression "flat". In other words whether the purchaser is an independent owner or not is entirely irrelevant in order to determine whether the premises are a flat or not. That being so, it is obvious that the premises in this case do satisfy all the three tests of 'a flat' within the meaning of the definition contained in the Act.

9. It is incidentally contended for the respondent that the Life Insurance Corporation had taken a view that each purchaser was the full and absolute owner of the portion purchased by him and he was able to mortgage the same and they have even accepted mortgages of the portion from some of the owners. But, as observed above, that is not the criterion to determine whether the premises are a flat.

10. Mr. Khare wanted to urge that in order to determine whether it is a flat it would also be necessary to take into account the dictionary meaning of that expression. But since the Legislature itself has chosen to define the word "flat" for the purposes of this Act, it would not be permissible to travel beyond the definition contained in the Act.

In order to determine the scope of that expression.

11. For these reasons discussed above, the view taken by the learned Magistrate that the premises involved in this case are not a 'flat' is obviously erroneous. The order dismissing complaint of the petitioner is, therefore, set aside and the case is sent back to the learned Magistrate to proceed with it according to law.

12. Rule absolute.

Revision allowed.

AIR 1972 BOMBAY 345 (V 59 C 62)

MODY AND KAMAT, JJ.

M/s. Arthur and Co., Appellants v. M/s. Shamji Kalidas and Co., Respondents.

Appeal No. 15 of 1968, D/- 26-4-1971.

Index Note:— Arbitration Act (1940), S. 2 (a) — East India Cotton Association Bye-laws, Bye-law 38-A — Cotton contract subject to Bye-laws of East India Cotton Association Bombay — Bye-law 38-A providing for arbitration in case of disputes applicable — Contract is an arbitration agreement in terms of S. 2 (a).

Brief Note:— Where a Cotton contract between two non-members incorporated a term that the contract would be subject to the bye-laws of the East India Cotton Association Ltd., Bombay, all the bye-laws of the Association became incorporated into the said contract and the bye-laws which were capable of applying to the contract would apply. The concluding portion of Bye-law 38-A of the said bye-laws amounted to an arbitration agreement. The cotton contract in question contains an arbitration agreement referred to in clause (b) of the bye-law. Clause (e) covers cotton contracts which contained any of the types of arbitration agreements mentioned in the previous clauses. Further clause (e) covers contracts between non-members of the Association also. The cotton contract was therefore covered by clause (e) of bye-law 38-A and there existed a valid arbitration agreement. As both the cotton contract and the Bye-law 38-A were in writing, there existed a valid arbitration agreement in terms of Section 2 (a).

(Para 13)

J. C. Bhatt with R. J. Bhatt i/b. M/s. Mulla & Mulla and Craigie Blunt and Caroe, Attorneys, for Appellants; Ashok H. Desai i/b. M/s. Amarchand & Mangaldas and Malvi Ranchhoddas and Co., Attorneys, for Respondents.

MODY, J.:— This is an appeal against the Judgment and Order of

Madon, J. dated 26th February 1968 granting the respondents' application and directing that the Contract dated 9th December 1964 between the appellants and the respondents be filed in Court under Section 20 of the Arbitration Act, 1940, and that all disputes arising between the parties, including the claim of the respondents against the appellants under and in respect of the said contract be referred to arbitration according to the bye-laws of the East India Cotton Association Ltd. so that the necessary steps under the said bye-laws may be taken to have the said disputes settled by arbitration as provided by the said bye-laws. The East India Cotton Association Ltd. is hereinafter referred to as "E. I. C. A. Ltd".

2. By that Contract the respondents agreed to sell to the appellants and the appellant agreed to buy from the respondents 200 bales of Egyptian cotton to be shipped during January/February 1965 on certain terms and conditions contained in that Contract. One of the terms of the Contract provides:—

"This contract is subject to the bye-laws of the East India Cotton Association Ltd., Bombay."

3. The respondents thereafter contended that the appellants committed certain defaults and a breach of the Contract and claimed on that basis a certain amount from the appellants. Thereafter the respondents claimed that the disputes between the parties be referred to arbitration in accordance with the bye-laws of the E. I. C. A. Ltd. The appellants contended that there was no agreement between the parties providing any express term for a reference of those disputes to arbitration. They further contended that although the said term in the Contract made it subject to the bye-laws of the E. I. C. A. Ltd., there was no provision in the bye-laws providing for arbitration which was applicable to the said disputes between the parties as both the appellants and the respondents were not members of the E. I. C. A. Ltd. The respondents thereupon filed an application by way of a Petition, which was numbered as a suit, being Arbitration Suit No. 224 of 1966. In defence, the appellants raised various contentions. At the hearing before Madon, J., however, the appellants gave up all their contentions except one. The appellants conceded, firstly, that the said Contract was a valid contract; secondly, that the said Contract was a "cotton contract"; thirdly, that the said disputes between the parties arose out of and were in relation to the said Cotton Contract; fourthly, that the bye-laws of the E. I. C. A. Ltd. got incorporated into the said Contract; and fifthly, that both the appellants and the respondents were not members of the

E. I. C. A. Ltd. Therefore the only dispute which remained for determination was the appellants' contention that there was no Arbitration Agreement between the parties contained in the said Contract dated 9th December 1964. The learned Judge, therefore, raised only one issue, namely:

"Whether there is any arbitration agreement between the Petitioners and the Respondents contained in the contract between them dated 9th December 1964 as alleged by the Petitioners in para 7 of the Petition".

The learned Judge negatived the appellants' contention and answered the said issue in the affirmative. The appellants have therefore filed this appeal.

4. There is no dispute that the bye-laws of the E. I. C. A. Ltd. have become incorporated into the said Contract. The appellants' contention, however, is that only such bye-laws as are capable of applying to the said Contract and the disputes between the parties can apply. There is no dispute that there are several provisions in the bye-laws which provide for arbitration. The only dispute is whether any of such provisions about arbitration is applicable to the present case.

5. Bye-law 36 provides for Arbitrations and Appeals in disputes as to quality. Its provisions are not relevant in this case except for understanding and interpreting the provisions of bye-law 38, the provisions of which relate to Arbitration and are in dispute between the parties. Bye-law 38 contains Cls. (A) to (G). Only the provisions of clause (A) are relevant, the other Clauses being only to provide the machinery for Arbitration. Clause (A) provides:

"38. (A) All unpaid claims whether admitted or not, and all disputes and difference (other than those relating to quality) arising out of or in relation to—

(a) cotton transactions between members including any dispute as to the existence of such transaction; or

(b) cotton contracts (whether forward or ready and whether between members or between a member and a non-member) made subject to these bye-laws or subject to E. I. C. A. arbitration or containing words or abbreviations to a similar effect including any dispute as to the existence of such transaction provided in the latter case the parties had agreed in writing before entering into business relation that any dispute arising between them out of that agreement or any such transactions that may be entered into including any dispute as to existence of such transaction shall be referred to arbitration under the bye-laws of the Association; or

(c) the rights and/or responsibilities of commission agents, muccadums and brokers not parties to such transaction or contracts; or

(d) commission agency agreement entered into subject to these bye-laws or subject to E. I. C. A. arbitration or containing words or abbreviations to a similar effect; or

(e) cotton contracts covered by any such arbitration agreement.

shall be referred to the arbitration of two disinterested persons, one to be chosen by each party from amongst the members, or their authorised or nominated representatives for the purpose of determination, settlement and adjustment of disputes or differences in respect of cotton transactions referred to above. The arbitrators shall have power to appoint an umpire and shall do so if and when they differ as to their award"

The portion appearing in clause (A) after what is reproduced above not being relevant to this case has not been reproduced above.

6. According to the appellants, none of the five sub-clauses (a) to (e) apply to the present case. According to the respondents, the present case falls under sub-clause (e). The composition of bye-law 38-A, to the extent reproduced above, is that in the beginning there appear certain words, hereinafter referred to as "the opening portion", then follow the five sub-clauses (a) to (e) and then follow certain other words reproduced above which are hereinafter referred to as "the concluding portion". In the opening portion occur the words "(other than those relating to quality)". These words appearing within brackets have obviously been used to make the field of operation of bye-laws 36 and 38-(A) mutually exclusive. These words make Bye-law 38-(A) not applicable to claims, disputes and differences relating to quality. These words which appear within brackets will, therefore be ignored when we proceed to consider the other provisions of Bye-law 38(A) as they are not relevant to that purpose. Each pair of sub-clauses (a) and (b), (b) and (c), (c) and (d) and (d) and (e) have between them the word "or". The result is that the opening portion and the concluding portion must be read, as it were, with each of the five sub-clauses (a) to (e) between them, or, in other words, as if bye-law 38-A, consists of five sub-clauses. A mere reading of sub-clauses (a) to (e), however, shows that their wording makes them inter-connected or inter-dependent for the purposes of their construction and that aspect cannot be lost sight of. The concluding portion contains the operative provisions of clause (A), the provision requiring a reference to arbitration. Therefore, the opening portion read with any

of the five sub-clauses whenever any of the five sub-clauses applies and then read with the concluding portion amounts to an arbitration agreement. It is, therefore, clear that whenever a Contract or an Agreement states that it is subject to the bye-laws of the E. I. C. A. Ltd. or that it is subject to the E. I. C. A. arbitration or contains words or abbreviations to the similar effect, all the bye-laws of the E. I. C. A. Ltd. relating to arbitration would get incorporated in the Contract or Agreement as if they had been bodily or verbatim copied out therein. If that contract or agreement is a written contract, a written agreement of arbitration as defined in clause (a) of Section 2 of the Arbitration Act, 1940, would result, provided any of the five sub-clauses is applicable.

7. The said Contract dated 9th December 1964 contains the said clause: "This contract is subject to the bye-laws of the East India Cotton Association Ltd., Bombay". These words incorporate the bye-laws of E. I. C. A. Ltd. within it by reference, but, of course to the extent that they are applicable to the said contract. If, therefore, any of the said five sub-clauses applies, there would be a written arbitration agreement between the parties. The only point of inquiry in this case, therefore, is whether any of the said five sub-clauses applies in the present case. That, in turn, involves construing the said five sub-clauses. The real dispute between the parties centres round the construction of the said five sub-clauses in general and sub-clause (e) in particular.

8. The words "cotton transactions" and "cotton contracts" occur in some of the said five sub-clauses. The word "cotton" is common. But why "transaction" in one and "contract" in the other? Normally, it must be presumed that they vary in their connotation, or, in other words, their meaning is not identical. As we will presently show, it appears that "cotton transaction" has been used in the sense of a business transaction in relation to cotton as, for example, sale or purchase, whereas "cotton contract" means such a cotton transaction with an additional term therein containing a "contract" that is, an agreement for arbitration. The expression used in sub-clause (a) is "between members". Sub-clause (a) will, therefore, apply only when both the parties to the "cotton transaction" are members, that is, members of the E. I. C. A. Ltd. It will not apply when one party or both the parties are non-members. Sub-clause (a) has to be read in the background of the fact, firstly, that E. I. C. A. Ltd. is a company incorporated under the Indian Companies Act, 1913; secondly, that it has Articles of Association; thirdly,

that such Articles of Association constitute a contract between its members inter se fourthly, that by the process by which every person become a member of the E. I. C. A. Ltd. the Articles of Association would constitute a written agreement between the members of the E. I. C. A. Ltd.; and fifthly, that there would be such a written agreement between the members in view of and to the extent mentioned in Art. 103 of the Articles of Association which provides:

"Whenever any dispute or difference arises between members inter se out of or in relation to any contract or transactions in cotton (including unpaid claims, whether admitted or not and including any dispute or difference as to the existence, validity or otherwise of such contract or transaction) the same shall be referred to arbitration in such manner as shall be prescribed by the by-laws. And it is hereby expressly declared that this shall be deemed to be an agreement of arbitration, and the holding of such an arbitration and the obtaining of an award thereunder shall be a condition precedent to the right of any member in respect of such dispute or difference as aforesaid, and no member shall have any right of action against any other member except to enforce the award in any such arbitration".

As sub-clause (a) applies only to members and as there would be an arbitration agreement as contained in Art. 103, there would be no necessity to provide for a further agreement of arbitration and it is because of this reason that sub-clause (a) uses the words "cotton transaction" and not "cotton contract". The language of Art. 103 is wide enough to include even disputes relating to the very existence of such a transaction.

9. Sub-clause (b) applies to "cotton contracts" not only between a member and a member, but also between a member and a non-member. As regards a non-member, there must be not only a "cotton transaction", but there must also be an arbitration agreement. It is because of that reason that the expression "cotton contract" has been used in sub-clause (b). But the language of sub-clause (b) discloses an intention that there should be a provision for arbitration even as regards "any dispute as to the existence of such transaction", which intention is disclosed by the words "including any dispute as to the existence of such transaction". If, however, an arbitration agreement is contained in a Cotton Contract, but the existence of the transaction itself is disputed, the whole Contract, including even the term therein for arbitration, would be in dispute and in such a case the dispute as to the existence of such transaction would not be referable to arbitration. It is in order to get over

that difficulty that sub-clause (b) further provides "provided in the latter case the parties had agreed in writing before entering into business relation that any dispute arising between them out of that agreement or any such transactions that may be entered into including any dispute as to the existence of such transaction shall be referred to arbitration under the by-laws of the association". This is clear because the above proviso is made applicable only "in the latter case" that is, in the case of a dispute as to the existence of such transaction. What the Proviso requires is that there must be an agreement in writing, that such agreement in writing must be "before", that is, prior to entering into the "business relation and that such agreement should be" that any dispute arising between them out of that agreement or any such transactions that may be entered into including any dispute as to the existence of such arbitration shall be referred to arbitration under the by-laws of the association". The comparatively short provision contained in sub-clause (b) presents many difficulties in its construction and in ascertaining the reasons for the actual language used. The words "Cotton Contract" have been used in sub-clause (b) in contradistinction to "Cotton Transaction" used in sub-clause (a). It is not difficult to ascertain the reason for this change. Under sub-clause (a) both the parties would be members and both would be governed by Art. 103. But under sub-clause (b) one party can be a non-member to whom Art. 103 would not apply and hence the words "Cotton Contract" have been used requiring not merely a cotton transaction but also, in addition, an agreement about arbitration. But what cannot be understood is why is sub-clause (b) made again applicable "between members" when there was no necessity to do so as all such disputes arising between members would fall within sub-clause (a). Similarly, it is difficult to comprehend why the words used in the earlier part of sub-clause (b) are "subject to the by-laws or subject to E. I. C. A. arbitration", but in the later part the only words used are: "under the by-laws of the association", although we feel that the context required all the said words used in the earlier part could have appropriately been repeated in the latter part. Further, the Proviso in sub-clause (b) requires the agreement in writing to be "before entering into business relation". Why is the scope of the agreement in writing restricted by the use of the word "before"? Such an agreement in writing would, for the purposes contemplated by the Proviso, be equally effective if such an agreement is even simultaneous or subsequent to the "Cotton transaction". Now the words

"such transaction" have been used in sub-clause (b) three times. Before the words "such transaction" occur in sub-clause (b) for the first time the word "transaction" does not at all occur in sub-clause (b). The words used earlier are: "Cotton Contracts". The fact that the words "such contracts" have not been used but the words "such transaction" have been used indicates that a distinction has been made between "cotton contracts" and "cotton transaction". The only distinction appears to be, as stated earlier, that "cotton contracts" are "cotton transaction" with an added term containing an arbitration agreement and it is because of such distinction that sub-clause (b) later specifically provides for an arbitration agreement. If the distinction we have made is correct, "such transaction" refers not to any "transaction" referred to earlier in sub-cl. (b) itself — because none has been so mentioned — but to a "transaction" which has been mentioned as "cotton transactions" in sub-clause (a). It is possible to so construe it because although sub-clauses (a) and (b) are separately numbered, the word used between them is "or" and there is a semicolon at the end of sub-clause (a) and therefore sub-clauses (a) and (b) form part of the same sentence. The use of the word "such" in sub-clause (e) is a matter of great controversy before us because it is sub-clause (e) which the respondents strongly canvass for. It cannot go unnoticed that at the end of each of the said sub-clauses (a), (b), (c) and (d) there is a semicolon, followed by the word "or" and therefore all the five sub-clauses are parts of the same sentence. The above discussion about the word "such" used in sub-clause (d) yields an important principle of construction, it being that "such" can refer not to that which is used in the same sub-clause in which it is used, but that it can refer to that which may have been used in an earlier sub-clauses of clause (A).

10. Sub-clause (c) also uses the word "such" in connection with "contracts or transactions". Neither the word "contracts" nor the word "transactions" has been used in sub-clause (c) itself, but they have been used in the earlier sub-clauses (a) and (b) and on the basis of the above principle, the word "such" in sub-clause (c) must be construed to refer to "transaction" and "contracts" used in sub-clauses (a) and (b) respectively.

11. Sub-clause (d) contains the words "subject to these by-laws or subject to E. I. C. A. arbitration or containing words or abbreviations to a similar effect". These words are identical to those used in the earlier part of sub-clause (b).

12. Now, turn to sub-clause (e). Its short provision is "Cotton contract" covered by any such arbitration agreement. "Cotton contracts" has been used in sub-clause (b) and "such contracts" in sub-clause (c). As already stated, for the purposes of clause (A) there appears to be a distinction between "cotton transactions" and "cotton contracts", the latter being a cotton transaction with the additional element of an agreement for arbitration. Then occur the words "any such arbitration agreement". Here the word "such" means of the nature mentioned earlier in sub-clause (a). The word "such" is merely descriptive and the inquiry therefore would be whether any provision of the nature of an arbitration agreement finds a place in any of the earlier sub-clauses (a) to (d). It is not necessary that the words "arbitration agreement" should have been specifically used and even a provision of the nature of an arbitration agreement without the use of the specific words "arbitration agreement" would suffice. A provision in the nature of an arbitration agreement finds a place in the earlier part of sub-clause (b) and in sub-clause (d) and is contained at each of these two places in the words "made subject to the by-laws or subject to E. I. C. A. arbitration or containing words or abbreviations to a similar effect". But the words in sub-clause (e) are "covered by any such arbitration agreement". The effect of the words "covered" will be considered a little later. But the words are "any such arbitration agreement" and not "such arbitration agreement". The use of the word "any" tends to indicate that "arbitration agreements" of more than one nature find mention in the earlier sub-clauses (a) to (d) that an examination of these four sub-clauses shows that it is in fact so. Sub-clause (b) refers to an "arbitration agreement" at two places: firstly, in its earlier part and, secondly, in its later part in the Proviso. The arbitration agreement referred to in the earlier part is an arbitration agreement in the Cotton Contract itself, whereas that in the Proviso is an arbitration agreement in writing and entered into before entering into business relation of the nature mentioned in that Proviso, that is, an arbitration under the by-laws of the Association, i.e., E. I. C. A. Ltd. The contents of both are the same, the difference being only as to whether such arbitration agreement is simultaneous, that is, contemporaneous with the business transaction or whether it precedes the business transaction. As all the five sub-clauses form part of but one sentence — the sentence embracing the opening portion, the five sub-clauses and the concluding portion — even grammatically "such arbitration" need not be

read as referring only to the contents of sub-clause (d) which immediately precedes sub-clause (e) but should be read as referring to the contents of all the preceding four sub-clauses (a) to (d) to the extent they contain an arbitration agreement. In our opinion, "cotton contracts covered by any such arbitration agreement" means the cotton contracts to which any such arbitration agreement applies. The word "covered" has been used to achieve the object that the arbitration agreement should embrace not only claim, disputes and differences arising in the performance of the business contract, but should also embrace those relating to the very existence of the contract itself. Another feature of the wording of sub-clause (e) is that it does not use words like "between members" or "between a member and a non-member" or any other similar descriptive words about the parties to the "cotton contract". Sub-clause (e) is, therefore, in that sense wider and can apply even when both the parties to the "cotton contract" are non-members as in the case before us.

13. In the case before us the said Contract dated 9th December 1964 between the parties to this Appeal was a "Cotton Contract". Because of the said term incorporated therein that the contract was "subject to the bye-laws of the East India Cotton Association Ltd., Bombay" all the bye-laws became incorporated into that contract, including bye-law 38-A. The words in the concluding portion of clause (A) of Bye-law 38 amount to an arbitration agreement. The nature of that arbitration agreement was, by reason of the words therein "subject to the bye-laws of the East India Cotton Association Ltd., Bombay" and the words of the concluding portion incorporated therein, that of an arbitration agreement mentioned expressly in the first part of sub-clause (b) and by reference in sub-clause (c). Therefore the said contract dated 9th December 1964 was "covered by such arbitration agreement" and fell within sub-clause (e). It must therefore be concluded that there existed a valid arbitration agreement between the parties. Mr. Bhatt, the learned Counsel for the appellants, did not dispute that if any of the said five sub-clauses (a) to (e) were held to be applicable in the present case, there would result an arbitration agreement between the parties which would cover the said disputes between the parties arising under the said contract dated 9th December 1964.

14. Mr. Bhatt had contended that the authority which made the bye-laws of the E. I. C. A. Ltd. could not legislate, nor can it be presumed to have legislated by making those bye-laws, in respect of non-members. In our opinion, the very approach underlying this con-

tention is misconceived. The authority that made the bye-laws did not, by the bye-laws themselves, provide for arbitration in respect of any non-member. In the present case the parties, though they both are non-members, have by their own voluntary act of making their contract subject to the bye-laws of the E. I. C. A. Ltd, incorporated Bye-law 38-A into their Contract and thereby agreed to an arbitration agreement. It is by reason of such voluntary act of the two parties, and not by any independent force of the bye-laws, that the agreement has come into being and become binding on the parties.

15. Mr. Bhatt had also contended that, in order to attract the provisions of clause (A) of Bye-law 38, it is not enough that the said parties should have stated in their said Contract dated 9th December 1964 that it was "subject to the by-laws of the East India Cotton Association Ltd., Bombay" but that, in order to attract the provisions of Cl. (A) of Bye-law 38, the parties should have stated specifically and in express words that the said Contract was "subject to the arbitration agreement as contained in Clause (A) of By-law 38 of the E. I. C. A. Ltd.". This contention of Mr. Bhatt misses the force and effect of the operative words containing an agreement for arbitration to be found in the concluding portion of clause (A) of By-law 38. These operative words are to be read as having been incorporated by reference into the said Contract dated 9th December 1964. So read, the said Contract dated 9th December 1964 contains within it an Arbitration Agreement. The principles about the contents of a document being incorporated into another document by reference to the former are so well-settled and well-established as not to need even a reference being made to any authorities or text-books enunciating them. When the contents of the operative words contained in the concluding portion clause (A) of By-law 38 are read into the said Contract dated 9th December 1964, the said Contract would contain words identical to those what Mr. Bhatt contended should, specifically and expressly have been used in the said Contract dated 9th December 1964.

16. The said Contract dated 9th December 1964 is in writing and so also are the provisions of clause (A) of bye-law 38 which are to be read into it. There was, therefore, in existence between the parties a written Arbitration Agreement as contemplated by clause (a) of S. 2 of the Arbitration Act, 1940, and it was a valid agreement. We, therefore, confirm the Judgment and Order of Madon, J. and dismiss the appeal with costs.

Appeal dismissed.

AIR 1972 BOMBAY 350 (V 59 C 63)

CHITALE AND NATHWANI, JJ.

The Municipal Corporation of Greater Bombay, Appellants v. Hasham Ismail Mamsa, Respondent.

Letters Patent Appeal No. 78 of 1970, D/- 7-10-1970 against Judgment of Vaidya J. reported in AIR 1971 Bom 215.

(A) Bombay Court-fees Act (36 of 1959), S. 6 (iv) (a) — Suit for accounts — What is — (X-Ref:— Court-fees Act (1870), S. 7 (iv) (f).)

For a suit which can properly be called a suit for accounts, legal liability to render accounts against the defendant must appear on the allegations in the plaint. When the plaintiff in a suit alleges that the defendant Bombay Corporation made demands for recovery of property tax from time to time and the plaintiff not only paid the entire amount due from him but had overpaid, such plaint allegations did not disclose any legal liability on Corporation to render accounts to plaintiff. AIR 1971 Bom 215. Reversed. (Paras 2, 4)

(B) Bombay Municipal Corporation Act (3 of 1888), S. 527 — Section if violates Arts. 14 and 19 (1) (f) of Constitution — (X-Ref:— Constitution of India, Articles 14, 19 (1) (f).)

Merely because a statute not dealing with limitation in general prescribes a special period of limitation different from the one in the Limitation Act, it does not follow that the provision prescribing the special period of limitation violates Article 14 of the Constitution, much less Art. 19 (1) (f) thereof. Hence S. 527 is not violative of Arts. 14 and 19 (1) (f) of the Constitution. (Point conceded).

(Para 9)

(C) Bombay Municipal Corporation Act (3 of 1888), S. 527 — Suit against Corporation — Limitation.

When notices of demand as sent by Corporation for recovery of property tax as served on plaintiff on 14-3-1968 and the suit in question in respect thereof was filed on 29-4-1969 the suit was clearly barred by limitation if the acts of Corporation complained of in the plaint could not be said to be unauthorised. AIR 1953 Bom 204. Distinguished. (Para 10)

Cases Referred: Chronological Paras

AIR 1953 Bom 204 = 55 Bom LR
65, Jalgaon Borough Municipality
v. Khandesh Spg. and Wvg. Mills
Ltd. 9

AIR 1932 Bom 111 = ILR 56 Bom
23, Ishwarappa v. Dhanji Bhanji 4

AIR 1929 Bom 337 = 31 Bom LR
476. Krishnaji Vinayak Belapur-
kar v. Motilal Magandas Gujarati 4

(1884) ILR 8 Bom 31, Lakshman v.

Babaji

4

K. K. Singhavi i/b. A. M. Desai, Attorneys, for Appellants; R. W. Adik, for Respondent.

CHITALE, J.:— This is an appeal against the decision of Vaidya, J. in Appeal from Order No. 405 of 1969 reversing the order of the trial Court holding that the suit in question fell under S. 6 (iv) (a) of the Court-fees Act, and it had no jurisdiction to entertain the suit, the valuation of the subject-matter of the suit being over Rs. 25,000/-.

2. In the opinion of Vaidya, J., the suit was essentially a suit for accounts and it fell under S. 6 (iv) (i) of the Court-fees Act. The relevant prayers in the prayer clause of the plaint read thus:— (p. 93/p.bk)

"(a) That the defendants may be ordered and decreed to render to the plaintiff the account of the aforesaid payments from time to time made to the defendants for property taxes of the plaintiff's said immovable properties and on taking up such account to pay to the plaintiff such amount as may be found due and payable by the defendants to the plaintiff.

(b) That it may be declared that the amount of property taxes for which the said bills are from time to time are served on the plaintiff is paid to the defendants and nothing is due and payable by the plaintiff to the defendants for the property taxes for the period upto 31st March 1968.

(c) That the defendants, their officers, servants and agents be restrained by an order and injunction of this Honourable Court from taking any coercive action for recovery of the property taxes for the period upto 31st March, 1968 and from attaching or selling the plaintiff's said immovable properties more particularly described in Exh. A to the plaint".

Mr. Adik, who appears for the respondent-plaintiff, has taken us through the relevant allegations in the plaint. He referred to paras 5, 7, 10 and 13 of the plaint. It is not necessary to set out in detail the relevant allegations in the plaint, as Justice Vaidya has set out the same in his judgment. In substance what the plaintiff alleges is that towards the property tax properly due from him he has made payments from time to time and not only the amount due from him to the Bombay Municipal Corporation (hereinafter referred to as the Corporation) by way of property tax is paid, but the Corporation is over-paid. This is made clear by the annexures to the plaint. Exh. F to the plaint sets out the particulars of the amount which the plaintiff claims from the Corporation as

due and payable to him, which is Rupees 22,238.81. Exh. G to the plaint is headed "Summary of the amount due to the plaintiff from the Municipality". The amount shown under this head is Rupees 5,511.05. It is rather difficult to reconcile the headings of these two Exhibits, but it appears from Exh. G to the plaint that, according to the plaintiff, taking all the payments made by the plaintiff to the Corporation into account, he alleges that the Corporation is over-paid to the extent of Rs. 5,511.05. Merely because the plaintiff alleges that he has made payments from time to time, the Corporation is thereby over-paid, hence it is necessary to take accounts, it cannot be said to be a suit for accounts. What must be considered is not an allegation here and there in the plaint, but the substance of the plaint read as a whole. For a suit which can properly be called a suit for accounts, legal liability to render accounts against the defendant must appear on the allegations in the plaint. In the present case all that the plaintiff alleges is that the Corporation made demands for property tax from time to time, he made payments from time to time and he has not only paid the entire property tax due from him, but in fact he has over-paid the Corporation. Considering the nature of the suit, as disclosed by the allegations in the plaint, it is obvious that in law there is no liability on the Bombay Municipal Corporation to render accounts to the plaintiff. The Corporation issued bills from time to time and made demands pursuant to those bills. If it is the case of the plaintiff that he has paid the entire amount due from him by way of property tax and has over-paid the Corporation, it is for the plaintiff to prove the alleged over-payment. We do not think that the allegations in the plaint disclose any legal liability on the Corporation to render accounts to the plaintiffs. It is also important to note that on the allegations in the plaint what the plaintiff seeks to do is to repudiate the liability in respect of the amount claimed from him by the Bombay Municipal Corporation as property tax.

3. The averments in the plaint also indicate that the plaintiff alleges that some of the bills were wrongly issued by the Corporation, as the property tax mentioned in these bills and claimed by the Corporation was not due from him. The plaintiff alleges that he was not liable to pay that tax because some of the sheds were burnt, some licences were cancelled and there were some vacancies, as set out in Exh. F to the plaint. These allegations clearly indicate that the plaintiff challenges the very validity of such bills and the demands made by the Corporation pursuant to such bills. If so, it

Is clear that at least in respect of the bills and demands so challenged the plaintiff is disputing by the present suit the liability in respect of the whole amount of such bills and demands. On the allegations in the plaint considered as a whole, we are unable to hold that this is a suit for accounts. Merely because the plaintiff alleges various payments from time to time and consequent over-payment, it cannot be held to be a suit for accounts. There are no allegations in the plaint to indicate any probability of shifting balances on either side, as in the case of a mutual open and current account or even a running account between the parties on a specific agreement either express or necessarily implied. Exhibits F and G to the plaint considered with the allegations in the plaint make it abundantly clear that the plaintiff challenges his liability in respect of Rs. 22,238.81 claimed by the Corporation as property tax and in addition seeks to recover from the Corporation Rs. 5511.05 — the amount of alleged over-payment. This by itself takes the valuation of the subject-matter of the suit above Rs. 25,000/-.

4. Justice Vaidya in his judgment observes:—

(pages 22 & 23, p.bk).

"..... In the present case, the plaintiff is not asking for a declaration to obtain adjudication against recovery of money from the plaintiff. He wants a declaration or adjudication that the money is already recovered and the defendants are over paid. It is not the same thing as adjudication against recovery of money. Supposing there was a simple claim where the plaintiff were to say that Rs. 10,000/- were due as taxes and the Municipal Corporation had recovered through error Rs. 11,000/- and hence the plaintiff was entitled to refund of Rs. 1,000/-; such a suit cannot be considered as a suit for declaration to obtain adjudication against recovery of money from the plaintiff. Nevertheless, if what the plaintiff, as stated in the present plaint, claims is a declaration, after taking accounts, it would be necessary to restrain the defendants from recovering the taxes under the 17 notices of demand in respect of the period from April 1950 to March 31, 1968. The prayers (c) and (d) in the plaint are necessarily, therefore, incidental reliefs, which must follow if the plaintiff is entitled to get the reliefs prayed for in prayers (a) and (b)"

With respect, we are unable to agree with the reasoning adopted by Justice Vaidya. In the illustration given in the above-quoted observations it would be a simple suit for recovery of Rs. 1,000/-. Justice Vaidya in his judgment refers to *Lakshman v. Babaji*, (1884) ILR 8 Bom 31,

Ishwarappa v. Dhanji Bhanji, ILR 56 Bom 23 = (AIR 1932 Bom 111) and *Krishnaji Vinayak Belapurkar v. Motilal Magandas Gujarati*, 31 Bom LR 476 = (AIR 1929 Bom 337). We have perused these decisions. All that these decisions lay down is that initially it is for the plaintiff to value the subject-matter of the suit and such valuation initially determines the jurisdiction of the Court. They do not lay down what are the essentials of a suit for accounts. In our opinion, in order that a suit can be held to be a suit for accounts, the allegations in the plaint must indicate that on those allegations a legal liability to render accounts does arise against the defendant. In the present case, the averments in the plaint do not indicate such a liability. In our opinion, the present suit is one challenging the right of the Corporation to recover the amount it demands by way of property tax on the two grounds mentioned above and the suit does fall under Section 6 (iv) (a) of the Court-fees Act, as held by the learned trial Judge.

5. Mr. Adik for the plaintiff further submits that in any case the trial Court was wrong in holding that by the present suit the plaintiff seeks to challenge the right of the Corporation to recover Rs. 1,40,778.74.

6. In view of the prayer (c) in the plaint, we are unable to accept the above contention of Mr. Adik. The allegation of over-payment is obviously inconsistent with this contention. Mr. Adik now states before us that the plaintiff desires to confine his claim in the suit to the items mentioned in Exh. F to the plaint. We see no reason why the plaintiff should not be allowed to restrict his claim even at this stage. In order to do that, amendment to the plaint would be necessary. The trial Court shall allow the plaintiff to amend the plaint suitably. We may mention here that Mr. Adik has made it clear before us that although it was the plaintiff's contention that the Corporation is over-paid to the extent of Rs. 5,511.05, the plaintiff does not want to pursue that claim and desires to restrict his claim to Rs. 22,238.81, detailed in Exh. F to the plaint. In view of this statement at the Bar made by Mr. Adik for the plaintiff, the City Civil Court, Greater Bombay, will have jurisdiction to entertain the suit. The trial Court shall direct the plaintiff to pay the necessary court-fee taking into consideration that the suit falls under Section 6 (iv) (a) of the Court-fees Act and the subject-matter of the suit is to be valued at Rs. 22,238.81.

7. In view of what is stated above the trial Court shall reconsider whether injunction as prayed for by the Notice of Motion, out of which this appeal

arises, should be granted in respect of the claim in the suit, modified as indicated above.

8. After we dictated the above order Mr. Singhavi for the Corporation points out that the trial Court has recorded the finding, though incidentally, that the suit is barred by limitation in view of S. 527 of the Bombay Municipal Corporation Act. He submits that since the plaintiff has restricted his claim so as to bring the suit within the jurisdiction of the trial Court, the question of limitation can properly be considered. The determination of that question does not require any additional evidence, hence this Court itself can consider that question before directing the trial Court to proceed with the suit. In view of this submission, we adjourn the further hearing of the appeal.

7th October 1970.

9. Mr. Singhavi for the defendant submits that the present suit is obviously barred by limitation in view of S. 527 of the Bombay Municipal Corporation Act (Bombay Act III of 1888) and in case this Court accepts this contention, it would not be necessary to send down the proceedings to the trial Court for disposal of the suit. We have carefully considered this contention and we find that this is not a case where any further evidence would be necessary in order to decide the question of limitation. We may also mention here that Mr. Adik for the plaintiff did not contend that this question of limitation requires any evidence to be led, before it could be decided. Mr. Adik for the plaintiff invites our attention to para 11 of the plaint, which reads thus:

"The plaintiff submits that Section 527 of the Bombay Municipal Act does not apply to the facts of the case inasmuch as the said notices of demand dated 14th March 1968 are ultra vires and illegal and contrary to the provisions of the said Act. The plaintiff in any event submits that Section 527 of the Bombay Municipal Corporation Act is illegal and ultra vires the Constitution of India as it violates the fundamental rights guaranteed to the plaintiff under Arts. 14 and 19 (1) (f) of the Constitution of India"

Mr. Adik for the plaintiff did not press the constitutional point raised in the above paragraph of the plaint and obviously for good reasons. It is obvious that there is no substance in that contention. Merely because a statute not dealing with limitation in general prescribes a special period of limitation different from the one in the Limitation Act, it does not follow that the provision prescribing the special period of limitation violates Art. 14 of the Constitution,

much less Art. 19 (1) (f) thereof. Mr. Adik, however, submits that Section 527 of the Bombay Municipal Corporation Act does not apply to the facts of this case, because according to the plaintiff the notices of demand served by the Bombay Municipal Corporation on the plaintiff are illegal. In support of this contention reliance is placed on the decision of this Court in *Jalgaon Borough Municipality v. Khandesh Spg. and Wvg. Mills Ltd.*, 55 Bom LR 65 = (AIR 1953 Bom 204). In our opinion, this decision has no application to the facts of the present case. In that case it was held that the Municipality had no authority to levy the tax in respect of which the suit was filed and it was on that footing that the question whether that suit was within limitation arose before the Court. In the present case considering the allegations in the plaint as a whole, it is abundantly clear that the plaint alleges that the notices of demand are illegal because the amounts claimed by the said notices are not in fact due from the plaintiff, since the plaintiff claims exemption in respect of items mentioned in Exh. F to the plaint and with regard to the rest he alleges that he has already paid amounts which amply cover the claim made by the said notices of demand. There is no allegation in the plaint that the Corporation had no authority to levy property tax, all that the plaintiff alleges is that he is entitled to exemption from paying the property tax in respect of items mentioned in Exh. F to the plaint on the grounds mentioned therein. Thus the plaint alleges not absence of authority to levy the tax in question, but wrong levy in respect of the same, ignoring the grounds for exemption claimed by the plaintiff. The plaintiff further alleges that the Corporation has issued notices of demand in respect of the tax which he has already paid. These allegations do not amount to an averment that the levy of the tax is unauthorised. What the plaintiff alleges is that the levy thereof is wrong in view of some of the provisions of the Bombay Municipal Corporation Act. Mr. Adik points out that the plaint alleges that the Corporation was not entitled to recover certain amount of tax levied in respect of certain huts, because according to the plaintiff these huts were at the material time not in existence at all. There is nothing to show that the Corporation admits that at the material time the huts were not in existence. Merely because the plaintiff alleges that the huts were not in existence at the material time, the act of the Corporation in levying the tax and issuing notices of demand in that respect cannot be said to be unauthorised. Even if the plaintiff succeeds in establishing that the huts did not exist at the mate-

rial time, it would only mean that the assessment made by the Corporation was wrong, but it does not mean that the Corporation had no authority to levy the particular tax under the statute. Merely because the plaintiff chooses to dispute the existence of the huts at a particular time, the levy of tax for the same and issuing notices to recover that tax cannot be held to be unauthorised acts on the part of the Corporation. Mr. Adik further points out that some amount of tax is disputed because according to the plaintiff there were vacancies. All these allegations raise disputed questions of fact just to show that the assessment of the tax is wrong. On these allegations it cannot be said that there is an allegation that the tax sought to be recovered is illegal in the sense that it is unauthorised, the Corporation having no authority to levy it, apart from the question of wrong assessment thereof. In effect the plaintiff claims exemption in respect of certain items mentioned in Exh. F to the plaint. If the Corporation has the authority to levy and recover property tax—which is not disputed by the plaintiff—assessment of such a tax, even if made by wrongly disputing certain facts on which exemption can be claimed, cannot be held to be unauthorised, nor can steps to recover such tax be held to be unauthorised. In view of this, we are unable to accept the plaintiff's contention that the principle laid down by the decision mentioned above — 55 Bom LR 65 = (AIR 1953 Bom 204) applies to the facts of the present case. Even on the allegations in the plaint the acts of the Corporation complained of cannot be said to be unauthorised.

10. The relevant dates on the question of limitation are: The notices of demand which are sought to be challenged by the present suit were served on the plaintiff on 14-3-1968 and the present suit was filed on 29-4-1969. If the acts of the Bombay Municipal Corporation complained of in the plaint cannot be held to be unauthorised, it is obvious that Section 527 of the Bombay Municipal Corporation Act applies and the suit is clearly barred by limitation. Accordingly we hold that the present suit is barred by limitation.

11. We may mention here that Mr. Adik for the plaintiff did not contend before us that the question of limitation cannot be considered at this stage, particularly in an appeal against the order on a notice of motion for injunction.

12. We may also mention here that Mr. Adik for the plaintiff did not urge before us that the plaintiff is entitled to rely on Section 14 of the Limitation Act, as was done in the trial Court,

to show that the suit is within limitation. Mr. Adik concedes that the subject-matter of the earlier suit was different from that of the present suit.

13. In the result we allow the appeal, set aside the order passed by Mr. Justice Vaidya in appeal from Order No. 405 of 1969 and for reasons indicated above we dismiss the plaintiff's suit. The plaintiff shall pay the defendant costs throughout. The plaintiff shall also pay the defendant the costs of the suit in the trial Court. The plaintiff shall pay necessary court-fee on the plaint, as indicated above. If the plaintiff fails to pay the necessary court-fee on the plaint, the trial Court shall take steps to recover the same. Order accordingly.

14. In view of the above order, the trial Court shall only see that the plaint is amended by the plaintiff, as indicated above, and shall recover the necessary court-fee from the plaintiff. Since we have dismissed the suit, nothing more need be done by the trial Court.

Order accordingly.

AIR 1972 BOMBAY 354 (V 59 C 64)

BHOLE, J.

The Laxmi Co-operative Bank Ltd., Sholapur, Petitioner v. Mohan Govind Diwanji and another, Opponents.

Spl. Civil Appln. No. 2607 of 1967, D/- 10-9-1971, to set aside order of Extra Asst. J., Sholapur, D/- 31-7-1967.

Index Note: (A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947). Ss. 13 (1) (g) and 25 — "Bona fide" requirement — If certain premises were used for residential purposes on 19-1-1948 i.e., the date on which the Act came into force and if the landlord requires it for non-residential purposes his requirement cannot be said to be "bona fide" as it is in contravention of Section 25. Civ. R. A. No. 2172 of 1957, D/- 3-12-1959 (Bom). Followed.

(Paras 5, 6)

Brief Note: (A) Section 13 (1) (g) is not controlled by Section 25 but both the sections must be read together. In considering whether in a particular case the alleged requirement of the landlord is reasonable or bona fide the court is entitled to take into account whether it is not forbidden by any law. (Para 6)

Index Note: (B) Constitution of India, Article 226 — Patent error of Law — The Court commits a patent error when it holds that certain premises were

not let for non-residential purposes on 19-1-1948 and at the same time holds that the requirement of the owner (Bank) for its occupation is reasonable and bona fide when such requirement contravenes provisions of Rent Control Act.

(Para 7)

Cases Referred: Chronological Paras

(1959) Civil Revn. Appln. No. 2172 of 1957, D/- 3-12-1959 (Bom) 6
AIR 1931 PC 265 = 134 Ind Cas 321, Arthur Wijetilekha v. Don Edmond Ronashinghe 3
AIR 1915 PC 1 = 17 Bom LR 455, Bombay Cotton Manufacturing Co. Ltd. v. Raja Bahadur Shivalal Motilal 3.

V. B. Rege, for Petitioner; K. J. Abhyankar, for Opponent No. 1.

ORDER:— The plaintiff, who is the owner of the suit house, and who wanted to evict the defendant, but did not succeed is the petitioner here. The respondent-defendant is occupying a portion on the ground floor of the Plaintiff's house as a monthly tenant on a payment of Rs. 20/- as rent. The property is in the city of Sholapur. The petitioner bank wanted the premises for the purpose of conducting the business. It therefore required the premises reasonably and bona fide for its own use and occupation. It, therefore, served a notice on the respondent dated 2-7-1964 demanding the possession of the premises as well as arrears of rent till the date of the notice. The respondent denied the claim of the petitioner by a reply to that notice. He, however, sent all the arrears. The suit thereafter for possession and mesne profits followed. The respondent resisted the suit. The trial Court framed a number of issues and found that the respondent has established that it bona fide required the suit premises for its own use and occupation and that greater hardship would be caused to it than the respondent, if the suit is dismissed. The trial Court, however, was of the view that in spite of this the petitioner would not be able to recover possession of the suit premises because Section 25 of the Bombay Rents, Hotel and Lodging House Rates Control Act (hereinafter called "Rent Act") is a hurdle in the way of the bank. Under Section 25 a landlord shall not use or permit to be used for non-residential purposes any premises, which on the date of the coming into operation of the Rent Act were used for residential purposes. The date when the Rent Act came into operation is 19-1-1948. The trial Court found that the suit premises were used for residential purposes on 19-1-1948 and, therefore it cannot be used for non residential purposes. Accordingly, therefore, the peti-

tioners were not entitled to recover the suit premises from the respondent.

2. The petitioner went in appeal to the District Court and the learned Extra Assistant Judge, who heard the appeal, also found in favour of the petitioner being of the view that the petitioner required the premises reasonably and bona fide for its own use and occupation. But because according to the learned Assistant Judge the suit premises were not let out for non-residential purposes on 19-1-1948, the petitioner would not be entitled to recover possession of the suit premises. Accordingly, therefore, he dismissed the appeal. It is this order of the learned Assistant Judge, Sholapur, that is sought to be corrected by the petitioner here.

3. Mr. Rege, the learned advocate for the petitioner, contends here that the findings of fact as regards the nature of occupation on 19-1-1948 is erroneous, because of the wrong approach by the learned Assistant Judge. During the course of the judgment, the learned Assistant Judge considered the evidence of Gangadhar Jabde, who was the first owner of the suit premises, Janardhan Pandit, who had conducted a charitable dispensary in the suit premises from 1945 till 1948 and one Sakham Chatli, who had given the evidence as regards alternative accommodation. It is true that the learned Assistant Judge, while deciding the nature of occupation on 19-1-1948, observed that although these three witnesses had stated that there was a charitable dispensary in the suit premises yet they should not be believed because that they are all interested in the petitioner; there is hardly any evidence to show that they were really interested witnesses. But at the same time while deciding the point regarding the necessity of the premises for personal occupation, the learned Assistant Judge in the same breath believed these very witnesses. It is true, as contended by Mr. Rege the learned advocate for the petitioner that such an approach for recording a finding of fact is erroneous. The witnesses did state that there was a charitable dispensary in the suit premises between 1945 and 1948. This period would cover 19-1-1948. The learned Assistant Judge believed the witnesses on one point but did not believe for no reason the very witnesses on other connected points. In the absence of any evidence whatsoever to show that on 19-1-1948 the nature of occupation was residential, the learned Judge held that it was residential. Mr. Rege, therefore, argued that the case be remanded back because of this patent error. He gave another ground for this and that is that appellate Court should be slow to dis-

believe the oral evidence of witnesses when such evidence was believed by the trial Court. After all, according to him the trial Court has opportunity of seeing the witnesses and also the way they give evidence. Therefore when there is question of believing the oral evidence, the appellate Court should not hastily disbelieve the oral evidence which was believed by the trial Court. He relied for this on *The Bombay Cotton Manufacturing Co. Ltd. v. Raja Bahadur Shival Motilal*, 17 Bom LR 455 and *Arthur Wijetilekha v. Don Edmond Ronashinghe*, AIR 1931 PC 255. The proposition of law as argued by Mr. Rege is correct. But at the same time the appellate Court had always jurisdiction to reassess all the evidence as well as the circumstances that are on record. If therefore, the appellate Court reassesses the evidence, which it is entitled to do in appeal, it cannot be said to have committed an error in law. In my view, therefore, it would be difficult for me to correct this kind of error of fact, though serious, committed by the learned Assistant Judge.

4. In my view the real point for consideration however here is this. Is the learned Assistant Judge as well as the trial Judge right when they independently dealt with the issues: whether the petitioner had established that it required the premises reasonably and bona fide for its own use and occupation; and whether the suit premises were let out for non-residential purposes on 19-1-1948. Both the Courts below held that the suit premises were residential premises on 19-1-1948 both the lower Courts have also answered the question about the reasonable and bona fide requirement of the petitioner in the affirmative. Now Section 13 (1) (g) of the Rent Act runs as under:

"13. (1) Notwithstanding anything contained in this Act but subject to the provisions of Section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied—

.....
(g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purpose of the trust or

....."
It is argued that Section 13 is independent and is not subject to any of the provisions of the Rent Act, because the expression "Notwithstanding anything contained in this Act, but subject to the provisions of Section 15" is used by the legislature and, therefore, it intended to

make Section 13 independent of any provisions in the Act. It cannot, according to Mr. Rege, be subject to any provision in the Act except Section 15. It is, therefore, argued that Section 13 cannot also be subject to Section 25 of the Act. Section 25 of the Rent Act is as follows:

"25(1) A landlord shall not use or permit to be used for a non-residential purpose any premises which on the date of the coming into operation of this Act were used for a residential purpose. (2) Any landlord who contravenes the provisions of sub-section (1) shall on conviction be punishable with imprisonment for a term which may extend to three months or with fine or with both."

It is, therefore, clear that the legislature had intended that the landlord shall not use or permit to be used for non-residential purpose any premises which on 19-1-1948 were used for a residential purpose. If, therefore, the premises were used for a residential purpose on 19-1-1948, a landlord is prohibited from using the same for a non-residential purpose. Section 25 also provides a penalty. Any landlord who contravenes Sec. 25 (1) is punishable with fine or with imprisonment extending to three months.

5. The point, therefore, that arises here for consideration is whether the words 'bona fide' in Sec. 13 (1) (g) can be interpreted with Section 25 at the back of our mind. Words 'bona fide' have been interpreted to mean in good faith, 'bona fide' also means 'honestly' as distinguished from bad faith or without fraud or deception. A question of bona fides is a question of fact and, therefore, the Court is entitled to look to every relevant fact or circumstance affecting the landlord's possession. "Bona fide required" would also mean genuinely and honestly required. To reach this conclusion this Court must be satisfied about the reality of the claim made by the landlord. Now it is true that bona fide and reasonable requirements include requirements for business as well as for residence. But if the premises were used for residential purposes on 19-1-1948 and if the landlord requires it for non-residential purposes, by an application (sic) can his requirement be said to be a reasonable requirement in view of the provisions of Section 25? Can it be said to be also a bona fide requirement in view of Section 25? It is true that Section 13 seems to be a self-contained section and would not be subject to any other provisions in the Act. But at the same time the Court will naturally have to consider bona fide and reasonable requirement of the landlord in view of the provisions of Section 25. If he is not entitled to change the user because he

has not fulfilled a particular condition will he be still said to require the premises bona fide and reasonably? It appears to me that even though the expression "notwithstanding anything contained in this Act but subject to the provisions of Sec. 15" is used in Section 13 yet when we have to give a finding on the "bona fide and reasonable requirement", we will also have to consider the reasonable and bona fide requirement after also reading the provisions of Section 25.

6. I am supported in this view of mine by the decision of Tarkunde, J. in Civil Revn. Appln. 2172 of 1957, decided on 3-12-1959 (Bom). A similar question as the one before me arose before him and according to him Section 25 and Section 13 of the Act are not mutually exclusive. There being no conflict between Section 13 (1) (g) and Section 25 of the Rent Act, there was no question of one section governing the other. Tarkunde, J. has observed during the course of his judgment that in considering whether in a particular case the alleged requirement of the landlord is reasonable or bona fide; the Court is certainly entitled to take into account whether the requirement alleged and proved by the landlord is not forbidden by any law. According to him if a landlord desires to use the premises contrary to the penal provisions in Section 25 this Court will not regard such requirement as either reasonable or bona fide. This means in his view Section 13 (1) (g) is not controlled by Section 25, but both the provisions have to be read together. He then continues and says "reading these provisions together it follows that where the landlord claims that he requires the premises contrary to the limitations imposed by Section 25 the Court will not hold that he has fulfilled the requirement of Section 13 (1) (g)" with respect I agree with this view of Tarkunde, J.

7. Now, therefore, it cannot be held that the suit premises were not let for non-residential purposes on 19-1-1948 and at the same time held that the bank's requirement for the purpose of its occupation is reasonable and bona fide. It appears to me that this is a manifest and patent error of law on the face of the proceedings. It therefore appears to me that the approach by the trial Court as well as by the learned Assistant Judge to the issues is erroneous. The findings; therefore, in consequence of this erroneous approach are manifestly improper. It is better and proper therefore to remand the record and proceedings of this case back to the District Court, Sholapur for correcting this manifest error. If need be a fresh hearing be given to the parties before passing the final judgment according to law.

8. Petition allowed. Rule made absolute. No order as to costs.

Case remanded.

AIR 1972 BOMBAY 357 (V 59 C 65)

KOTVAL, C. J. AND VAIDYA, J.

Kekhasarao Sorabji Irani, Petitioner v. The State of Maharashtra and others. Opponents.

Special Civil Appln. No. 1554 of 1968, D/- 30-7-1971.

Index Note:— (A) Cri. P. C. (1898), Sections 435 and 438 — Issue of domicile and nationality certificate — Procedure for cancellation in case it is wrongly or illegally issued — Government cannot issue executive instructions for its cancellation.

Brief Note: (A) Issuing of a domicile and nationality certificate, which consists of important legal evidence of nationality, citizenship and domicile of a person, is a judicial function. There is no provision of law under which executive instructions can be given by the Government to the District Magistrate or the Magistrate concerned to cancel the certificate without even hearing the person affected. Even if the Government was of the opinion that the certificate had been wrongly or illegally issued by the Taluka Magistrate who was an executive Magistrate the District Magistrate ought to have been asked to exercise the powers under Section 435, Criminal P. C. by calling the papers and in case he was satisfied that the certificate was wrongly or illegally issued, to make a report under Section 438, Criminal P. C. Therefore, the instructions issued by the Government to the District Magistrate to cancel the certificate of the petitioner were totally unwarranted. (Para 16)

Index. Note:— (B) Constitution of India, Art. 5 (a) and (c) — Essentials of citizenship under the Article — Domicile.

Brief Note: (B) The petitioner was not only born in India, brought up in India, educated in India, but after he attained majority, he served in the ordnance factory and started a business of his own in Sholapur in 1947 making India his permanent home. His wife was also permanently residing in India. He had never left India after his birth.

Held that at the commencement of the Constitution i.e. on November 26, 1949, the petitioner was domiciled in India. Even assuming that his domicile of origin was Persia or Iran, as his father and mother hailed from Iran, in law he acquired a domicile of choice in India prior to the commencement of

the Constitution. He became a citizen of India under Article 5 as he was born in the territory of India and he had been ordinarily residing in the territory of India for not less than five years immediately preceding the commencement. (Paras 20, 21)

Index Note:— (C) Citizenship Rules (1956), R. 30 — Acquisition of foreign citizenship — Exclusive jurisdiction of Central Government.

Brief Note: (C) In the case of a citizen of India within Art. 5 of the Constitution it is only the Central Government which has jurisdiction to decide whether he has acquired foreign citizenship. This question has to be decided by the Central Government as provided by Rule 30 of the Rules framed under the Citizenship Act, 1955. Unless the Central Government decides this question, such a person cannot be treated as a foreigner and cannot be deported from the territories of India. AIR 1971 SC 1382, Relied on. (Para 24)

Cases Referred: Chronological Paras

AIR 1971 SC 1382 = 1971 Cri LJ 1103, State of Uttar Pradesh v. Rahmatullah	24
AIR 1956 Bom 729 = 58 Bom LR 825, Michael Anthony Rodrigues v. State of Bombay	20
AIR 1955 SC 36 = (1955) 1 SCR 697, Central Bank of India Ltd. v. Ram Narain	20
(1892) 3 Ch 180 = 67 LT 689, Craignish v. Craignish	20
(1858) 7 HLC 124 = 28 LJ Ch 396, Whicker v. Hume	20

A. A. Peerbhoy with A. N. Salik, for Petitioner; S. N. Naik i/b. M/s. Little and Co. Attorneys, for Opponents.

VAIDYA J.:— The petitioner Keshasrao Sorabji Irani was born in Bombay in the year 1922. His father Sorabji Kekobad Irani came to India from Persia in the year 1902 to assist his sister in the business of running a restaurant in Bombay. Sorabji married in 1913 the petitioner's mother Goharbai in Bombay. He continued his business in Bombay and settled down in India and never went back to his country of origin or went out to any other country till his death in the Sassoon Hospital at Poona. When Sorabji died, the petitioner was 7 months old. The petitioner was educated at Poona and passed his Matriculation examination in the year 1940. After passing the Matriculation examination he studied for a diploma course in Engineering in the Poona Engineering College. In 1944, he obtained a diploma in Mechanical Engineering from the College of Engineering at Poona. Thereafter the petitioner worked in the ammunition factory at Kirkee, first as a

supervisor trainee from May 1944 to November 1944, and then as supervisor B grade in Material Estimate Office from December 1944 to March 1946.

2. In 1947 the petitioner settled down in Sholapur. He has been running a general store and restaurant at Sholapur since that date till now. On October 19, 1949, he married one Banu Rashid. Banu Rashid is an Indian citizen born in India in 1932 and her parents were also domiciled in India. The petitioner resided in India since his birth. He never went out of India. The petitioner, therefore, claims to be a citizen of India under Article 5 of the Constitution of India. He continued to enjoy all the rights of the citizens of India including the right to vote.

3. However, the petitioner is being harassed from the year 1960 by police officers in the office of the District Superintendent of Police at Sholapur and other authorities of the Government of Maharashtra. The harassment began in the year 1960 when one Sub-Inspector Joshi approached him and told him that as he was Irani, he should register himself and his wife as foreigners. The petitioner protested. He told S. I. Joshi that he was not an Iranian national but an Indian citizen by birth. He also told him that his wife was also an Indian citizen, that his name "Irani" was only a surname and had nothing to do with his nationality or domicile. The Sub-Inspector, however, told him that he and his wife must fill in the forms of registration under Registration of Foreigners Rules and that if he did not do so, he would be prosecuted and expelled from India. He also assured him that if he filled in the forms, nothing would happen to him. The petitioner, therefore, filled up from A under the Registration of Foreigners Rules, 1939. Even in that form, against the column "present nationality", he mentioned "Indian". Against the column "previous nationality, if any" he mentioned "Nil". This form was filled in by him on January 5, 1960; and similar forms were also filled in at that time by the wife of the petitioner and his mother Goharbai. In the form filled in by Goharbai, her nationality was mentioned as Iranian because she wrongly believed that as she was born in Iran, she was Iranian national and had also obtained as Iranian passport.

4. Nothing happened till April 10, 1961 when in pursuance of a letter addressed by the District Superintendent of Police, Sholapur a residential permit was issued to the petitioner stating:—

"As you are not in possession of valid national passport, you have been permitted to stay in India for three months, i. e. until 10-7-1961."

It was also stated in the letter that the petitioner should get a valid passport from his Consul in India before the above date. A similar letter and residential permit were received by the petitioner's wife. The petitioner then approached the office of the District Superintendent of Police and met one Sub-Inspector Padgaonkar and told him that the said residential permits were illegally and wrongly issued to the petitioner and his wife notwithstanding that they were Indian citizens. S. I. Padgaonkar advised the petitioner to apply for naturalization under Section 6 (1) of the Citizenship Act read with Rule 17 (1) of the Citizenship Rules. Acting on the advice of S. I. Padgaonkar, the petitioner filled in form No. XII prescribed under Rule 17 (1). Even in that form, however, he stated that he was an Indian citizen by birth. A similar form was filled in by his wife. The two forms were forwarded to the Secretary, Ministry of Home Affairs, Government of India, New Delhi through the Collector of Sholapur. On August 18, 1961, the Additional Collector, Sholapur returned the forms to the petitioner directing him to send the same directly to the Government of India. The petitioner, therefore, sent the two forms directly to the Secretary Ministry of Home Affairs, Government of India, New Delhi. The Government of India returned the forms with a remark that as the affidavits in support of the two forms did not bear the same date. The forms were returned. Nothing happened thereafter till the year 1964.

5. On July 18, 1964, the District Superintendent of Police, Sholapur once again called upon the petitioner to obtain a passport and apply for extension of time of his stay in India. The petitioner, who had not consulted any lawyer or taken any legal advice till this stage, thought it necessary to take legal advice. He was advised then that as he was an Indian Citizen, he had not to apply under Section 6 (1) of the Citizenship Act. He also wrote a letter to the Assistant Secretary, General Administration Department Government of Maharashtra, Bombay on September 24, 1964 submitting that the residential permits were wrongly and illegally issued to him in the past and that he should be treated as an Indian citizen as he was always an Indian citizen. The petitioner was directed by a letter dated December 30, 1964 by the District Superintendent of Police to give particulars about himself and his wife claiming to be citizens under the Constitution in answer to the questionnaire sent to him. In that reply the petitioner's father's nationality was described as "Not known but domiciled in India".

6. Notwithstanding this, however, on July 15, 1965, the District Superin-

tendent of Police, Sholapur informed the petitioner that the Government of Maharashtra had not considered the request of the petitioner to be treated as an Indian citizen for the reason that the details about the father of the petitioner were not known. The petitioner then sent a letter to the Government of Maharashtra on September 27, 1965 giving all the details about himself and his father and the circumstances in which he and his wife had filled up previously certain forms. That letter runs as follows:—

"68, Railway Lines,
Sholapur.

Dated: 27-9-1965

From

Mr. K. S. Irani,
68, Railway Lines,
Sholapur.

To

The Under Secretary,
The Govt. of Maharashtra,
General Administration Department,
Sachivalaya,
Bombay.
Subject: Request for grant of Indian
citizenship.

Sir,

I sent an application on 24-9-1964 to Your Honour for grant of Indian citizenship to me. I had stated in that application that I was born in Bombay in the year 1922 and educated in Engineering College, Poona. I have given all the details about myself and parents in that application. I and my wife being Indian citizens, it was not necessary for me and my wife to get registered as Indian Nationals, when we are already Indian citizens. But when the District Superintendent of Police, Sholapur intimated to my mother, my wife and myself in 1961 to get registered as Iranian Nationals, we got ourselves, by misunderstanding, so registered.

When I sent my application dated 24-9-1964 referred to above, I had sent certificates and forms duly filled in along with the application. I have received a letter No. 79/IP/937/SB of 1965 dated 15th July 1965 from the District Superintendent of Police, Sholapur that my application dated 24-9-1964 referred to above to the General and Administration Department, Government of Maharashtra could not be considered for the reasons stated in the D. S. P.'s letter dated 15th July 1965 referred to above.

It appears grant of Indian citizenship has been withheld from me and my wife mainly because the authorities require additional information about my father.

My father, late Sorabji Kaikobad Irani came to India from Iran in about 1902, when he was 17 or 18 years old. He was called to India for assisting in Hotel

business by his eldest sister, who was staying in Bombay and who is not living now. My father's younger sister Gulbai Home Driver aged about 70 is at present staying at Poona in Camp area. She has been staying in Poona since childhood.

My father died in 1922 in Sassoon Hospital, Poona, when I was 7 months old. My parents were married in India in about 1913 and I was born in 1922. My father never went back to Iran, after he came to India in 1902.

My father's sister Gulbai Home Driver who is staying in Camp area gave me the above information about my father.

I feel assured that the information supplied above will satisfy Your Honour that impediments in the way of grant of Indian citizenship to myself and my wife as mentioned in the letter dated 15th July 1965 of the D. S. P., Sholapur referred to above can very well be removed and early orders may be passed in my case and that of my wife regarding the grant of Indian citizenship.

Since, as stated in the D. S. P.'s letter dated 15th July 1965 my wife's case depends upon my claim to Indian domicile, this application may be treated as one on behalf of myself and my wife.

I request that Your Honour will give an early and favourable decision in the matter.

I beg to remain,

Sir,

Yours most obedient servant,

Sd/- K. S. Irani."

Surprisingly, the Government of Maharashtra rejected the request of the petitioner to be treated as a citizen of India; and the petitioner was informed about this decision by the District Superintendent of Police on April 21, 1966. The petitioner asked the Government of Maharashtra by his letter dated April 28, 1966 to furnish him the reasons as to why he was not being treated as the citizen of India.

7. The petitioner also tried to know more about his citizenship and was advised that he should obtain a domicile certificate and the certificate of citizenship from the taluka Magistrate, North Sholapur. Accordingly, he obtained a domicile certificate on July 8, 1966 which runs as follows:—

"No. II-MAG-129/66

Sholapur 8-7-66.

CERTIFICATE OF AGE, NATIONALITY, DOMICILE, ETC.

(Issued by Authorities in the State of Maharashtra)

On submission of the proof noted below:—

It is hereby certified that Shri Kekhasarao Sorabji Irani was born on

the 19th day of April in the year one thousand nine hundred and twenty two only at Bombay Taluka Bombay District Bombay in the State of Maharashtra within the territory of India or of Maharashtra that he is a CITIZEN OF INDIA that he is domiciled in the State of Maharashtra (add, if necessary) by reason of birth that he belongs to community Parshi.

Particulars of Proof submitted.

A Answers given by the applicant on the form of questionnaire prescribed.

B Birth certificate issued by the Public Vaccination Medical Practitioner, Bombay.

C Affidavits or Declaration of by the applicant.

D Other proof certificate of Birth Registry from Asstt. Health Officer, Greater Bombay Municipal Corporation, Public Health Department.

Dated at Sholapur this 8th day of July 1966.

(Seal of the
Taluka Executive
Magistrate,
Sholapur.)

Sd/- 8/7

Taluka Executive Magistrate,
North Sholapur".

It is clear from the certificate that the Taluka Magistrate gave the certificate after considering the answers given by the petitioner in the form of questionnaire prescribed for obtaining the domicile certificate, birth certificate issued by the Public Vaccination Practitioner, Bombay, affidavits made by the petitioner and the certificate of birth registry from Assistant Health Officer, Greater Bombay.

8. Though he obtained this certificate, the petitioner's troubles did not end. He received from the District Superintendent of Police a letter on August 19, 1967, more than a year after he obtained the aforesaid domicile certificate. The letter sounds rather curious. The letter stated:—

"I have the honour to inform you that the Government desire whether you and your wife are still interested in acquiring Indian citizenship. If so, you are requested to apply afresh as your old application is out-dated".

By his letter dated August 30, 1967, the petitioner replied that as the petitioner and his wife were Indian citizens, there was no necessity for them to make any application for citizenship.

9. In spite of this, on March 26, 1968, the petitioner received a letter from the District Magistrate, Sholapur calling upon the petitioner to attend his office on

March 28, 1968 "to receive instructions in making an application for grant of a certificate of naturalization under S. 6 (1) of the Citizenship Act and in producing the requisite documents along with the said application". The petitioner did not attend the office. He sent a letter on April 26, 1968 reiterating that he was already an Indian citizen; and he could not be compelled to apply for naturalization, bringing to the attention of the District Magistrate the fact that he had already obtained certificate of age, nationality and domicile, a copy of which was forwarded to the District Magistrate along with the letter.

10. It is strange, however, that instead of accepting the certificate, the authorities took the extraordinary step of trying to take back the certificate of domicile issued by the Taluka Magistrate from the possession of the petitioner, so that he should be prohibited from making use of the said document as evidence of his status. The Tahsildar, North Sholapur, who is also the Taluka Magistrate, North Sholapur, by his letter dated... April 1968 called upon the petitioner to attend his office with the certificate of nationality and domicile dated July 8, 1966. At this stage, the petitioner apprehended that there was a sinister move to deprive him of his certificate of nationality and domicile. He contacted his legal advisers at Bombay. They advised him not to produce the certificate of domicile before the Taluka Magistrate. On July 5, 1968, the Tahsildar wrote a further letter which runs as follows:—

"NOTICE"

No. O. P. L-M-68
Sholapur,
5-7-68.

To

Shri K. S. Irani,
Sholapur.

From

Tahsildar,
Sholapur.

Sir,

You have not produced domicile certificate upto 16th May 1968 as promised by you on 8th May 1968. You are therefore requested to produce the same on or before the 10th July 1968. You are therefore informed that if you fail to do so severe action will be taken against you and as per Government Rules domicile certificate will be taken back from you.

Sd/-

Tahsildar, South Sholapur".

11. On receipt of this letter, the petitioner filed the above petition in this Court on July 30, 1968 under Art. 226 of the Constitution of India submitting that he was being harassed unnecessa-

rily by the Police and the Government authorities from 1960 onwards.

12. In the petition, after setting out the facts mentioned hereinabove, he contended that having regard to the facts of birth and subsequent life of the petitioner, his status as a citizen of India under Art. 5 of the Constitution of India was established beyond a shadow of doubt. He submitted that he was domiciled in India at the time of the commencement of the Constitution having been born in India in 1922 and having been brought up in India, educated in India and carrying on business permanently and living permanently in India. He also submitted that his conduct in filling up the forms under the Registration of Foreigners Rules and under Section 6 of the Citizenship Act was not voluntary and was as a result of illegal pressure and threat by the police officers, that even in these forms, he had mentioned the true fact, viz., that his nationality was Indian and hence his status as a citizen of India, was not affected by filling up those forms. He, however, apprehended that the authorities including respondent No. 1, the State of Maharashtra, respondent No. 2 the District Superintendent of Police, Sholapur and respondent No. 3, the Taluka Magistrate, North Sholapur, Sholapur were contemplating immediate action which would be inconsistent with his status as an Indian citizen. He alleged in the petition that his fundamental rights as a citizen of India were in jeopardy due to the threatened action on the part of the respondents. He, therefore, prayed that it should be declared that he is a citizen of India and entitled to all the protection and rights guaranteed to the citizen of India under the Constitution of India. He also prayed for an order restraining respondent No. 1, the State of Maharashtra, respondent No. 2, the District Superintendent of Police, and respondent No. 3, the Taluka Magistrate, North Sholapur, Sholapur from deporting the petitioner out of India and/or forcing him to take passport of any foreign country and/or taking any action which may be inconsistent with the constitutional status of the petitioner as a citizen of India. He prayed for a further injunction restraining the respondents from calling upon the petitioner to surrender the certificate of nationality and domicile given to him.

13. The petition was admitted by this Court on August 14, 1968. The respondents did not care to file any affidavit in reply to the petition till January 23, 1970. On that day, however, respondent No. 3, the Taluka Magistrate, who was also the Assistant Electoral Registration Officer, Sholapur City South Assembly Constituency, Sholapur, called upon the

petitioner to show cause why the objection to the inclusion of his name in the electoral roll should not be accepted. The objection was on the ground that the petitioner was not a citizen of India. The petitioner then wrote a letter informing respondent No. 3 that the above petition was pending in this Court; and as the petitioner had exercised his franchise at all the general elections previously, he should not be deprived of his franchise illegally. He reiterated that he was a citizen of India at the commencement of the Constitution of India and he was protected by Art. 5 of the Constitution of India. In spite of this reply, the name of the petitioner was deleted from the electoral list. He, therefore, filed Civil application No. 348 of 1971 alleging that respondent No. 3 had committed contempt of this Court in omitting the petitioner's name from the list.

14. It was not before June 21, 1971 that the respondent filed their affidavit in reply to resist the petition. On that day, the Under Secretary to Government of Maharashtra, General Administration Department filed an affidavit in reply vaguely denying the allegations made by the petitioner with regard to his birth, education, upbringing occupation and living in India and calling upon the petitioner to produce all the relevant papers without making any serious attempt to repel any of the submissions made by the petitioner under Art. 5 of the Constitution of India. Notwithstanding the specific allegations against Sub-Inspector Joshi and Sub-Inspector Padgaonkar, the respondents did not care to file any affidavit of those officers. The Under Secretary filed the affidavit in reply merely denying the allegations made without stating on what basis he was denying those allegations. The Under Secretary, who did not claim any personal knowledge about the facts alleged in the petition, filed the affidavit in reply stating that the allegations were "not admitted" and yet, he relied merely on the forms filled up by the petitioner and his wife under Section 6 (1) of the Citizenship Act, 1955 and the Registration of Foreigners Rules. He also relied on certain directions to cancel the said certificate issued to the Taluka Executive Magistrate. In paragraph 4 of his affidavit in reply, he said:—

"The Superintendent of Police reported to the Collector in his letter dated 9th October 1967 that the applicants were born and brought up in India and there was nothing adverse against them and that he had no objection to consider the request of the applicants. The Superintendent of Police obtained fresh applications from the applicants and submitted them to the Government together with a fresh report. The Government on re-

ceipt of the said report vide their letter in G. A. D. No. CTZ(N) 49/61 dated 1-2-1968, requested the District Magistrate to ask the applicants to apply for naturalization in Form XII of the Citizenship Rules, 1956 to the Government of Maharashtra with requisite information and documents. It was pointed out in the said letter that the domicile and citizenship certificate obtained by the petitioner from the Taluka Executive Magistrate North Sholapur were quite incorrect and the Taluka Executive Magistrate was directed to cancel the said certificate".

In paragraph 26, however, he stated:

"I however say that the District Magistrate, Sholapur directed the Taluka Executive Magistrate to cancel the certificate of domicile issued by him to the petitioner for the reason that the petitioner was an Iranian national and was registered as a foreigner".

The respondents have not cared to place before the Court the so-called directions issued by the District Magistrate to the Taluka Executive Magistrate.

15. Mr. Naik, who appeared for the respondents, produced before us a file from the Sachivalaya, which showed that the Under Secretary, General Administration Department, had informed the District Magistrate that it was not correct on the part of the Taluka Magistrate to have issued a certificate of domicile and nationality to the petitioner; and the District Magistrate was advised: "The said certificate may be cancelled immediately under intimation to Government. The circumstances under which the said certificate was issued may also be explained". Mr. Naik relying on this letter argued that in pursuance of these directions, the District Magistrate must have issued instructions or directions to the Taluka Magistrate; and accordingly, the Taluka Magistrate called upon the petitioner to return the domicile certificate. The Under Secretary has submitted in the affidavit that the domicile certificate issued by the Taluka Magistrate was invalid because the petitioner and his wife had applied under Section 6 (1) of the Citizenship Act and were registered under the Registration of Foreigners Rules in the Office of the District Superintendent of Police at Sholapur. He has further submitted in the affidavit in reply that because the petitioner "who has been registered as an Iranian national and has refused to comply with the request made by the Government of Maharashtra to put in an application for naturalization under Section 6 of the Citizenship Act", he was not entitled to any relief prayed for in the petition.

16. At the outset, it is necessary to observe that we are amazed at the

manner in which the submissions made by the petitioner since 1960 have been dealt with by the Police Department and by the General Administration Department of the Government of Maharashtra. It is shocking to see that by executive instructions, directions are given by the General Administration Department to the District Magistrate to cancel a certificate of domicile issued by a Taluka Magistrate. Issuing of a domicile and nationality certificate, which consists of important legal evidence of nationality, citizenship and domicile of a person, is a judicial function. If at all there was something wrong with the certificate, the District Magistrate ought to have been asked to call for the papers and see whether the order was properly passed under Section 435 of the Criminal P. C.; and if the District Magistrate was satisfied that the certificate was wrongly or illegally issued, he ought to have made a report to this Court under Section 438 of the Criminal P. C. Disregarding all these provisions and the functions of the Taluka Magistrate, who is an Executive Magistrate under the Criminal P. C. it pains us to note — instructions have been issued, without even hearing the petitioner, to cancel the certificate; and the Taluka Magistrate proceeded to call upon the petitioner to give back the certificate in a most extraordinary manner. It is in these circumstances that the petitioner, who claims to be a citizen of India and about whose citizenship we have no doubt whatsoever, was compelled to file this petition before us about the callous manner in which he was being deprived of his certificate of domicile and nationality by officers, who are admittedly acting under the Government of Maharashtra in the General Administration Department as stated by the Under Secretary in his affidavit in reply. We asked Mr. Naik to point out any provision of law under which such instructions could be given by the Government to the District Magistrate or to the Taluka Magistrate. He had to concede there was none.

17. The next question is whether the fact (1) that the petitioner and his wife filled up forms under the Registration of Foreigners Rules; (2) that they further filled forms under the Citizenship Act, 1955; (3) that the petitioner's mother claimed to be an Iranian national and obtained an Iranian passport; and (4) that the petitioner refused to apply for naturalization on the ground that he was already a citizen of India, are grounds on which the petitioner could be considered as a foreigner.

18. The petitioner claims citizenship under Art. 5 of the Constitution of India which runs as follows:

"At the commencement of this Constitution, every person who has his domicile in the territory of India and

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India".

The petitioner claims to be a citizen both under clause (a) and clause (c) of Art. 5 as he was born in the territory of India in 1922, as stated above; and after he attained his majority, he made India his permanent home; and, therefore, his domicile was in the territory of India. It is also his contention that he has been ordinarily resident in the territory of India for not less than 5 years immediately preceding the commencement of the Constitution.

19. As stated above, the affidavit in reply merely challenged the petitioner to produce all the relevant documents. There is no effective denial of the facts alleged in the petition. At the hearing of the petition, the Counsel for the petitioner produced before us for perusal the petitioner's birth certificate, his school certificate, the diploma of engineering given to him by the Engineering College at Poona and other documents referred to in the petition. The documents fully supported the averments made in the petition. His father died when he was only 7 months old. It is clear from the facts stated above that even his father had come to India to settle down permanently in India. Perhaps, his domicile was also India, as there is no evidence whatsoever before us to show that he ever went back to Iran after he once came to India to manage the restaurant of his sister. The mere fact that the petitioner's mother described herself as an Iranian or obtained an Iranian passport would not change the domicile of the father of the petitioner. Apart from that, the petitioner was not only born in India, brought up in India, educated in India, but after he attained majority, he served in the ordnance factory and started a business of his own in Sholapur in 1947 making India his permanent home. His wife was also permanently residing in India. He had never left India after his birth.

20. Having regard to the above facts, which are not at all effectively or properly traversed by the respondents, we have no doubt in our mind that at the commencement of the Constitution, i.e., on November 26 1949, the petitioner was domiciled in India. He became a citizen of India under Art. 5 as he was born in

the territory of India and he had been ordinarily residing in the territory of India for not less than five years immediately preceding the commencement. "By domicile," as remarked by Lord Cranworth in *Whicker v. Hume*, (1858) 7 HLC 124 at p. 160.

"We mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it".

A more sophisticated definition of domicile is that it "is a conception of law which, though founded on circumstances of fact, gives to those circumstances an interpretation frequently different from that which a layman would give to them and it is a conception of law employed for the purpose of establishing a connection for certain legal purposes between an individual and the legal system of the territory with which he either has the closest connection in fact or is considered by law so to have because of his dependence on some other person".

The American Law Institute has provided a useful definition of domicile as "the place, generally the home, which the law assigns a person for certain legal purposes". This Court and the Supreme Court have applied the definition of domicile given by Mr. Justice Chitty in *Craigish v. Craigish*, (1892) 3 Ch 180 at p. 192, viz.,

"That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom".

See *Central Bank of India Ltd. v. Ram Narain*, (1955) 1 SCR 697 = (AIR 1955 SC 36) and *Michael Anthony Rodrigues v. State of Bombay*, 58 Bom LR 825 = (AIR 1956 Bom 729).

21. Applying any of these definitions, it is clear from the facts of this case relating to the birth, conduct and life of the petitioner that he must be considered to have had Indian domicile prior to the commencement of the Constitution. His permanent home was in India from his birth and particularly from the time he attained his majority. Even assuming that his domicile of origin was Persia or Iran, as his father and mother hailed from Iran, his occupation is carried on in India and he and his family have been residing in Sholapur permanently and hence in law he acquired a domicile of choice in India prior to the commencement of the Constitution. The respondents have not been able to place any material before us which shows any present intention of the petitioner of removing himself from India or leaving the shores of India.

22. It is, however, contended by Mr. Naik on behalf of the respondents that it is not open to the petitioner to contend that he was a citizen of India as he had signed the forms referred to above under the Registration of Foreigners Rules and Section 6 (1) of the Citizenship Act. There is no merit in this contention, because, as stated above, the petitioner has clearly adumbrated in his petition the facts and circumstances in which he was made to sign these forms. It is also clear from these forms that even when signing these forms, he has correctly stated that he had no previous nationality and he was always from his birth an Indian citizen.

23. Mr. Naik submits that the story of the petitioner that he was induced by coercion and pressure by the police officers to sign these forms is a cock and bull story inasmuch as the petitioner was running a restaurant and store at Sholapur and was clever enough to get a certificate of nationality and domicile from the Taluka Magistrate suppressing these facts. There is no substance in this contention, because the petitioner had not suppressed any of the facts. On the contrary, when he was oppressed by the repeated blunders of the police officers in asking him to apply under the Citizenship Act and to register himself as a foreigner, he took legal advice and obtained the certificate of domicile and nationality. Even in the forms signed by him, as stated above, he described himself as a citizen of India.

24. Moreover, once the facts establish that he was a citizen of India under Art. 5 of the Constitution of India, it is now well settled that it is only the Central Government which has jurisdiction to decide whether he has acquired foreign citizenship. This question has to be decided by the Central Government as provided by Rule 30 of the Rules framed under the Citizenship Act, 1955. Unless the Central Govt. decides this question, such a person cannot be treated as a foreigner and cannot be deported from the territories of India. See *State of U. P. v. Rahamatullah*, AIR 1971 SC 1382 in which case, Rahmatullah was arrested for overstaying in India as a foreigner on July 11, 1963. On March 6, 1965 he was charged by the City Magistrate, Varanasi with the commission of an offence punishable under Section 14 of the Foreigners Act. The prosecution alleged that he was a Pakistani national and had on April 1, 1965 entered into India on a Pakistani passport dated March 15, 1955 and Indian visa dated March 22, 1955 obtained by him as a Pakistani national and even after expiry of the permitted period, he was overstaying without a valid passport or visa. The accused pleaded in that case

that though he had entered India on a Pakistani passport, he was not a Pakistani national. On the contrary, he claimed to be an Indian citizen and, therefore, rightfully living in India. According to him, he had been born in India of Indian parents in 1932 and was an Indian citizen under the Constitution. The High Court of Allahabad in revision set aside the conviction ordered by the Magistrate and confirmed by the Sessions Judge as the High Court found on the facts relating to the life and conduct of the accused that he was not a foreigner when he entered India though he had obtained a Pakistani passport. The High Court also held that having not entered as a foreigner, his case was outside paragraph 7 of the Foreigners Order, 1948, made under Section 3 of the Foreigners Act. The order of acquittal passed by the High Court was confirmed by the Supreme Court after reviewing several authorities relating to the question of acquisition of foreign citizenship by a citizen of India; and the Supreme Court observed:—

"It seems to us to be obvious that till the Central Government determined the question of the respondent having acquired Pakistan nationality and had thereby lost Indian nationality, he could not be treated as a foreigner and no penal action could be taken against him on the basis of his status as a foreigner, being a national of Pakistan".

In our view, therefore, even in the instant case, the respondents were acting illegally in treating the petitioner as a foreigner notwithstanding the clear facts of his life and conduct which showed that he was a citizen of India. Section 2 (a) of the Foreigners Act, 1946 defines a foreigner as a person who is not a citizen of India. Having regard to all the facts and circumstances of the case including the forms relied on by the respondents, we find that there is nothing on the record before us to show that the petitioner was not a citizen of India.

25. We must, therefore, declare that the petitioner was a citizen of India at the commencement of the Constitution of India and continues to be so and is entitled to all the protection and rights guaranteed to a citizen of India under the Constitution of India. The respondents must also, therefore, be prohibited by an injunction from deporting the petitioner out of India and/or forcing him to take passport of any foreign country and/or taking any action which may be inconsistent with the constitutional status of the petitioner as a citizen of India on the basis of any of the orders referred to in the petition. The petition succeeds. Rule absolute. The respondents to pay the costs of the petitioner.

26. In view of these reliefs granted to the petitioner, the Counsel for the petitioner does not press for the reliefs prayed for in Civil Application No. 348 of 1971. Civil Application No. 348 of 1971, is, therefore, allowed to be withdrawn.

Order accordingly.

AIR 1972 BOMBAY 365 (V 59 C 66)

VIMADALAL, J.

P. B. Bhatt and others, Plaintiffs v. V. R. Thakkar and others, Defendants.

Suit No. 401 of 1964, D/- 27-7-1971.

Index Note:— (A) Evidence Act (1872), Ss. 91 and 92 — The expression "terms" of a contract in S. 91 and the corresponding expression in S. 92 have no application to a statement contained in a writing which is in the nature of a condition precedent to the very formation of that contract.

Brief Note:— (A) The expression "terms" in Sections 91 and 92 must relate to statements, assertions or representations contained in a written contract which relate to the subject-matter of the contract and to something to be done or not to be done under the contract, and has no application to a provision in the nature of condition precedent to the very existence or formation of a contract. (1908) ILR 31 Mad 45, Rel. on.

(Para 2)

Index Note:— (B) Evidence Act (1872), S. 92, Proviso (6) — An extrinsic evidence is admissible for the purpose of showing the circumstances in which the document came to be prepared and executed with a view to arrive at the true effect of the transaction to which the document relates.

Brief Note:— (B) An extrinsic evidence is admissible for the purpose of finding out the meaning of the words which have actually been employed, or what is the same thing, in order to translate the language of the document by assigning a definite meaning to terms capable of such explanation with a view to arrive at the true effect of the transaction in question in cases in which the words used are such that one might suspect that they do not convey the intention correctly or in other words, there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer or to the facts existing at the time when the document was executed. (Para 3)

Even in cases in which the expression used in a written contract is "subject to a written contract" or other equi-

valent expression, it would be open to the Court, and indeed, it would be its duty to extract the intention of the parties and to see whether there is cogent evidence to indicate that the parties intended a binding contractual obligation to come into existence even before a writing was executed. AIR 1969 Bom 231, Rel. on. (Para 3)

Cases Referred: Chronological Paras

AIR 1969 Bom 231, Belapur Co. Ltd. v. Maharashtra State Farming Corpn.	3
AIR 1923 PC 47 = 50 Ind App 25, Harichand v. Govind	3
(1908) ILR 31 Mad 45 = 18 Mad LJ 1, Venkatasubbiah Chetty v. Govindarajulu Naidu	2

M. P. Laud with A. H. Mehta and M. B. Rele, for Plaintiff; M. H. Shah with A. N. Mody, G. A. Thakkar and A. B. Divan, for Defendants Nos. 1 to 5.

ORDER:— Whilst the first plaintiff was being examined in-chief by Mr. Laud and was deposing to an interview between himself and plaintiffs Nos. 2 and 3 accompanied by a broker named Narayandas Budhwani and the first defendant and one Chandrakant Thakore, he deposed to the terms which were offered by the first defendant in regard to the businesses of Femina Stores and Meghdoot Restaurant which were proposed to be taken by the Plaintiffs under a conducting agreement, along with an option to purchase the same. The first plaintiff deposed that after those terms were proposed, there was a discussion which went on for about half-an-hour. The first plaintiff was then put a question, "what happened then?" At that stage Mr. Shah on behalf of defendants Nos. 1 to 5 raised an objection to the effect that in view of the plaintiffs' own case in para 7 of the plaint that the agreement in question had been reduced into writing in the form of annexure 'A' to the Plaint, no oral evidence could be permitted to be given having regard to the provisions of Sections 91 and 92 of the Indian Evidence Act. I have heard counsel on both sides at considerable length on that question of admissibility. Mr. Laud's contention on that question was twofold. First he contended that S. 91 barred the leading of oral evidence in cases in which a contract had been reduced into writing only in regard to the "terms" of that contract, and the statement contained in the concluding part of annexure 'A' to the Plaint that the transaction was subject to an agreement to conduct-cum-sale being entered within a month cannot be said to be a term of the contract between the parties. Mr. Laud pointed out that all the other statements contained in annexure 'A' to the plaint were terms of the contract which

were in conformity that the oral contract pleaded in para 6 of the plaint. For that purpose, Mr. Laud also relied on Explanation 3 to Section 91 of the Evidence Act. The second contention of Mr. Laud was that he was in any event entitled to lead oral evidence for the purpose of showing the circumstances in which the provision relating to the execution of an agreement within a month came to be inserted in annexure 'A' to the plaint under proviso 6 to Section 92 of the Evidence Act which permits any fact to be proved which shows in what manner the language of a document is related to existing facts.

2. I will now proceed to deal with the first contention of Mr. Laud. I may state at the very outset that neither counsel has cited any authorities before me except authorities in the nature of standard works and dictionary to show what is the precise legal connotation of the expression "terms" in relation to a contract. Turning first to the plain language of Sections 91 and 92 of the Evidence Act, in my opinion, when those sections refer to the "terms" of a contract they necessarily postulate that there is a contract in existence, the statements contained in which are in the nature of terms. As a matter of plain language and grammatical construction I have, therefore no hesitation in taking the view that the expression "terms" of a contract in Section 91 and the corresponding expression in Section 92, have no application to a statement contained in a writing which is in the nature of a condition precedent to the very formation of that contract. It is the contention of Mr. Shah himself that the concluding words of annexure 'A' to the Plaint are in the nature of a condition precedent to the very formation of the contract, and that condition not having been fulfilled, no contract ever came into existence. As against that, it is the case of Mr. Laud for the plaintiffs that the statement contained in the concluding words of annexure "A" is a mere expression of a desire as to how the transaction was to go through. In either view of the matter, therefore, it cannot be said to be a term of the contract. In Murray's English Dictionary (1919 edn.) the expression "term" is given as having several meanings some of which have relation to the concept of a period of time with which we are not concerned. One of the meanings which however is applicable to the present case is given as "limiting condition" and the plural of the expression "term" is given as having the meaning of conditions or stipulations limiting what is proposed to be granted or done. It is then stated that the expression is rarely used in the singular, and the meaning of the expression when used in the singu-

lar is stated to be "that which is so required or demanded, a condition or prerequisite of something". The expression "terms" in the plural, therefore, means according to Murray's Dictionary, a condition or stipulation which limits what is to be granted or done, and in my opinion, therefore, it cannot apply to something which is in the nature not of a limitation of what is to be done under a contract, but of a condition precedent to the very formation of the contract. In distinguishing between "representations" and "terms" in relation to a contract, Anson on the Principles of the English Law of Contract (22nd edn.) at p. 114 appears to give to the expression "terms" the meaning of representation or assurances intended to be an integral part of the agreement. This again would, in my opinion, show that it can have no application to a statement or representation which is in the nature of a condition precedent to the very formation of the contract. On pp. 119-120 Anson deals with the distinction in the law relating to sale of goods between a condition and a warranty, but that I am afraid, is not of much assistance for the purpose of ascertaining the meaning of the expression "terms" used in Ss. 91 and 92 of the Indian Evidence Act. In dealing with the question of classification of terms, Chitty on Contracts (23rd edn.) Vol. I p. 279 para. 595 also deals with the distinction between conditions and warranties and the statements made in that paragraph are, therefore, also not of direct assistance for the purpose of determining the point of admissibility with which I am dealing. This much would, however, follow from the way in which the distinction between conditions and warranties has been dealt with both in Anson as well as in Chitty, that the expression "terms" connotes both conditions as well as warranties and that contracts are normally made up of a number of terms, some of which are regarded as major or essential terms and are, therefore, called conditions, and others are regarded as of minor importance and therefore, called warranties. From this also it would follow that the expression "terms" applies to provisions contained in contracts which have already come into existence and are legally enforceable. The proposition that Sections 91 and 92 are not applicable to just anything and everything that is contained in a written contract does not really need authority, but if authority were needed it is to be found in the decision of a Division Bench of the Madras High Court in the case of Venkatasubblah Chetty v. Govindarajulu Naidu, (1908) ILR 31 Mad 45, where it was held that oral evidence was admissible to show that the party liable on the contract contracted for him-

self and as the agent of his partners, and that such partners are liable to be sued on the contract though no allusion is made to them in the written contract. In that connection, referring to Ss. 91 and 92 of the Indian Evidence Act, it was stated in the Judgment (at p. 47) that the question as to who the contracting parties were was not one of the "terms of a contract" within the meaning of those sections. I hold that the expression "terms" in Ss. 91 and 92 of the Indian Evidence Act must relate to statements, assertions or representations contained in a written contract which relate to the subject-matter of the contract and to something to be done or not to be done under the Contract, and has no application to a provision in the nature of a condition precedent to the very existence or formation of a contract. On that ground alone, therefore, the objection raised by Mr. Shah to the admissibility of oral evidence for the purpose of showing the circumstances in which that provision came to be inserted in the writing annexure 'A' to the plaint must be rejected, and it is really not necessary for me to deal with the second ground which is urged by Mr. Laud to repel that objection. I will, however, briefly deal with the same also as it has been argued at some length.

3. The real question which arises in connection with the same is in regard to the scope and application of proviso 6 to Section 92 of the Evidence Act. It has been contended by Mr. Shah on behalf of defts. Nos. 1 to 5 that the said proviso must be limited in its application to cases which fall within one or other of the sections of Chapter VI of the Evidence Act which follow that proviso viz. Sections 93 to 98 thereof. The scope of Sections 91 to 98 of the Indian Evidence Act, including proviso 6 to Section 92 has been considered by me in the case of Belapur Co. Ltd. v. Maharashtra State Farming Corporation, AIR 1969 Bom 231 in which after considering various authorities on the point, I have summarised the legal position in the following terms (para 24):-

"The propositions that emerge from a consideration of these authorities on the subject are as follows: (1) Cases in the English Courts of Chancery have no application to the law of India as laid down in the Evidence Act. (2) In view of the provisions of Section 91 of the Evidence Act, no extrinsic evidence, oral or documentary, can be admitted to prove the terms of a contract, grant or other disposition of property, except the document itself or secondary evidence of its contents when admissible under the relevant provisions of that Act and the court must find out the expressed intention of the parties. The fundamental

rule of construction is to ascertain the intention from the words used in the document which is considered to be the written declaration of the mind of the author. (3) If the words are clear in expressing that intention and the language applies to existing facts, extrinsic evidence is not admissible for construing the deed or for ascertaining the real intention of the parties e.g. surrounding circumstances cannot be considered with a view to holding that a document which is on the face of it a sale deed was intended to operate as a mortgage. (4) If, however, the words are such that one may suspect that they do not convey the intention correctly or in other words, there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer or to the facts existing at the time when the document was executed, extrinsic evidence is admissible, both under proviso (6) to Section 92 of the Evidence Act as well as in English law. In such cases, extrinsic evidence is admissible for the purpose of finding out the meaning of the words which have actually been employed, or what is same thing, in order to translate the language of the document by assigning a definite meaning to terms capable of such explanation or by connecting them with the proper subject-matter, or in other words for the purpose of throwing light on the meaning of the words used with a view to arrive at the true effect of the transaction to which the document relates. The whole object in such cases is to place the Court, as near as may be, in the position of the parties to the document. (5) The subsequent conduct of the parties is, however, not relevant or admissible for the purpose of construing a written document. (6) If the language employed in the document is ambiguous, the question of admissibility or otherwise of extraneous evidence would be regulated by the provisions of Sections 93 to 98 of the Evidence Act. The plain meaning of the word "ambiguous" is, obscure, or of double meaning (Concise Oxford Dictionary). (7) In view of Section 92 of the Evidence Act, oral evidence can, in no event, be admitted to contradict, vary add to or subtract from the terms of the document, as far as the parties to that document are concerned."

I have also held (page 25) that proviso 6 to Section 92 of the Evidence Act is not an exception to the rule laid down in the main part of the section, as a proviso normally is, but is a substantive provision which itself lays down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to existing facts. I have further

held that it has nothing whatsoever to do with the question of contradicting, varying, adding to or subtracting from the terms of the document with which the main part of Section 92 deals, and does not take away or qualify anything that would, but for that proviso, have fallen within the substantive portion of that section. The position in regard to proviso (6) to Section 92 of the Evidence Act in view of what I have held in *Belapur Co.'s case* is that extrinsic evidence is admissible under that proviso for the purpose of finding out the meaning of the words which have actually been employed, or what is the same thing, in order to translate the language of the document by assigning a definite meaning to terms capable of such explanation with a view to arrive at the true effect of the transaction in question in cases in which the words used are such that one might suspect that they do not convey the intention correctly or in other words, there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer or to the facts existing at the time when the document was executed. The words "subject to an agreement to conduct-cum-sale to be entered within a month" used in the concluding part of annexure "A" to the plaint in the present case are capable of two possible meanings: one that the execution of a written agreement within a month was a condition precedent to the very formation of the contract: and the other that it is, the mere expression of a desire as to how the transaction was to go through. It is true that in English law the words "subject to a contract in writing" or equivalent words have generally been construed by courts in England to mean that the agreement is of no legal effect until a written document is executed (*Chitty on Contracts* (23rd Edn.) Vol. 1 p. 79, and *Anson on the Principles of the English Law on Contract* (22nd Edn.) pp. 53-54 and *Cheshire on the Law of Contract* (7th Edn.) p. 33). That, however, is not an inflexible rule. In fact, in the passage from *Cheshire* where this point is dealt with, it is stated (at p. 33) "Unless there is cogent evidence of a contrary intention, the courts, construe these words so as to postpone the incidence of liability till a formal document has been drawn up and signed," and (at p. 34). "The task of the Courts is to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surround and follow it, and the question of interpretation may thus be stated. Is the preparation of a further document a condition precedent to the creation of a contract or is it an incident in the performance of an already binding obliga-

tion?" Referring to an observation of Lord Wright it is further stated in *Cheshire* (at p. 36) that Judges would always seek to implement and not to defeat reasonable expectations though they could not invent a contract which the parties had been too idle to make for themselves. It is, therefore, clear that the position in English law is that even in cases in which the expression used in a written contract is "subject to a written contract" or other equivalent expression, it would be open to the court, and indeed, it would be its duty to extract the intention of the parties and to see whether there is cogent evidence to indicate that the parties intended a binding contractual obligation to come into existence even before a writing was executed. It was sought to be contended by Mr. Shah that whatever might be the position in English law, the powers of the court in that behalf would be limited in this country by the statutory provisions of Sections 91 and 92 of the Evidence Act, but I see no reason why they should be so limited in view of the terms of proviso (6) to Section 92 of the Evidence Act which is, *inter alia*, intended to meet precisely such a situation. In fact, as indicated in my judgment in *Belapur Co.'s case* (para 24) the position in regard to the admissibility of extrinsic evidence under proviso (6) to S. 92 of the Evidence Act as well as in English law appears to be the same. Mr. Shah on behalf of defendants Nos. 1 to 5 relied strongly on the decision of the Privy Council in the case of *Harichand v. Govind*, AIR 1923 PC 47 where a question very similar to the question which arose before me arose before the Privy Council, the Plaintiff-purchaser contending that the two documents which formed the foundation of the suit constituted a completed contract, and the defendant-vendor urging that it was only in the nature of a provisional agreement conditional on the preparation of a formal document. In the trial court, the defendant had attempted to tender some oral evidence to show what actually took place on the occasion that the parties entered into the agreement relied upon by the plaintiff, but the trial judge had refused the application in a single sentence in these words: "I reject that evidence: irrelevant and inadmissible". The Privy Council took the view that the ruling of the learned trial judge was right and that under Section 92 of the Indian Evidence Act the evidence sought to be led was rightly rejected. It is however, clear from the judgment of the Privy Council that that statement in the judgment was based practically on a concession in the course of the argument before them for it has been stated (at p. 48, col. 2) that no attempt was

made on appeal to take exception on behalf of the defendant to that part of the trial judge's order. It is for that reason that with that brief observation, the Privy Council did not think it necessary to refer further to that point. Under these circumstances, I do not consider the decision of the Privy Council in *Harichand's case* on which Mr. Shah has relied as his "trump card" to be a decision on the point which arises before me. In the event of my being wrong in the view which I have taken above, viz. that the statement contained in the concluding part of annexure "A" to the plaint is not one of the "terms" of the contract between the parties, I would still hold extrinsic evidence to be admissible under proviso (6) to Section 92 of the Indian Evidence Act for the purpose of showing the circumstances in which the said writing came to be prepared and executed, and this statement found place therein, with a view to arrive at the true effect of the transaction to which the document relates. I, therefore, overrule Mr. Shah's objection.

Order accordingly.

AIR 1972 BOMBAY 369 (V 59 C 67)

KOTWAL, C. J. AND VAIDYA, J.

Ganeshrao Kishanrao Deshmukh, Petitioner v. Devisingh Venkatasingh and others, Opponents.

Special Civil Appln. No. 1727 of 1967, D/- 27-7-1971, to set aside order of Officer on Spl. Duty Revenue and Forest Deptt., Sachivalaya, Bombay, D/- 2-2-1967

Index Note: (A) Hyderabad Abolition of Inams and Cash Grants Act (8 of 1955), S. 2-A — The power under Section 2-A to hear appeal cannot be delegated by the State Government.

Brief Note: (A) The function of making a quasi-judicial decision like the one under Section 2-A cannot be delegated to another person or authority in the absence of statutory provision authorising such delegation. There is no provision in Section 2-A which enables the Officer on Special Duty to entertain appeal. The only authority competent to decide an appeal under Section 2-A (2) is the State Government i.e., the Minister incharge of the department concerned.

The fact that the Minister has countersigned the notes put up by the Officer on Special Duty does not necessarily mean that he applied his mind independently to the facts and contentions as he is required to do in exercise of his power to decide the appeal under S. 2-A. Merely signing below notes or agreeing to a

IP/JP/F400/72/RMP

note put up by a subordinate officer cannot be said to be proper or fair or reasonable way of deciding the appeal under Section 2-A, Spl. C. A. Nos. 1928 to 1932 of 1966 and 1415 of 1967 (Bom) and Spl. C. A. Nos. 812 and 948 of 1966, D/- 8-11-1968 (Bom) and Spl. C. A. No. 395 of 1965, D/- 19-1-1966 (Bom), Followed.

(Paras 9, 10, 11 and 12)

Cases Referred: Chronological Paras

(1968) Spl. Civil Appns. Nos. 812 and 948 of 1966, D/- 8-11-1968 (Bom) 8

(1967) Spl. Civil Appns. Nos. 1928 to 1932 of 1966 and 1415 of 1967 (Bom) 8

(1966) Spl. Civil Appln. No. 395 of 1965, D/- 19-1-1966 (Bom) 8

AIR 1951 SC 467 = 1952 SCR 110 = 1952 Cri LJ 54, Harla v. State of Rajasthan 11

AIR 1950 Bom 332 = 52 Bom LR 421, Tuljansa Janardhansa Pawar v. Commr. of Income-tax, Bombay, South 8

S. J. Deshpande, for Petitioner; S. P. Kurudukar (for No. 1), A. B. Naik, (for No. 4) and M. R. Kotwal, Asst. Govt. Pleader (for No. 6), for Opponents.

VAIDYA, J.:— This petition under Article 227 of the Constitution of India is directed against an order purporting to be of the Government of Maharashtra communicated to the petitioner's Advocate by an officer of the Government described as the Officer on Special Duty, Revenue and Forest Department in respect of an appeal filed by the petitioner before the Government of Maharashtra under Sec. 2-A of the Hyderabad Abolition of Inams and Cash Grants Act, 1954. By the impugned letter dated February 3, 1967, the Officer on Special Duty informed the petitioner's Advocate that the appeal filed by the petitioner on July 20, 1964 was disposed of as per Government memorandum dated February 2, 1967 and a note accompanying thereto.

2. The Government memorandum dated February 2, 1967 is addressed to the Collector of Osmanabad with reference to the appeal filed by the petitioner and proceeds to decide the dispute between the petitioner and opponents Nos. 1 and 2 as to whether opponents Nos. 1 and 2 are Kabiz-e-kadims within the meaning of Sec. 2 (1) (e) of the Hyderabad Abolition of Inams and Cash Grants Act. The memorandum states:—

"Government has given careful consideration to the appeal petition and the arguments advanced in it. It has also examined the arguments which had been advanced by the advocates of the parties in the course of the enquiry made into the appeal petition by the officer on special duty at the instance of Government.

It has perused the written arguments of the parties. For the reasons recorded in the enclosed note, Government considers that the appellant has no case and that no modification of the Tahsildar's order is called for in so far as the land described as survey number 60 of the village Ashiva is concerned, and that in respect of survey No. 1 of Sankaral it needs to be declared that on 20th July 1955 as also on 1st July 1960 Rukminibai widow of Ramsing was entitled to hold it as Kabiz-e-kadim along with Kishansing Pitambarsing and Umraosing and that the shares of the three holders in the lands were as under, etc. etc." The memorandum is signed "by order and in the name of the Governor of Maharashtra" by the Officer on Special Duty, Revenue and Forest Department.

3. The accompanying note is a lengthy note. It gives the checkered history of the litigation between the petitioner and opponents Nos. 1 and 2 since 1897 and the various proceedings before the High Court of Hyderabad and other authorities in the former Hyderabad State and the Revenue Tribunal and this Court. It summarises the arguments of the Advocates for the parties, who appeared and argued personally and also gave written arguments. There is nothing in the note to indicate as to who prepared the note, but it is not disputed that this note was prepared by the Officer on Special Duty, who heard the Advocates for the parties and recorded the written arguments and other materials before him.

4. The said order, memorandum and the note together are challenged in the above petition inter alia on the ground that the deciding authority under Section 2-A of the Hyderabad Abolition of Inams and Cash Grants Act was the Minister, Revenue Department of the Government of Maharashtra and he had not heard the parties before deciding the matter; and further that the hearing of the appeal by the Officer on Special Duty in the Revenue and Forest Department was incompetent because he was not the State Government, who alone could decide an appeal under Section 2-A of the Hyderabad Abolition of Inams and Cash Grants Act.

5. As this contention must succeed, it is not necessary for disposal of this petition to set out any other ground or the history of the litigation, which unfortunately commenced in 1897 when Balabal, the predecessor-in-title of the petitioner died. It is enough only to point out that the dispute had once come to this High Court at the instance of opponents Nos. 1, 2 and another as petitioners; and on July 31, 1962 in that matter, which was Special Civil Application No. 1461 of 1961, Chainani, C. J.,

and K. K. Desai, J., modified an order of the Revenue Tribunal with the following observations:

"It is not disputed that the lands vested in Government after the Hyderabad Abolition of Inams and Cash Grants Act came into force. The case of the first and third petitioners is that they are entitled to the grant of the lands under Section 6, as they were Kabiz-e-Kadims. Mr. Gupte has invited our attention to the judgment of the Judge of the Paigah Committee delivered on 13-6-1347 Fasli in which there are some observations that the ancestors of the first and third petitioners were in possession of the lands even in the lifetime of Balabai. It is not known on what evidence these observations were made. Mr. Gandhi who appears for the opponent, does not admit that the family of the first and third petitioners was in possession of the lands before they were assumed under Government management. He has contended that even assuming that the petitioners' family was then in possession of the lands, their rights, if any, came to an end when the lands were taken charge of by Government and that as the petitioners subsequently took lease from Government they cannot now claim any rights against the opponent. He has contended that the petitioners cannot, therefore, claim to be Kabiz-e-kadim. The question whether the petitioners are Kabiz-e-kadim and whether they are consequently entitled to the grant of the lands as occupants is, therefore, a disputed question, which can only be decided after proper enquiry. Such an enquiry has been directed by the Revenue Tribunal. We are informed that the officer competent to hold this enquiry is the Deputy Collector. We direct that the Deputy Collector should hold a full and detailed enquiry in the matter. He should allow both the parties to lead evidence and thereafter dispose of the matter as expeditiously as may be possible without paying any regard to the status of any party."

We are told that this Court had to direct the authorities not to have any regard to the status of any of the parties as there were some allegations with regard to the status of opponent No. 1 at that time. Thereafter the Deputy Collector sent it to the legally authorized officer to decide the question under Section 2-A viz. the Tahsildar, Taluka Ausa in District Osmanabad, who by his order dated May 5, 1964 decided the dispute in favour of opponents Nos. 1 and 2 holding that opponent No. 1 was the Kabiz-e-kadim of survey No. 60 of village Ashiya and opponent No. 2 was the Kabiz-e-kadim of survey No. 1 at Sankral. Feeling aggrieved by the said decision, the petitioner carried the appeal to the State

Government under Section 2-A of the Hyderabad Abolition of Inams and Cash Grants Act.

6. Now, it is not disputed that, in connection with the said appeal, it was only the Officer on Special Duty, who heard the arguments of Advocates for the parties on Nov. 23 and 24, 1965, in the course of what he has chosen to describe as "an enquiry" in paragraph 6 of the note accompanying the memorandum, which is referred to above. Under Section 2-A (1) if any question arises whether any person is a Kabiz-e-kadim, permanent tenant or tenant, the State Government or an officer authorized by the Government shall decide the question. Where any question is decided by an officer so authorized by the State Government, any person aggrieved by such decision may file an appeal to the State Government under Section 2-A (2). The Government has not produced any notification authorizing the Officer on Special Duty, Revenue and Forest Department to hear an appeal or to hold any 'inquiry'. There is also nothing in Section 2-A (2) which enables the Government to authorise any such officer to hear the appeal against the decision of a Tahsildar, who admittedly was the officer authorized to decide the question within the meaning of Section 2-A (1).

7. It is a fundamental principle of administration of justice in civilized societies where rule of law is respected that normally the person or authority, who has to decide a question affecting rights and liberties of persons, must give a reasonable and fair opportunity to the parties concerned of being heard by that authority. Ordinarily none should be condemned or prejudiced unheard. It is not disputed that under the rules of business framed under the Constitution of India, the 'State Government' means in practice the Minister in charge of the department concerned. There is nothing in the orders annexed to the petition to show that the Minister in charge of the Revenue Department at the relevant time, who was concerned with the matter for the time being, had anything to do with the appeal. Mr. Kotwal, the learned Assistant Government Pleader, however, produced before us for our perusal the file relating to the matter in the Sachivalaya at Bombay and pointed out that the then Minister for Revenue had signed below the signatures of the Officer on Special Duty on the various notes put up in the file including the final note deciding the appeal and the memorandum disposing of the appeal which was put up to him for his approval. It is true that the then Minister for Revenue Department signed on January 29, 1967 the proposal for communicating the order as in the Government memo kept for his

approval; and it is only thereafter that it appears that the Officer on Special Duty wrote the impugned letter dated February 3, 1967 and forwarded the memorandum dated February 2, 1967. It is also true that the memorandum, as stated above, refers to the perusal of the written arguments addressed by the Advocates for the parties. But it is difficult for us to believe that the written arguments and the oral arguments of the Advocates addressed to the Officer on Special Duty on November 23 and 24 of 1965 could have had any influence on the mind of the deciding Minister who passed the final orders, according to the file, on January 29, 1967.

8. The duty of the appellate authorities to apply the mind independently to the contentions of the parties, after giving a reasonable opportunity to the parties to be heard, has been emphasized by Courts in India in many decisions. For instance, in *Tuljansa Janardhansa Pawar v. The Commissioner of Income-tax, Bombay South*, 52 Bom LR 421 = (AIR 1950 Bom 332) Chagla, C. J. and Tendolkar, J., pointed out at p. 423

"When an authority upon whom judicial functions are conferred has to decide or hear a case or an appeal, he can only do so provided he has heard all parties which are likely to be affected by the order which he is going to make. It is a fundamental principle of natural justice that no Judge or no person upon whom judicial powers are conferred can come to a judicial or a quasi-judicial decision without hearing all parties who are to be affected by his decision, and we must always assume that the Legislature who has knowledge of judicial principles and rules of natural justice impliedly, if not expressly, incorporate these rules whenever they confer judicial functions upon a person or an authority. If these rules of natural justice are to be excluded, then we must find in the statute an express provision to that effect". This Court has decided in a number of matters arising from the decisions in similar circumstances under Section 2-A of the Hyderabad Abolition of Inams and Cash Grants Act that the Minister deciding the appeal should give a hearing to the parties in these matters. In special civil applns. Nos. 1928 to 1932 of 1966 and 1415 of 1967 (Bom) decided by Abhyankar and Madon, JJ., it was observed:—

"We may also mention that it is not clear from the record as to which person actually disposed of the appeals. Under the law an appeal lies to the State Government; but the matter seems to have been dealt with and the arguments heard by an Officer on Special Duty. Whether that Officer on Special Duty had the

powers to dispose of appeals or the matter had to be decided ultimately by the Minister or some other officer, is not clear from the record. If it so happens that the arguments were heard by one authority while the power to dispose of the appeal vested in some other authority, say the Minister, then the appellate order will also suffer from a serious defect. We are unable to find how the appeals were disposed of on the material placed before us".

In another judgment in special civil applications Nos. 812 and 948 of 1966 (Bom) decided by Abhyankar and Madon, JJ., on November 8, 1968, they observed:

"It is said that the ultimate decision of the appeal is given by the Minister in charge. Thus, the authority deciding the appeal on behalf of the State Government is the Minister in charge. Further, according to the State, the arguments in support of the appeal are heard by the Special Officer, in this case Mr. Ranade. We are unable to understand how an authority empowered to decide the Appeal can decide the matter when the arguments in support of the order or challenging the order are heard by some other authority or person. To ensure proper disposal of any appeal the authority empowered to decide the matter must itself hear the rival contentions of the parties in respect of the matter required to be adjudicated. On this ground also, therefore, the order in appeal suffers from serious defects of procedure which cannot possibly be permitted". Again in special civil application No. 395 of 1965 (Bom), Tarkunde and Gokhale, JJ., observed on January 19, 1966:—

"It appears that the appeal under Section 2-A was heard by the Officer on Special Duty, and Section 2-A provides that any question as to whether any person is a tenant or not shall be decided by the State Government or an Officer authorised by the Government The question, therefore, when it arises, would have to be decided either by the Minister concerned or by the Secretary of the Revenue Department so as to comply with the requirements of Section 2-A".

9. It is a well established principle of law that the function of making a quasi-judicial decision like the one under Section 2-A cannot be delegated to another person or authority in the absence of statutory provision authorizing such delegation. There is no provision in Section 2-A which enabled the Officer on Special Duty in the present case to hold what he described as an 'enquiry'. The only authority competent to decide an appeal under Section 2-A (2) is the State Government. The State Government could not delegate the power to the Officer on Special Duty.

10. It may be that in the absence of any statutory requirement the Minister was free to determine his own procedure reasonably. But that would not entitle him to delegate the power of hearing the parties to a subordinate Officer like the Officer on Special Duty in the Revenue and Forest Department. It is impossible to believe that the arguments, which admittedly were addressed to the Officer on Special Duty in November 1965, could have had any influence on the Minister, who actually decided the appeal in January 1967, as stated above. The fact that he has countersigned the notes put up by the Officer on Special Duty does not necessarily mean that he applied his mind independently to the facts and contentions as he is required to do in exercise of his power to decide the appeal under Section 2-A. Merely signing below notes or agreeing to a note put up by a subordinate officer cannot be said to be a proper or fair or reasonable way of deciding an appeal under Section 2-A. There is nothing in the orders annexed to the petition before us or in the file produced by Mr. Kotwal for our perusal to indicate that the Minister himself had actually applied his mind to the facts and contentions involved in the case.

11. In view of this position, the above petition was adjourned twice to enable the Government to file an affidavit in reply repelling the allegations of non-application of mind on the part of the deciding Minister made by the petitioner and to meet the contention of the petitioner that the Minister, who decided the matter, had not heard him. In spite of these adjournments, however, no affidavit in reply has been filed. It must be, therefore, presumed that the contention raised by the petitioner is correct. There is nothing before us to show that the Minister had personally applied his mind to the oral or written arguments of the parties or to the various contentions raised by the parties. Hearing of the parties by the Officer on Special Duty was not hearing by the Minister. Parties were, therefore, denied a reasonable opportunity of being heard by the Minister deciding the appeal. What has happened in this case attracts the following observations made by Vivian Bose, J., in *Harla v. The State of Rajasthan*, 1952 SCR 110 at p. 113 = (AIR 1951 SC 467):

"The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience."

With respect, the above remarks made regarding a secret Government Resolution may, in the facts and circumstances of this case, be applied to the memorandum disposing of the appeal and the note appended thereto as there is nothing on the record to indicate the process by which the Minister decided the appeal.

12. Now, Section 2-A confers large powers on the State Government and the officers authorized by the State Government to decide (1) whether any land is an inam; (2) whether any inam is held with or without conditions of service; (3) whether any inam is a community service inam or watan; (4) whether a commutation settlement in respect of any watan has or has not been effected; (5) whether any land held as inam is or is not alienable without the permission of the competent authority; or (6) whether any person is a Kabiz-e-kadim, permanent tenant or tenant. These are all, more often than not, complicated questions of facts as well as law. In the instant case, the facts are further complicated by the protracted and hotly contested litigation before the various authorities in the former Hyderabad State and in this State. The legality of the various orders passed in favour of the petitioner and against opponents Nos. 1 and 2 had to be considered very carefully by the deciding authority. We find nothing in the record before us to indicate that the Minister who was the deciding authority had applied his mind to any of these aspects of the case.

13. In view of this conclusion, the order communicated by the Officer on Special Duty on February 3, 1967 and the memorandum dated February 2, 1967 referred to above must be quashed and the matter should be remitted to the Government for disposing of the appeal in accordance with the law and the observations made hereinabove. Rule absolute. No order as to costs.

Rule made absolute.

AIR 1972 BOMBAY 373 (V 59 C 68)

BHOLE, J.

Lalshankar Mulji Joshi, Petitioner v. Kantilal Mohanlal Parikh and another, Respondents.

Special Civil Appln. No. 3015 of 1967, D/- 14-10-1971, to set aside order of 4th Extra Asstt. J., Poona, D/- 31-8-1967.

Index Note:—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 12 (2) — Notice demanding arrears of rent and to quit the premises — Validity — Mere fact that by mistake or oversight the landlord had

IP/IP/F403/72/LGC

demand the rent for the month for which it was not due, would not make the notice invalid. C. A. No. 387 of 1964, D/- 5-4-1966 (SC). Followed — (X-Ref:— Transfer of Property Act (1882), Section 106). (Para 6)

Cases Referred: Chronological Paras

C. A. No. 387 of 1964, D/- 5-4-1966

(SC), Raghunath Ravji Dandekar v. Anant Narayan Apte

6

K. J. Abhyankar, for Petitioner.

ORDER:— This is a landlord's petition challenging the order passed by the Extra Assistant Judge, Poona. The respondent is a tenant of the suit premises belonging to the petitioner at a rent of Rs. 17/- per month. Because he was in arrears of rent for more than six months, therefore the petitioner had to serve a notice on the respondent. The notice was dated 17-8-1965 and the respondent was asked to quit by 30-9-1965. The petitioner claimed a sum of Rs. 176-90 p. As the notice was not complied, the suit was filed claiming arrears of rent and possession on three grounds, the first being arrears of rent for more than six months, the second was that the suit premises were required for personal use by the landlord and the third was that the respondent-tenant was keeping the premises locked and had not been using them.

2. The trial Court framed a number of issues on the pleadings of the parties and held that the petitioner had established that the respondent was a defaulter for a period of six months or more. He was of the view that the tenancy of the respondent-tenant was validly terminated under Section 106 of the Transfer of Property Act, though not under Section 12 (2) of the Bombay Rent Act. Accordingly, therefore, the trial Court dismissed the petitioner's suit for possession, but passed a decree for arrears of rent. Against this decree the landlord went in appeal.

3. The appellate Court considered several issues and found that the notice served by the petitioner is not valid, the demand therein being excessive. According to him, the notice being invalid, the tenant cannot be said to be not ready and willing to pay the arrears of rent accrued due upto the date of the notice. He, therefore, did not consider as to whether the respondent was or was not in arrears of rent for a period of more than six months on the date of the notice of demand issued on 17-8-1965 and whether he was not ready and willing to pay the arrears of rent.

4. The trial Court decided against the petitioner on the issue regarding the bona fide requirement by the petitioner as also the issue regarding

the respondent not using the premises and keeping them locked. These findings of the trial Court were confirmed by the appellate Court, who dismissed the appeal with costs. This order of the learned Assistant Judge, Poona, is now challenged here by the petitioner-landlord.

5. It is argued by Mr. Abhyankar, learned advocate for the petitioner, that the learned Assistant Judge has committed an error in holding the notice invalid, inasmuch as the notice did not ask for any excessive rent from the tenant. The petitioner-landlord had already obtained a decree from the Small Cause Court, Poona, for a sum of Rs. 207/- and that the tenant was still in arrears of Rs. 293/-. The notice mentioned the amount of Rs. 511-90 p. The tenant had paid Rs. 335/-. Therefore, the petitioner-landlord claimed Rs. 176-90 p. by this notice. The notice is dt. 17-8-1965. The learned Asstt. Judge while considering the validity of the notice observed during the course of his judgment that by the notice of demand the petitioner not only claimed rent upto 15-8-1965, but also claimed rent due upto 15-9-1965. It is contended by Mr. Abhyankar on behalf of the petitioner that this notice was proper and legal since the tenancy was sought to be terminated by the end of 15th September 1965. The learned Assistant Judge was, however, of the view that the demand was excessive because the rent claimed for the period 15-8-1965 to 15-9-1965 had not become due and payable to the petitioner-landlord at the time of the said notice of demand. According to him, therefore, the demand was not lawful and the respondent-tenant was under no obligation to comply with the demand. According to the learned Assistant Judge as the demand was not lawful, the notice is illegal and the respondent-tenant cannot be said to be not ready and willing to pay the arrears of rent. Now, the point here for consideration is whether in the facts and circumstances of the case the view taken by the learned Assistant Judge is correct.

6. It is now well-settled that a liberal construction is put upon a notice to quit in order that it should not be defeated by inaccuracies either in the description of the premises or the name of the tenant or the date of the expiry of the notice; and that the test of its sufficiency is not what its contents would mean to a stranger ignorant of all the facts and circumstances touching the premises to which the notice purports to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances and the mistakes, if any, should not be construed

with desire to find faults, but they should be construed liberally. In the instant case it appears that the petitioner-landlord was under a mistaken belief while asking for rent for the period from 15-8-1965 to 15-9-1965. It is not that he meant that the rent would not be due to him on 15-9-1965. It may be that he remained under a wrong impression and thought that he could demand such rent since he was terminating the tenancy on and from 15-9-1965. In my view, therefore, this appears to be a mistake on the part of the petitioner committed while giving the notice. The Supreme Court in Civil Appeal No. 387 of 1964, decided on 5-4-1966, while considering validity of a notice, which demanded Rupees 7,000/-, when actually, according to the Courts below only Rs. 6,900/- were due, observed that they were not able to understand how the notice to quit under the Transfer of Property Act will be bad because of a mistake or over-sight in demanding more than was due under Section 12 (2) of the Rent Act. Their Lordships held that all that Section 12 (2) of the Rent Act requires is the notice by the lessor for payment of arrears of rent. Their Lordships further observed that it was true that such a notice shall contain the figure of the amount due as arrears of rent, but according to their Lordships, if there was a mistake in the amount specified in the notice, that did not, in their opinion, make the notice under Section 12 (2) bad or because of that mistake the notice to quit under the Transfer of Property Act bad. It appears to me that simply because by mistake or over-sight the landlord had demanded the rent for the month for which it was not due, that would certainly not make the notice invalid. The view taken by the learned Assistant Judge is therefore not correct.

7. For the aforesaid reasons I set aside the decree passed by the learned Assistant Judge, Poona, remand the record and proceedings back for finding on two issues which were framed by him and disposing of the appeal according to law.

8. Rule made absolute. Costs costs in the cause.

Rule made absolute.

AIR 1972 BOMBAY 375 (V 59 C 69)

WAGLE, J.

Baban Krishnarao Misal, Petitioner v. Narayan Yeshwant Godse and others, Opponents.

Special Civil Appln. No. 2076 of 1967, D/- 25-8-1971, to set aside order of Maharashtra Revenue Tribunal, at Kolhapur, D/- 31-10-1966.

JP/JP/F583/72/GDR

Index Note: (A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Section 33-B (4) — Point of time for considering whether sub-section (4) applies is the date on which the Certificate is granted — 'Certificate holder' — Meaning. (X-Ref:— S. 33-A (i).)

If the landlord attains majority before the grant of the certificate although the application under S. 88-C was made when he was a minor, he cannot come within the category of a minor certificate holder and hence he would not be governed by Section 33-B (4). The category has to be decided on the date when the certificate comes into existence.

(Paras 6 7)

Cases Referred: Chronological Paras

AIR 1967 Bom 428 = 69 Bom LR

383, Parvatibai Ramchandra v.

Mahadu Tukaram

8

M. G. Chaudhary, for Petitioner; A. V. Datar, for Opponents Nos. 1, 2, 4 to 8.

ORDER:— The short point that arises in this petition is whether the petition for possession under Section 33-B of the Tenancy Act made by the petitioner was barred by limitation. The petitioner was a minor when the application under Section 88-C for exemption was made by him on September 31, 1961. The order that he was entitled to a certificate was made on July 31, 1963. The birth-date of the petitioner was June 12, 1945 and he attained majority on June 12, 1963. The certificate was in fact issued on August 30, 1963.

2. In pursuance of the certificate the petitioner served a notice upon Respondents 1 to 8 as required under Section 33-B (3) of the Tenancy Act. Thereafter on May 15, 1964 the instant proceeding under Section 33-B was initiated. On February 23, 1965 this application was dismissed on the ground that it was barred by limitation. This decision of the Tenancy Aval Karkun was confirmed in appeal by the Deputy Collector and in revision by the M. R. T. The instant petition is filed for quashing the three decisions of revenue forums.

3. Mr. Choudhary appearing for the petitioner contended that the starting period of limitation under Sec. 33-B for minors as provided for in Sec. 33-B (4) is within one year from the date on which the minor attains majority. The minor attained majority on June 12, 1963 and the notice was served and the application under Section 33-B were both made within one year from the date the minor attained majority. The fact that the petitioner was a minor when the proceedings under Section 88-C were instituted, cannot be disputed.

4. Mr. Choudhary's contention was that since the application under S. 88-C

was made by the present petitioner when he was a minor, he becomes a minor certificate holder when ultimately the certificate is granted. This conclusion is irrespective of the fact whether the order passed in the application under S. 88-C for the grant of the certificate has been passed after the minor attains majority. According to Mr. Choudhary the final order passed in the proceedings under S. 88-C relates back to the date when the application is made. The application under Section 88-C was made by the petitioner on September 11, 1961 when he was a minor. If, therefore, this argument is accepted that the last order relates back to the initial making of the application, then certainly it could be contended that the person who made an application, since he was a minor at the date, becomes a minor certificate holder. He would then be governed by sub-section (4) of Section 33-C and any application made by him within one year of his attaining majority, would be within time.

5. However, there is no support for the contention advanced by Mr. Choudhary that the document relates back to the date of the application under Section 88-C in case of a minor and although the certificate in fact may have been granted after he attains majority, still he belongs to the category of a minor certificate holder.

6. A certificated landlord has been described in Section 33-A (i) as "a person who holds a certificate issued to him under sub-section (4) of Sec. 88-C". The relevant date, therefore, is the grant of the certificate and not the making of an application for obtaining the certificate. Unless the certificate comes into existence no person can be a holder thereof. The point of time, therefore, for considering whether sub-section (4) of Section 33-B applies is the date on which the certificate is granted. In the instant case the certificate was granted on August 30, 1963. On that date the landlord was a major. Even if the date of the order for grant of a certificate is taken to be the relevant date, then landlord cannot come within the category of a minor certificate holder for the simple reason that before the grant of the certificate he had attained majority.

7. In a litigation it is the duty of the party who applies as a minor to get the record corrected immediately upon his attaining majority. Because the petitioner failed in his duty in not getting his name on the record as a major, no advantage can be obtained by the said person. Since a certificate must be held, a certificate must be in existence and the category, therefore, has got to be

decided on the date when the certificate could come into existence. In the instant case the certificate could have come into existence on or after July 31, 1963. On that date obviously the Petitioner was a major. He was, therefore, not a minor certificate holder, but he was a major certificate holder. He would, therefore, not be governed by Section 33-B (4) of the Tenancy Act.

8. An argument was further advanced by Mr. Choudhary that there is a decision of this Court which has extended the meaning of the expression "certificated landlord". In *Parvatibai Ramchandra v. Mahadu Tukaram*, 69 Bom LR 383 = (AIR 1967 Bom 428) a Division Bench of this Court held that the right of a certificated landlord to apply under Section 33-B does not lapse upon the death of the holder and that the same can be exercised within the specified time by his successor in interest. This judgment only shows that the right which the landlord obtains under the certificate granted under Section 88-C is a heritable right. The judgment has no bearing on any other point. It does not deal with the point as to from what time a person should be taken as a certificated landlord; whether from the date the certificate comes into existence or from an earlier date. Since I have held that unless the certificate comes into existence there cannot be a certificated holder, the argument based upon the decision in 69 Bom LR 383 = (AIR 1967 Bom 428) has no application.

9. A further argument was advanced by Mr. Choudhary that in any case as regards Narayan Yeshwant Godse (Respondent No. 1) the petitioner's claim should have been allowed. This argument was based upon a statement given by Respondent No. 1 on February 23, 1965 as follows:

"If the possession of the said half area in the land which I am doing as a tenant is given to the applicant plaintiff, I will have no objection whatsoever. I have no grievance remaining about this." Mr. Choudhary's contention on this point was that in respect of the property held by Respondent No. 1 as a tenant of S. No. 204 there should have been an order in favour of the petitioner in spite of the fact that his application was held to be barred by time. What was urged was that when the tenant admitted the claim and expressed his willingness to the passing of an order for possession in respect of the land which he held, it should have been held that the tenant has waived the right which he had obtained by rules of limitation. Mr. Choudhary's contention, therefore, was that although the petitioner might not have been given any

relief in respect of the property held by other tenants, a relief in respect of the land held by Narayan Yeshwant should not have been denied to him. The point, however, is whether this point was taken by him before the Deputy Collector. I do not find from the judgment of the Deputy Collector that this point was at all pressed before him or even before the Tenancy Aval Karkun. Had this point been pressed before the Tenancy Aval Karkun and the Deputy Collector, those two authorities might have applied their mind to it and either upheld or rejected it. But the point cannot be raised for the first time in this Court acting under Art. 227. I, therefore, hold that the decisions of the revenue forums were correct and no interference is necessary.

10. Rule discharged. No order as to costs.

Order accordingly.

AIR 1972 BOMBAY 377 (V 59 C 70)

K. K. DESAI, J.

Sohanraj Ganeshmal Shah, Appellant v. Gulabrao B. Kate and another. Respondents.

A. F. O. No. 50 of 1971, D/- 16-4-1971 against order of D. D. Pol, Civil J. Sr. Divn. at Poona on Exh. 4 in Spl. C. S. No. 145 of 1969.

Index Note:— (A) Civil P. C. (1908), O. 38, Rr. 5, 6 — Scope and applicability — Order for furnishing security for producing property in Court when made.

Brief Note:— (A) The application for attachment before judgment under O. 38, R. 5 is in normal circumstances disposed of much prior to the hearing of the suit in which such application is made. The initial order that the Court makes under the above Rule 5 is a direction to the defendant to furnish security in the sum mentioned by the Court as may be sufficient to satisfy the decree or to appear and show cause why the defendant was not bound to do so. The order of attachment is thus initially issued under the last part of clause (1) of Rule 5 in the above manner. After the order of the above nature is made the final hearing of the application under Rule 5 takes place in accordance with the provisions in Rule 6. (Para 7)

Order under Rule 6 confirming the attachment and in the alternative giving option to the defendant to furnish security can only be made in cases in which the Court holds that the defendant was disposing of his properties or removing the same from jurisdiction of Court with intent to defraud and defeat his credi-

tors. The question of the application for attachment before judgment is not liable to be once again considered at any subsequent stage i.e. at the time of making the judgment. (Para 7)

K. J. Abhyankar, for Appellant; J. E. Shinde for A. G. Sabnis, for Respondents: Nos. 1 and 2.

JUDGMENT:— This is an appeal on behalf of the original plaintiff from the order dated October 22, 1970, dismissing the plaintiff's application for attachment before judgment and directing that the surety Namdeo Laxman Bibave was not liable for payment of the amount due to the plaintiff under the surety bond dated July 25, 1969, and that the surety stood discharged.

2. Mr. Abhyankar for the plaintiff has contended that the learned Judge erred in thinking that the application Ex. 4 for an order of attachment before judgment had not been already disposed of completely by the prior order dated July 24, 1969, and by the execution of the surety bond dated July 25, 1969, in pursuance of the above prior order dated July 24, 1969. The impugned order has been made on the wrong footing that the application Ex. 4 for order of attachment before judgment had still remained outstanding for disposal. The order is entirely misconceived and not sustainable. Mr. Shinde for the surety Namdev Laxman Bibave has denied these contentions made by Mr. Abhyankar. He has submitted that the application Ex. 4 had remained outstanding to be disposed of and the finding in the impugned order that the defendant had not disposed of any of his properties to defraud his creditors is correct. The application for attachment before judgment has accordingly been rightly dismissed.

3. In connection with these rival contentions, the following are relevant facts:—

On or about June 17, 1969, the plaintiff instituted the present suit for recovering Rs. 10,165/-, interest and costs from the defendant. By application Ex. 4 filed on June 17, 1969, the plaintiff applied for attachment before judgment on the ground that the defendant was not the owner of any immovable property situated within the jurisdiction of the Court and the defendant was involved in heavy debts. The defendant had with ulterior and fraudulent intention to deceive his creditors sold away his Fiat motor-car and transferred a truck of his ownership in the name of a third party. The defendant owned the motor truck bearing No. BYL 5937, though he had purchased it in the name of his wife. The plaintiff applied for an order of attachment before judgment in respect of the above truck. On that application,

an ex parte order for attachment before judgment was issued on June 20, 1969. The order directed attachment but stated: "If the defendant gives solvent security of Rs. 12,000/-, the attachment shall not be made. Notice; pay emergent process". It is clear that the warrant of attachment containing the above directions attaching the above truck was duly effected. The defendant thereupon filed his say by the affidavit dated July 24, 1969, Ex. 13. By this affidavit, the defendant denied the various allegations made by the plaintiff in the application Ex. 4, but he stated that without prejudice to these denials he was prepared to give an undertaking not to sell or dispose of any of his properties pending the hearing. His wife would also give such an undertaking. He, therefore, applied for raising of the attachment and delivery and/or return of the truck free of attachment. Upon the filing of this affidavit Ex. 13, the trial Court heard the pleaders of the parties and directed that the truck be released from attachment. "If the defendant gives solvent security for Rs. 12,000/-". This order was made on July 24, 1969 and the submission of Mr. Abhyankar has been that this is the final order whereby the plaintiff's application Ex. 4 for attachment before judgment was completely disposed of. The effect of the order was that attachment of the truck was confirmed subject, however to the option given to the defendant to get the attachment raised upon furnishing solvent security for Rupees 12,000/-. The defendant accepted the correctness of the above order as appears from the Nazir's report and the surety bond dated July 25, 1969. The Nazir reported that the defendant had produced surety of Rs. 12,000/-. The surety had agreed to produce solvency certificate. The attachment on the truck stood raised. I have no doubt that the truck was released from attachment upon execution of the surety bond by the present respondent.

4-5. This bond is dated July 25, 1969, and the relevant part thereof reads as follows:—

"x x x x I do hereby enter into an agreement with the Hon'ble Court that should the defendant fail to act upto any order that may be passed hereafter x x x x, then I and my heirs, executors, assigns or legal representatives shall bring and pay into Court, in cash, the sum of Rs. 12,000/- x x x x at any time the Hon'ble Court may order so. x x x x x".

6. The suit was heard and disposed of by the final judgment and decree dated October 22, 1970. The plaintiff obtained decree for Rs. 10,165/- and interest and costs as appearing in the judgment. Apparently, the defendant having

been ordered to pay the above decretal amount to the plaintiff the present respondent as surety had become liable to pay the decretal debt under the above surety bond. An order to that effect should have been made by the trial Court. The trial Court, however, in my view, entirely wrongly proceeded to pronounce the impugned order along with its judgment in the suit on October 22, 1970. On the footing that the issues raised by the affidavit Ex. 13 by denial of the allegations in application Ex. 4 were outstanding to be decided, the trial Court proceeded to hold that the plaintiff's application for attachment before judgment was not sustainable. It found that the defendant had not transferred any of his properties fraudulently with intent to defeat his creditors. The trial Court, therefore, pronounced that the surety was not liable for payment of any amount to the plaintiff under the above surety bond. In the main judgment in the suit, in discussing the issue No. 6, the trial Court referred to the above application Ex. 4 and stated: "I have passed the orders on the application for attachment before judgment to day and I have held that the surety would be discharged and there would thus be no liability on the surety, but that only the defendant would be liable for the amount". In that very paragraph the trial Court noticed that the defendant had filed his own insolvency petition. The trial Court was aware that the defendant was likely to be adjudged insolvent and that the plaintiff was not in a position to recover the decretal debt from the defendant.

7. I have found it extremely difficult to appreciate the reasons why the trial Court proceeded to pronounce its findings on the issues raised on the application Ex. 4 by the denials in the affidavit Ex. 13 by the impugned order dated October 22, 1970. It is difficult to understand why these issues should not have been considered as completely heard and disposed of by the order dated July 24, 1969. The matter of the application for attachment before judgment under O. 38, R. 5 of the Code of Civil Procedure is in normal circumstances disposed of much prior to the hearing of the suit in which such application is made. The initial order that the Court makes under the above Rule 5 is a direction to the defendant to furnish security in the sum mentioned by the Court as may be sufficient to satisfy the decree or to appear and show cause why the defendant was not bound to do so. The order of attachment is thus initially issued under the last part of Clause (1) of Rule 5 in the above manner. After the order of the above nature is made the final hearing of the application under Rule 5 takes place in

accordance with the provisions in Rule 6 which runs as follows:—

"6. (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit". I have no doubt that the Order dated July 24, 1969, is the order in accordance with the provisions in Rule 6. By that order, after hearing parties, the direction given was that the attachment of the truck should be raised on the defendant giving solvent security for Rs. 12,000/-. Such an order can only be made in cases in which the plaintiff's application for attachment before judgment is found sustainable under the above Rule 5. In cases in which it is found that the defendant was not disposing of any part of his property or removing the same from jurisdiction of the Court with intent to defraud his creditors, order directing the defendant to furnish security as made by the present order dated July 24, 1969, can never be made. In other words, order under Rule 6 confirming the attachment and in the alternative giving option to the defendant to furnish security can only be made in cases in which the Court holds that the defendant was disposing of his properties or removing the same from jurisdiction of Court with intent to defraud and defeat his creditors. It is abundantly clear that the order dated July 24, 1969, directing that attachment should be raised only if the defendant furnishes security in the sum of Rs. 12,000/- must be held to be order made upon the final hearing of the application Ex. 4. The order was complete disposal of that application. The order dated July 24, was made under Rule 6. It is difficult to appreciate why the learned Judge did not apply his mind to the contents of Rules 5 and 6 and considered the matter of the application Ex. 4 once again on the footing that it was not completely disposed of by the order dated July 24, and by execution of the surety bond by the present respondent on July 25. The question of the application Ex. 4 was not liable to be once again considered at any subsequent stage. The learned Judge made the impugned order by reconsidering the application Ex. 4 after it had been disposed of on July 24, 1969. The submissions made by Mr. Abhyankar are correct and are

accepted. The learned Judge's observations in connection with the release of the respondent in this application from the surety bond as contained in the impugned order and the paragraph 8 of his judgment are contrary to law. The order and the above observations are accordingly set aside. The respondent is bound to discharge the decretal debt. The plaintiff will be accordingly entitled to enforce the surety bond in accordance with law. The respondent will pay costs of this appeal. The order dated October 22, 1970, is set aside.

Order accordingly.

AIR 1972 BOMBAY 379 (V 59 C 71)

VAIDYA, J.

Balku Laxman Khatik, Petitioner v. Biru Ramachandra Kotmire and another, Opponents.

Special Civil Appln. No. 1614 of 1967, D/- 16-4-1971 to set aside order of Maharashtra Revenue Tribunal at Poona. D/- 25-11-1966.

Index Note:— (A) Bombay Tenancy and Agricultural Lands Act (58 of 1948), S. 88-C — "Holding" — The holding referred to in the section is the holding in respect of lands leased and not the other holdings of a landlord. (Para 6)

Index Note:— (B) Bombay Tenancy and Agricultural Lands Act (58 of 1948), S. 33-B (5) (b) — Restoration of possession — Power and duty of revenue authorities.

The tenancy authorities have to ascertain the holdings of a landlord while deciding the question of restoring possession under Section 33-B (5) (b). If in finding out the holding of the landlord, it is necessary for the tenancy authorities to consider the factum of an alleged partition or validity of the partition deed they are bound to look at it and say whether it is a real partition. If it is found that the partition is a sham partition effected for the purpose of defeating the rights of a tenant, they can ignore the partition. (Para 8)

N. D. Hombalkar, for Petitioner; M. R. Kotwal, for Opponent No. 1.

ORDER:— The petitioner in the above Special Civil Application under Art. 227 of the Constitution of India is the tenant of S. Nos. 159/2-3, 162/3 and 189/7 totally measuring only Acres 3 and Gunthas 8, situate at village Are in Karvir Taluka of Kolhapur District. Respondent No. 1-landlord filed an application under Section 33-B of the Bombay Tenancy and Agricultural Lands Act, 1948, against him after obtaining a certificate under Section 88-C for recovery of

IP/JP/F406/72/YPB.

possession of the said lands on the ground of bona fide requirement for personal cultivation. The application was granted by the Tenancy Aval Karkun on February 23, 1964. The order of the Tenancy Aval Karkun was set aside in appeal by the District Deputy Collector on October 27, 1964, observing as follows:—

"I am satisfied that comparative position of land in possession is not considered adequately by the lower Court. I, therefore, partly allow the appeal and set aside the order of the lower Court and remand to consider the issue of comparative land in possession as required under Section 33-B and then decide the matter. No other issue is open for consideration".

2. After the remand the Tenancy Aval Karkun allowed the parties to lead Evidence. The petitioner contended that the Registered partition deed dated December 22, 1956, under which the landlord had taken to himself only 3 Acres and 24½ gunthas and given 49 acres and 9 gunthas to his son and 37 acres and 4 gunthas to one of his two wives was disproportionately unequal and effected solely with a purpose of defeating the rights of the petitioner-tenant under the provisions of the Bombay Tenancy Act; and there was no partition in fact effected, as at the time of the date of the alleged partition, respondent No. 1, his son and wife were all living together and only at the time of the hearing of the application, they were living separately in houses Nos. 1857 and 1899.

3. The Tenancy Aval Karkun considered the evidence before him and found that there was tenant only in the suit lands, and it was, therefore, clear that the landlord had taken a very small portion of 3 acres and 24½ gunthas of land including the suit lands with an intention to withdraw the suit lands from the tenant although about 30 acres of land comes to the share of the applicant if an equal partition is made. The Tenancy Aval Karkun therefore ignored the alleged partition and found that respondent No. 1-landlord had already other lands larger in area than the lands with the tenant; and therefore, he was not entitled to possession of the lands in dispute in view of the provisions of Section 33-B (5) (b) of the Bombay Tenancy Act. Under that section the landlord shall be entitled to terminate a tenancy and take possession of the land leased but to the extent only of so much thereof as would result in both the landlord and the tenant holding thereafter in the total an equal area for personal cultivation. Respondent No. 1 had, if all lands measuring Acres 89 Gunthas 21, alleged to be partitioned are found to be held by him, larger area than the tenant; and there-

fore, by his order dated August 14, 1965, the Tenancy Aval Karkun rejected the application.

4. The said order was confirmed in appeal by the District Deputy Collector by his order dated January 17, 1966, after agreeing with the findings recorded by the Tenancy Aval Karkun. The said decisions were set aside by the Maharashtra Revenue Tribunal in a revision application filed by respondent No. 1 landlord on the ground that as the holding of the landlord had already been considered, while granting the certificate under Section 88-C, it was not open to the Tenancy Authorities to consider once again the holding of the landlord.

5. The said decision of the Tribunal dated November 25, 1966, is challenged in the above petition. Mr. Hombalkar, learned Counsel for the petitioner, contended that the Tribunal has committed a manifest error in assuming that Section 88-C proceedings involve the consideration of the holding of the landlord notwithstanding that section requires only consideration of the 'lands leased'. This contention of Mr. Hombalkar must be upheld because the Tribunal has observed:—

"Section 88-C is very clear. It says only such landlord would be given exemption certificate whose land or holding is less than or equal to the economic holding as defined in Tenancy Act and whose income is less than Rs. 1,500/-....."

It appears that the Tribunal did not care to look into sub-section (1) of S. 88-C, which reads as follows:—

"88-C (1) Save as otherwise provided by Sections 33-A, 33-B and 33-C, nothing in Sections 32 to 32-R (Both inclusive) shall apply to lands leased by any person if such land does not exceed an economic holding and the total annual income of such person including the rent of such land does not exceed Rs. 1,500/-.

Provided that the provisions of this sub-section shall not apply to any person who holds such land as a permanent tenant or who has leased such land on permanent tenancy to any other person".

6. The holding referred to in the section is clearly the holding in respect of 'land leased' and not the other holdings of the landlord. The Tribunal, therefore, misconceived the section and approached the case illegally.

7. Mr. Kotval, learned Counsel for the landlord, however, submitted that although Section 88-C did not refer to the holding of the landlord, while considering the income of the landlord, it was necessary to consider the holding of the landlord; and once a certificate under Section 88-C was granted on the basis that the landlord had income less than

Rs. 1,500/-, it would not be open to the Tenancy Authorities to challenge that certificate by considering the other holdings of the landlord, which would yield more income. Mr. Kotwal is unable to say whether the holding of the landlord was in fact considered while granting the certificate under Section 88-C in connection with the income of the landlord, because no certified copy of the order granting the certificate is on the record. The certificate under Section 88-C, which is on the record, does not show that the holding of the landlord other than the leased land was considered. There is nothing on the record to show that while granting certificate under Section 88-C all the holdings of the landlord were taken into account. The Tribunal was, therefore, quite wrong in assuming that it was not open to the Tenancy Authorities to consider the holding while passing an order under Section 33-B, particularly having regard to the provisions of Section 33-B (5) (b) of the Tenancy Act.

8. Mr. Kotwal then submitted that the Tenancy Authorities had no jurisdiction to invalidate a registered partition-deed. This contention of Mr. Kotwal must be rejected because the tenancy Authorities have to ascertain the holdings of the landlord while deciding the question of restoring possession under Section 33-B (5) (b) of the Bombay Tenancy Act. If, in finding out the holding of the landlord, it is necessary for the tenancy Authorities to consider the factum of partition or validity of the partition-deed they are bound to look at it and say whether it is a real partition. In the present case the fact-finding authorities, viz. the Deputy Collector and the Tenancy Aval Karkun, disbelieved the landlord and held that the partition was a sham partition effected for the purpose of defeating the rights of a tenant. The terms of partition referred to above fully support their findings. It is difficult to believe that the partition was real when only the tenanted lands measuring acres 3 gunthas 8 and a small piece of land to make a total of acres 3 and gunthas 24 were allotted to the landlord and disproportionately unequal proportions were allotted to his son and his wife. In my judgment, the Deputy Collector and the Tenancy Aval Karkun were, therefore, right in ignoring the alleged partition between the landlord and his son and one of his wives; and in rejecting his application under Section 33-B.

9. In the result the judgment and order of the Maharashtra Revenue Tribunal dated November 25, 1966, is quashed. The order of the Tenancy Aval Karkun dated August 14, 1965, and the

order of the Deputy Collector dated January 17, 1966, are restored.

10. Rule absolute with costs.

Application allowed.

AIR 1972 BOMBAY 381 (V 59 C 72)

VAIDYA, J.

Smt. Parvatibai, Petitioner v. Smt. Sitabai Ganpat Chavan and another, Opponents.

Special Civil Appln. No. 1454 of 1967, D/- 8-4-1971 to set aside order of Maharashtra Revenue Tribunal, Poona, D/- 17-3-1967.

Index Note:— (A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 33-B (5) (c) — The word 'otherwise' in the section is wide enough to include "under a will" — Thus, legatee under a will from certificated landlord is not a person qualified to terminate tenancy or make an application for possession of lands from excluded tenant under Section 33-B — (X-Ref:— Section 33-B). AIR 1967 Bom 428, Foll. (Paras 4, 6, 8)

Index Note:— (B) Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 33-B — Right of certificated landlord to terminate tenancy or apply for possession of lands, surviving on his death to all his heirs succeeding as tenants-in-common, cannot be exercised by any one of them alone — (X-Ref:— Sections 33-A and 88-C). (Para 9)

The word 'person' in expression 'leased by any person' in Section 88-C (1) means and includes where the land is owned and let by a number of persons, all these persons. The word cannot have a different meaning in Section 33-A which defines certificated landlord with reference to certificate under Section 88-C. Where, therefore, a person succeeds to the lands of deceased certificated landlord along with other adult heirs as tenant in common, he alone cannot terminate tenancy or apply under Section 33-B for possession of the lands from excluded tenant, unless such other heirs are also joined for the purpose. (1961) 63 Bom LR 657. Rel. on; AIR 1967 Bom 428, Distinguished. (Paras 4, 9)

Cases Referred: Chronological Paras

AIR 1967 Bom 428 = 69 Bom LR 383, Ramchandra v. Mahadu 3, 4
AIR 1966 SC 24 = (1965) 3 SCR 488, Commissioner of Income-tax M. P. v. Seth Govindram Sugar Mills 8
(1961) 63 Bom LR 637 = 1961 Nag LJ 474, Jainabai v. Bakaji Bhau 4, 5

H. D. Gole, for Petitioner; V. N. Gadgil, for Opponent No. 1.

IP/JP/F398/72/JRS

ORDER:— The subject-matter in dispute in this Special Civil Application under Art. 227 of the Constitution of India, consists of agricultural land S. No. 501/3 situate at Saswad in Poona District. This land and some other lands originally belonged to Ganpat Chavan, the Husband of respondent No. 1. The petitioner was the tenant of the above land. There was another tenant Laxman Jagtap in possession of some other lands of Ganpat. Ganpat applied for a certificate under Section 88-C of the Bombay Tenancy and Agricultural Lands Act, and obtained it on January 20 1959, in respect of the aforesaid land and the lands in possession of Jagtap. Unfortunately, Ganpat died thereafter. Respondent No. 1 alone claiming to be the sole heir of Ganpat, terminated the tenancy of the petitioner and of the aforesaid Jagtap under Section 33-B of the Bombay Tenancy Act and filed an application in the Court of the Tenancy Aval Karkun, Purandhar, for restoration of possession of the aforesaid lands on March 29, 1962.

2. Laxman Jagtap settled so far as he was concerned, the matter with respondent No. 1 by giving possession to her of the lands in his possession. The petitioner resisted the application on several grounds including the ground that respondent No. 1 could not terminate the tenancy relying on the certificate granted to her deceased husband; and further that even if she could do so, she could not file an application without joining her sons and daughters who were heirs and legal representatives of the deceased Ganpat. It was also contended that the landlady did not bona fide require the lands for personal cultivation. The Tenancy Aval Karkun overruled the contentions raised on behalf of the petitioner and ordered possession to be given to the landlady on September 16, 1964.

3. The petitioner carried an appeal to the Deputy Collector, who reversed the order on the ground that respondent No. 1 could not rely on the certificate granted to her deceased husband. Respondent No. 1 then filed a revision application before the Maharashtra Revenue Tribunal against the decision of the Deputy Collector. The Tribunal by its decision dated March 17, 1967 set aside the order of the Deputy Collector relying on the decision of this Court in *Parvati Ramchandra v. Mahadu*, 69 Bom LR 383 = (AIR 1967 Bom 428). There Tarkunde and K. K. Desai, JJ. held that the right of a certificated landlord to apply under Section 33-B of the Bombay Tenancy Act for possession of land from an excluded tenant does not lapse on his death and can be exercised, within the specified time, by his successor in interest. The Tribunal applied the case

to the facts of the present case and further held that as respondent No. 1 was the sole legatee of the will, it was not necessary for the sons and daughters to be joined in the application. The Tribunal, therefore, set aside the order of the Deputy Collector and restored the order passed by the Tenancy Aval Karkun.

4. The said decision of the Tribunal is challenged by Mr. Gole for the petitioner on the ground that the Tribunal wrongly applied the decision of this Court in *Parvati's case*, 69 Bom LR 383 = (AIR 1967 Bom 428) to the facts and circumstances of the present case. He submitted that in the present case Ganpat Chavan died living behind him his widow, two adult well placed sons and three daughters, as admitted by the widow herself, and that all these were Ganpat's heirs under the Hindu Succession Act. Mr. Gole also contended that although the will was relied on by respondent No. 1, it was not proved or produced in the proceedings, and in the absence of that will, it was wrong on the part of the Tribunal to have proceeded on the footing that respondent No. 1 was the sole legatee under the said will. He argued that even assuming that she was the sole legatee under the will, she could not make an application under S. 33-B as she derived her title under the alleged will from her husband, and as such did not fulfil the requirements of Section 33-B (5) (c) of the Bombay Tenancy Act, 1948. He urged that as she was not the only heir of deceased Ganpat, in the absence of the will, she alone could not terminate the tenancy or make an application without joining the sons and daughters. In support of his last argument, he relied upon the decision in *Jainabai v. Bakaji Bhau*, (1961) 63 Bom LR 637 (657) where it is held that the word 'person' in the expression 'leased by any person' in Section 88-C (1) of the Bombay Tenancy Act, means and includes where the land is owned and let by a number of persons, all these persons and that if they hold the land as tenants-in-common, an application by any one of them for exemption from the applicability of Sections 32 to 32-R of the Act must be in respect of the whole land in which he has an undivided share and the income, which will consequently be taken into consideration under S. 88-C (1) of the Act, will be the income of all these persons who own or have leased the land jointly. Mr. Gole contended that the same meaning should be given to the word 'person' used in the definition of the word 'certificated landlord' in Section 33-A (1) as the said definition is based on the certificate issued under Section 88-C. As the heirs of Ganpat Chavan succeeded as tenants-in-common

under Section 19 (b) of the Hindu Succession Act, 1956, according to Mr. Gole, all of them must join in acting as certificated landlords.

5. In view of these contentions, the first question which arises is as to whether respondent No. 1 could terminate the tenancy of the petitioner and make an application under Section 33-B as the sole legatee under the will of the deceased Ganpat Chavan. Though there is some discussion of the will by the Tenancy Aval Karkun, no will was produced before him. There was no evidence except the bare statement of respondent No. 1 to show that there was a will. In the absence of production of will, it was wrong on the part of the Tenancy Aval Karkun and the Tribunal to assume that respondent No. 1 was the sole legatee under the will. I would have remitted the case to the trial Court, if it was necessary to decide whether respondent No. 1 was in fact the sole legatee under the will of deceased Ganpat Chavan.

6. I, however, think that it is not necessary to remand the case because, even assuming that respondent No. 1 was the sole legatee under the will she would be disqualified from terminating the tenancy in view of Section 33-B (5) (c), which reads as follows:—

"33-B (5) The right of a certificated landlord to terminate a tenancy under this section shall be subject to the following conditions, that is to say:

(a)

(b)

(c) The land leased stands in the Record of rights (or in any public record or similar revenue record) on the 1st day of January 1962 and thereafter until the commencement date in the name of the landlord himself, or of any of his ancestors (but not of any person from whom title is derived by assignment or Court sale or otherwise), or if the landlord is a member of a joint family, in the name of a member of such family".

7. The effect of this clause was considered by this Court in Parvati's case referred to above. It is observed at page 388:

"It cannot be assumed in the absence of adequate reason that the legislature did not intend to grant to the successor-in-interest the same limited protection which it granted to a small holder with limited income. There are, on the other hand ample provisions in the Act to ensure that the successor in interest of a certificated landlord would not be able to secure the benefit conferred by Section 33-B, if he is not himself a small holder with limited income. In the first place Clause (c) of sub-section (5) of Section 33-B provides that such a successor-in-interest would not be able to terminate

the tenancy of the excluded tenant if his title is 'derived by assignment or Court sale or otherwise'. A donee or purchaser from a certificated landlord would be unable to terminate the tenancy of the excluded tenant."

In that case this Court dealt with two petitions. In the petition in Spl. C. A. No. 1878/64 it appears that the certificated landlord died leaving behind him as his only heir his widow. She was held to be entitled to make an application under Section 33-B as the successor-in-interest of her husband, notwithstanding the provisions of Section 33-B (5) (c). In the other Spl. C. A. No. 1962 of 1964 a certificate under Section 88-C was obtained by one Vithabai, the widow, and on her death in September 1961 her husband's sister Kamalabai claimed to be the legatee under Vithabai's will. It was contended on her behalf that besides being the legatee under the will, she was also the nearest heir of Vithabai and, therefore, the matter was remanded to the Maharashtra Revenue Tribunal keeping open the contention urged on behalf of the tenant that Kamalabai being the legatee under the will executed by the widow Vithabai, did not fulfil the requirement of Section 33-B (5) (c) and was not entitled to terminate the respondent's tenancy. Mr. Gole, who also appeared in that case, says that at p. 389 of the report of that case clause (b) actually stands for clause (c) of sub-section (5) of Section 33-B.

8. It is, therefore, clear that in that case this Court held that a person who derived title by assignment, or Court sale or otherwise, through or from the certificated landlord, would not be able to terminate the tenancy of the excluded tenant. It is also clear that the point as to whether a legatee under the will did or did not fulfil the requirements of clause (c) of sub-section (5) of Section 33-B was not decided. The passage quoted above shows that the successor-in-interest who derives title through or from the certificated landlord by assignment, or Court sale or otherwise was expressly held to be not qualified to apply under Section 33-B. The word 'otherwise' in my judgment is wide enough to include 'under a will'. This Court has held, as pointed out earlier, that a donee or purchaser from a certificated landlord would be unable to terminate the tenancy of the excluded tenant. I cannot see any reason to distinguish a case of a donee or a purchaser from the case of a legatee under a will. I am, therefore, of the opinion that respondent No. 1 could not terminate the tenancy of the petitioner or make an application under Section 33-B as the sole legatee under the alleged will of Ganpat Chavan even assuming that such

a will was executed, as stated by respondent No. 1.

9. The next question is as to whether she alone could make the application as the heir of her deceased husband under the Hindu Succession Act. Whether the property was self-acquired property of Ganpat or joint family property of Ganpat, under the Hindu Succession Act she would be entitled to a share therein along with her sons and daughters. She alone could not make an application under Section 33-B or terminate the tenancy. She could not be the Manager or Karta when there were adult male (?) sons in the family. (See Commissioner of Income-tax, M. P. v. Seth Govindram Sugar Mills, AIR 1966 SC 24). Under Section 19 (b) of the Hindu Succession Act all the heirs would be succeeding as tenants-in-common. Hence it would be necessary for all of them to terminate the tenancy and apply for possession. It is well settled that if they are holding the property as tenants-in-common, one of them alone cannot terminate the tenancy, and a notice of termination must be given by all or on behalf of all. Further as laid down by this Court in the aforesaid case of (1961)

63 Bom LR 637 the word 'person' used in the expression 'leased by any person' in Section 88-C (1) means and includes where the land is owned and let by a number of persons, all these persons. The word cannot have a different meaning in Section 33-A which defines 'certificated landlord' with reference to Section 88-C certificate. In the present case, it is clear that the sons and daughters of respondent No. 1 did not join respondent No. 1 in either terminating the tenancy of the petitioner or making an application for possession. I am, therefore, of the opinion that the application made by respondent No. 1 alone was not maintainable under Section 33-B.

10. For these reasons, the decision of the Maharashtra Revenue Tribunal is quashed; the order passed by the District Deputy Collector Baramati Division on March 31, 1966, is restored though for different reasons; and the application made by respondent No. 1 is rejected.

11. Rule absolute. No order as to costs.

Rule made absolute.

END

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CALCUTTA SECTION

WITH COMPARATIVE TABLES FOR

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CALCUTTA HIGH COURT

1972

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" " Parimal Kumar Chanda (Addl.) (18-2-1972).
" " Nirmal Chandra Mukherji (Addl.) (18-2-1972).

The Hon'ble Mr. Justice Amar Nath Banerjee (Addl.) (14-8-1972).

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NOMINAL TABLE

A. Akoofi Jadwat Pvt. Ltd. v. Oriental Fire and General Insurance Co. Ltd.	(June) 228	Ganesh Chandra v. Chunlil Mondal	(Apr) 150
Abdul Rahim v. Kamalapati Mukherjee	(Dec) 541	Gopal v. State of Uttar Pradesh	(Feb) 67
Arun General Industries Ltd. v. Gunny Trading Co.	(Dec) 542	Gostha Behari Ghose v. University of Calcutta	(Feb) 61
Arun General Industries Ltd. v. Rishabh Manufacturers Private Ltd.	(Mar) 128	Hahnemen Publishing Co. P. Ltd. v. Dinesh Chandra Ghosh	(Nov) 484
Asansol Electric Supply Co. v. Chunnial Daw	(Jan) 19	Haji Munna Mia and Co. Pvt. Ltd. v. Union of India	(May) 185
Ashoka Marketing Ltd. v. Assistant Collector of Central Excise, Calcutta III	(Sep) 398	Haridas Roy v. Calcutta Commercial Bank Ltd.	(Aug) 329
Asiatic Oxygen Ltd., In re	(Feb) 50	Hari Prasad Singh v. Commissioner of Income-tax, West Bengal	(Jan) 27
Asim Pramanik v. Vice-Chancellor, Burdwan University	(Nov) 482	Heavy Engineering Corporation Ltd. v. Crompton Greaves Ltd.	(May) 217
Aslam, Sk. v. Union of India	(July) 292	Himangsu Sekhar v. Kishori Lal	(Feb) 77
Babulal v. Jeshankar	(Nov) 494	India Folls Ltd. v. 5th Industrial Tribunal, West Bengal	(Aug) 308
Baidyanath Kundu v. Jyotshna Rani	(Oct) 443	Indu Bhushan v. State of West Bengal	(Apr) 160
Banwarilal Pasari v. D. R. Kohli	(Aug) 306	International Coal Corporation v. Pure Sitalpur Coal Concern Ltd.	(Feb) 45
Basanta Kumari v. Ila Mukherjee	(Apr) 149	Iswar Jagannath Deb Jew v. Fatlick Chand Seal	(Nov) 489
Bedana Bala Dassi v. Calcutta State Transport Corporation	(Aug) 305	Jahar Lal Manna v. Sri Tarakeswar Jew's Shebait	(Sep) 376
Benarasi Prosad Sharma v. Bhagwar Choudhury	(July) 291	Jaidev Jain & Co. v. Union of India	(June) 253
Bhattacharjee (Agency) & Co. Pvt. Ltd. v. Tarak Nath Banerjee	(Sep) 393	Jayanta Mohan v. Jagat Mohan	(Mar) 88
Binoy Kumar Saha v. Revenue Officers, Malda	(Nov) 458	K. C. Chatterjee v. Durgapur Projects Ltd.	(Sep) 383
Biswanath v. Ajit Kumar	(Feb) 52	Kaileswar Singh v. Upendra Nath Koyal	(July) 276
Biswapati Dey v. Kennsington Stores	(Apr) 172	Karam Chand Thapar and Bros. (Coal Sales) v. Inder Mohan Kapoor	(Mar) 82
Central Bank of India v. Srish Chandra Guha	(Aug) 345	Koparmal Gurudayal v. Sagarmal Bengani	(Oct) 430
Chaitanya Charan Nayak v. Manik Chandra Nandy	(Dec) 520 (FB)	Kothari Trading and Investment Co. Pvt. Ltd. v. Union of India	(Nov) 466
Chakraborty, S. N. v. Bimalendu Mazumdar	(Aug) 352	Kutubuddin Ahammed v. Kashim Ali	(July) 293
Chartered Bank v. Commissioner for Port of Calcutta	(May) 198	Lahiri, B. P. v. Jyotirmayee Devi	(Oct) 404
Chittaranjan Mondal v. Sankar Prosad Sahani	(Nov) 469	Lalit Mohan Ghosh v. Atal Mondal	(Mar) 81
Chunlil Basu v. Hon'ble Chief Justice of the High Court at Calcutta	(Nov) 470	Life Insurance Corporation of India v. M. L. Dalmia and Co. Ltd.	(July) 295
Collector of Customs, Calcutta v. Biswanath Mukherjee	(Oct) 401	Luxmi Devi, Smt. v. Akul Mahato	(Mar) 104
Corporation of Calcutta v. Building Tribunal	(Aug) 318	Madan Mohan Ghosh v. Sishu Bala Atta	(Dec) 502 (FB)
Corporation of Calcutta v. Hindusthan Construction Co. Ltd.	(Oct) 420	Mahboobur Rahman v. Public Service Commission, West Bengal	(Aug) 348
D. Macropolo and Co. v. Union of India	(Aug) 350	Manjusha Debi, Sm. v. Sunil Chandra Mukherjee	(Aug) 310
Damodar Valley Corporation v. Ikrah Nandi Coal Co.	(Apr) 153	Mihir Kumar Sarkar v. State of West Bengal	(Jan) 8
Datta, K. C. v. Ballygunge Estate Pvt. Ltd.	(May) 221	Mihir Kumar Sarkar v. State of West Bengal	(Sep) 355
Deben Adhicary v. State of West Bengal	(Mar) 84	Mofazzel Mondal v. Anachhaddin. Sardar	(Feb) 74
Debi Mata v. State of West Bengal	(Dec) 497	Monoranjan Routh v. State of West Bengal	(Nov) 487
Dhanomoy Thapa v. State of West Bengal	(Jan) 1	Munilal Bhagwat Sharan v. Chief Commercial Superintendent, Eastern Railway	(Oct) 405
Durga Prasanna Gupta v. State of West Bengal	(Sep) 378	Nazla Rob v. Commissioner of Wakf, West Bengal	(Sep) 389
Dwijapada v. Prafulla Chandra	(Oct) 409	Nirmala Auddy v. Monorama Chakraborty	(June) 256
Electrical Industries Corporation v. Union of India	(Dec) 539	Nishakar Pan v. Mahedeb Ghosh	(July) 258
Esam Sk. v. Sattar Mulick	(Apr) 141	Nurul Hoda v. Amir Hasan	(Nov) 449 (FB)
Fatechand Mahesri v. State of West Bengal	(May) 177		

Pashupati Roy v. State of West Bengal	(Sep) 366	Sachindra Nath Mahapatra v. State of West Bengal	(Sep) 385
Plastic Industries, B. K. v. Jayantilal Kalidas Sayani	(Aug) 339	Sallila Chandra v. Hiran Kumar	(May) 189
Pradip Lamp Works v. Pratap Chandra Basu	(Sep) 361	Sambhu Das Pyne v. Corporation of Calcutta	(July) 273
Pratima Baul v. Indu Bhushan Banerjee	(June) 255	Sanjib Kumar Mukherjee v. Nathmal Rampuria	(Dec) 524 (SB)
Prem Nath Mayer v. Registrar of Trade Marks	(July) 281	Satsang v. Kiron Chandra Mukhopadhyay	(Dec) 533
Probodh Chandra v. Income-tax Officer, 'C' Ward	(Oct) 417	Saugar Electricity Supply v. M. P. Electric Board	(Oct) 408
Purusottam Lalji v. Ratan Lal Agarwalla	(Nov) 459 (FB)	Sheikh Hossain v. Naubahar Bibi	(Oct) 446
Rabindra Nath v. Abinash Chandra	(Apr) 143	Shri Iswar Jagannath Deb Jew v. Fatik Chandra Seal	(Sep) 372
Rabindra Nath v. Divisional Commissioner, Burdwan Division	(Oct) 447	Sisir Kumar Chandra v. Sm. Monorama Chandra	(July) 283
Radha Kanto v. State of West Bengal	(Apr) 174	Sisir Kumar Kundu v. Smt. Sabita Rani Mandal	(Jan) 4
Rajlakshmi v. Krishna Chaitanya	(May) 210	Sitaram v. Banwarilal	(Mar) 105
Rajputana Trading Co. Pvt. Ltd. v. Iswarsingh Kripalsingh	(Feb) 56	Sovabati Dassi, Sm. v. Kashi Nath Dey	(Mar) 95
Ramdayee, Mst. v. Dhanraj Kochar	(Aug) 313	State of West Bengal v. Ganesh Chandra Mitra	(Aug) 333
Ramesh Ch. Sood v. A. S. O. Sub-Division, Raanaghat	(Nov) 455	— v. Mohamad Hanif	(Nov) 467
Ramesh Prosad Agarwal v. Union of India	(Nov) 465	— v. Union Club, Purulia	(June) 225
Ram Kumar Kajarla v. M/s. Chandra Engineering (India) Ltd.	(Sep) 381	Sudhansu Sekhar Maity v. State of West Bengal	(Aug) 320
Ram Singh, M. S. v. Bijoy Singh	(May) 190	Sukumar Bysack v. Sushil Kanta	(May) 207
Raymon Engineering Works Ltd., Calcutta v. Union of India	(July) 281	Sunil Kumar v. Supdt., Hooghly Jail	(Feb) 35
Sabitri Devi Saraf v. M/s. Ramgopal Motilal Kajoria	(Dec) 516 (SB)	Tempa Landu v. Ranjit Kundu	(Nov) 496
		Tirthapada Nag v. Ram Babu Gupta	(Oct) 411
		Union of India v. Radharani Ghosh	(Aug) 343

SUBJECT INDEX

Advocates Act (25 of 1961), S. 34 (2) (iii)
— Rule making power conferred on High Court is not ultra vires Art. 14 of the Constitution (Nov) 470D

Arbitration Act (10 of 1940), S. 2 (a) — Arbitration agreement — Dispute

(July) 295
—S. 2 (e) — Reference to arbitration — Validity (Apr) 153A

—Ss. 8 and 9, Expl. — Arbitrator's refusal or neglect to act—What constitutes (Feb) 67A

—S. 8 — Arbitration clause providing reference of dispute to the Secretary, U. P. Government, Industries Deptt.—Arbitrator is the incumbent in the office of the Secretary at the time of reference and not a persona designata — Parties cannot be said to have intended not to supply the vacancy if the arbitrator refused or neglected to act (Feb) 67B

—S. 8 — Application under S. 8—Point depending on question of fact not taken specifically even in affidavit in opposition — Cannot be allowed (Feb) 67C

—S. 20 — Arbitration clause for referring disputes to "Chief Engineer of Company" — Post of Chief Engineer vacant at the time of dispute—Court can appoint arbitrator (Sep) 383A

—S. 20—Arbitrator before appointment giving his suggestions; without there being any reference to him for arbitration — He renders himself incapable of acting as arbitrator (Sep) 383B

—S. 21 — Arbitration of suit disputes —Share-holders can object intervening in third party's suit against company when a director, becoming Special Officer under consent order in company's another suit wherein restraint order against directors also had been passed, files an agreement for arbitration of that third party's suit to gain control over the company (Feb) 45A

—S. 21 — Calcutta High Court Rules under — Agreement to refer suit disputes to arbitration cannot be accepted if it is simply put in — Compliance with those rules is necessary (Feb) 45B

—S. 30 — Misconduct of arbitrator — Determination—Appreciation of evidence by arbitrator if relevant consideration (July) 295

—S. 30 (a) — See also Ibid, S. 39 (vi) (Apr) 153D

Arbitration Act (contd.)

—S. 30 (a)—Misconduct in proceeding or error apparent on face of record — Absence of signature of one of two arbitrators on some of the minutes of proceedings does not render the award invalid (Apr) 153B

—S. 30 (a) — Misconduct or procedural defect—Statement of parties before arbitrators that they would not adduce any evidence on certain issues — Award of arbitrator giving findings on these issues on consideration of oral and documentary evidence on record — Award is not invalid for misconduct (Apr) 153C

—S. 30 (a)—Misconduct—Contract stipulating payment of interest for delayed payments—Arbitrator instead of awarding interest according to stipulation awarding small sum of Rs. 650/- as compensation for long delay in paying Rs. 16058/- — Award is not vitiated by misconduct (Apr) 153E

—S. 33—See Forward Contract (Regulations) Act (1952), S. 2 (b) (Dec) 542

—S. 34 — Application to stay proceedings — Grant of — Principles regarding (May) 198A

—S. 34—Stay of suit when may not be granted (May) 198B

—S. 34—Stay of suit—Plaintiff alleging fraud against the petitioner who however desires to have the disputes tried by the Arbitrators — Suit should not be stayed. (Case law discussed) (July) 281

—S. 39 (vi) — Appeal against order refusing to set aside award — Scope of appeal (Apr) 153D

—S. 40 — Application for stay of proceedings — Grant of — Principles (May) 198C

Bengal Agricultural Debtors Act (7 of 1936)

See under Debt Laws.

Bengal Finance (Sales Tax) Act (6 of 1941)
See under Sales Tax.

Bengal General Clauses Act (1 of 1899), S. 17—See Bengal Wakf Act (1934), S. 27 (2) (iii) (Sep) 389D

Bengal Money-lenders Act (10 of 1940)
See under Debt Laws.

Bengal Police Regulations (1943)
See under Civil Services.

Bengal Tenancy Act (8 of 1885)
See under Tenancy Laws.

Bengal Wakf Act (13 of 1934), S. 27 (2) (iii) — See also Constitution of India, Art. 226 (Sep) 389A

—Ss. 27 (2) (iii) and 29 and R. 4 — Rule 4 does not necessarily bar inclusion of mutawalli in the Administrative Committee that is formed under the above Sections (Sep) 389C

—Ss. 27 (2) (iii) and 29 — Commissioner who has the power to appoint Administrative Committee has the concomitant power to dissolve it by reason of S. 17 of the Bengal General Clauses Act. (Sep) 389D

—S. 27 (2) (iii) — Allegation of mismanagement is not sine qua non for dissolving Administrative Committee formed under the section (Sep) 389E

—S. 29.

See (1) *ibid*, S. 27 (2) (iii) (Sep) 389C, D
(2) Constitution of India, Art. 226

(Sep) 389A

—S. 32 and R. 1 — "Persons affected" in R. 1 (a) — Meaning (Sep) 389B

Bengal Wakf Rules, R. 1 — See Bengal Wakf Act (1934), S. 32 (Sep) 389B

—R. 4 — See Bengal Wakf Act (1934), S. 27 (2) (iii) (Sep) 389C

Bihar and West Bengal (Transfer of Territories) Act (40 of 1956), S. 43 — Provision for extending existing law in transferred territories — Repeal of existing law need not be by Parliament (Dec) 497E

Burdwan University Regulations

See under Education.

Calcutta City Civil Court Act (W. B. Act 21 of 1953), Ss. 3 and 5 — As amended by W. B. Act (35 of 1969) — Notification D/- 14-11-1969 — Establishment of City Civil Court in 1953 and conferment of additional Jurisdiction to that Court in 1969 are intra vires the State Legislature under Schedule 7 List II Entry 3 and List III Entry 13 of the Constitution — The main Act and the Amendment Act are intra vires (Apr) 160A

—S. 5 — See *ibid*, S. 3 (April) 160A

—S. 8 (1) (a) — See Houses and Rents — W. B. Premises Tenancy Act (1956), S. 20 (April) 150A

—Sch. I, Entries 1 and 2 — Deletion of Entry 2 by the Amendment Act (35 of 1969) — Effect (April) 160H

Calcutta High Court (Jurisdictional Limits) Act (15 of 1919) — Fixation of territorial limit of original jurisdiction based on economic and historical reasons is not ultra vires, Art. 14 of the Constitution (Nov) 470B

Calcutta High Court Original Side Rules

See under High Court Rules and Orders

Calcutta Municipal Act (83 of 1951)

See under Municipalities.

Calcutta Thika Tenancy Act (2 of 1949)

See under Tenancy Laws.

Calcutta University Act (2 of 1966)

See under Education.

Central Civil Services (Classification, Control and Appeal) Rules (1957)

See under Civil Services.

Central Civil Services (Classification, Control and Appeal) Rules (1966)

See under Civil Services.

Central Civil Services (Conduct) Rules (1955)

See under Civil Services.

Central Civil Services (Conduct) Rules (1964)

See under Civil Services.

Civil Procedure Code (5 of 1908), S. 2 (ii)

—See *ibid*, O. 22, R. 4 (Aug) 329

—S. 9

See (1) Specific Relief Act (1877), S. 21 (b) (Jan) 19B

(2) Tenancy Laws — W. B. Land Reforms Act (1956), S. 21

(Mar) 104

—S. 10 — Stay of suit — Same parties — Complete identity of either the subject-matter or the parties is not required (Mar) 128A

—S. 10 — Stay of suit — Matter directly and substantially in issue — It is enough if the matters in controversy in the two suits are substantially the same (Mar) 128B

—S. 11 — Directly or substantially in issue (July) 276

—S. 24 — Transfer of suit — Grounds

(July) 291

—S. 34 — Ad interim interest — Suit under S. 72 of Contract Act for refund of money paid by mistake — Both the parties labouring under the same mistake — Held it would not be sound exercise of discretion to allow plaintiff ad interim interest during pendency of suit (Oct) 420E

—S. 80 — Railway Administration making part payment in full settlement of claim after issue of first notice under S. 80 and plaintiff accepted the same under protest — Suit for balance if maintainable without second notice (Nov) 466

—S. 100 — Second Appeal — Issue not involving question of fact — Can be raised in second appeal where a change of law has taken effect after the decision in first appeal and has been given retrospective effect (Feb) 52B

Civil P. C. (contd.)

—S. 109 — See Constitution of India, Art. 133 (1) (Nov) 465

—S. 110 — See Constitution of India, Art. 133 (1) (Nov) 465

—S. 115—No jurisdictional error either of law or of fact — High Court would not interfere even if the Subordinate Judge is in error in his appraisal of evidence adduced before him (May) 221A

—S. 151

See (1) Ibid, O. 41, R. 25 (Oct) 401B

(2) High Court Rules and Orders — Calcutta High Court Original Side Rules, Chap. 26, R. 51

(Feb) 77

—O. 1, R. 1—See Constitution of India, Art. 226 (Aug) 320G

—O. 1, R. 3 — See Houses and Rents—W. B. Premises Tenancy Act (12 of 1956), S. 20 (Aug) 313B

—O. 1, R. 5 — See Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), S. 20 (Aug) 313B

—O. 2, R. 3

See (1) Constitution of India, Art. 226 (Aug) 320G

(2) Houses and Rents—West Bengal Premises Tenancy Act (12 of 1956), S. 20 (Aug) 313B

—O. 6, R. 17 — Amendment of plaint practically changing the nature and character of the suit and raising fresh issues triable on evidence, cannot be allowed at the belated stage of appeal

(Mar) 88A

—O. 6, R. 17 — Written statement was amended to clarify and elucidate facts already in the pleadings and to formulate new questions of law from such facts for decision by Court — Amendment after 7 years held did not, in the circumstances, cause injustice to plaintiff (Sep) 372A

—O. 9, R. 13—Ex parte decree—Allegation that neither the summons nor the notice was duly served — Application under O. 9, R. 13 maintainable

(May) 221B

—O. 9, R. 13 — Application for setting aside ex parte decree— Satisfaction of the ex parte decree through execution proceedings no bar for making application

(May) 221C

—O. 11, R. 14—Order for production of documents—When can be made

(Aug) 308

—O. 22, R. 4 — Death of one of defendants—Order of abatement—Effect

(May) 185

—O. 22, R. 4—Abatement suit on mortgage — Death of a defendant — Plaintiff

Civil P. C. (contd.)

impleading all heirs of deceased known to him — Decree whether binds absent heirs — Principles to be applied in determining whether suit abates, stated

(Aug) 329

—O. 22, R. 4 (1) — Plea open to legal representative of deceased defendant — Service of fresh writ of summons on him if necessary (Nov) 494

—O. 22, R. 9 — See also Letters Patent (Cal.), Cl. 15 (Nov) 449 (FB)

—O. 22, R. 9—Where delay in applying for substitution of the heirs of the sole respondent or for applying for setting aside abatement is not bona fide it cannot be excused (Apr) 141

—O. 22, R. 10—Continuation of suit by plaintiffs' assignee — Suit for ejectment by lessee against under-lessee — During pendency of suit lessee surrendering lease to lessor—Lease given to new lessee — New lessee cannot continue suit instituted by original lessee (May) 190B

—O. 22, R. 10 — Continuation of suit by substituted plaintiff—He must affirmatively prove that he is rightful owner

(May) 190C

—O. 34, R. 1—See Ibid, O. 22, R. 4 (Aug) 329

—O. 39, R. 1—Injunction pending suit —Main factors to be considered are question of balance of conveniences and question of prima facie case (Mar) 105A

—O. 39, R. 1—Injunction—Balance of convenience (Mar) 105B

—O. 40, R. 1 — Rights of person examined pro inter esse suo (Aug) 345

—O. 40, R. 1 — Grant of permanent lease by receiver of debutter property — Permissibility (Nov) 489

—O. 41, R. 22—Cross-objections—New point—Point not taken in the memorandum of objections not allowed to be raised at the hearing of appeal

(Aug) 343B

—O. 41, R. 25 and S. 151 — Calcutta High Court Rules R. 43 — Appeal from order in writ proceedings — Whether remand can be ordered (Oct) 401B

—O. 41, R. 27—Additional evidence in appellate court—When can be allowed (Mar) 88B

—O. 43, R. 1 — Appeals from Orders— Order allowing inspection of seized documents—Whether appealable

(Sep) 398

CIVIL SERVICES

—Bengal Police Regulations (1943), Reg. 883 — See also Interpretation of Statutes (Sep) 385B

Civil Services — Bengal Police Regulations (contd.)

— Regs. 883 & 884 — Since Revisional Authority acts quasi judicially, its order should be a reasoned one especially when it is one of reversal (Sep) 385D

— Regs. 883 & 884 — Appeal against order in revision is incompetent

(Sep) 385E

— Reg. 884 — See also

(1) Ibid, Reg. 883 (Sep) 385D, E

(2) Interpretation of Statutes (Sep) 385B

— Reg. 884 — For exercise of revisional power matter need not be pending before the Original or Appellate authority — Revisional authority has power to interfere with final order of Disciplinary authority even where a person is suffering the punishment imposed (Sep) 385A

— Reg. 884 — Exercise of revisional power after 2 years from date of original order without any justifiable cause for the delay held resulted in needless mischief and injury to the delinquent — Order quashed (Sep) 385C

— Central Civil Services (Classification, Control and Appeal) Rules (1967), R. 15(5)

— See Constitution of India, Art. 311

(Jan) 27D

— Central Civil Services (Classification, Control and Appeal) Rules (1966), R. 15 (4)

(i) (b) — See Constitution of India, Art. 311 (2)

(Jan) 27G

— Central Civil Services (Conduct) Rules (1966), R. 3 — Where charges are supported by statement of allegations with detailed facts, the charge is not vague or indefinite (Jan) 27A

— R. 3 — Validity — Rule 3 is not void on ground of vagueness (Jan) 27B

— Central Civil Services (Conduct) Rules (1964), R. 25 — Rule is prospective

(Jan) 27C

Companies Act (1 of 1956), S. 34 (2) — See Monopolies and Restrictive Trade Practices Act (1969), S. 22 (Mar) 105C

— S. 113 (1) — Obligation of the Company — Sub-section (1) enjoins upon the Company to have the shares, etc. ready for delivery and not to deliver the shares etc. Thus it does not authorise a person applying for their delivery to have an order for delivery of the said shares under this section (Feb) 50

— S. 149 — See Monopolies and Restrictive Trade Practices Act (1969), S. 22

(Mar) 105C

— S. 172 — Non-compliance — Effect — Non-compliance of the provisions of

Companies Act (contd.)

S. 172 would make resolutions placed at the meeting void (Jan) 19A

— S. 173 (2) — Section does not imply that any and every lapse should be visited with the consequence of ultra vires doctrine. A special business only requires to find a place in the explanatory statement attached to the notice of General Meeting of Shareholders (Mar) 105E

— S. 173 (2) — A company seeking approval of General Body of Shareholders for starting a new undertaking need not mention in the Explanatory Note attached to Notice that licence under S. 11 of the Industrial Development and Regulation Act is obtained (Mar) 105F

— S. 173 (2) — A company seeking approval of general body of shareholders for investing capital in new undertaking need not disclose to individual shareholders the details of financial arrangement with collaborators (Mar) 105H

— S. 402 (e) — See Arbitration Act (1940), S. 21 (Feb) 45A

Constitution of India, Pre. — See also Letters Patent (Cal) (1865) Pre: (Nov) 470A

— Pre. and Art. 247 — Marginal notes in the Constitution furnish some proof as to their meaning and purpose (Apr) 160D

— Pre. — Constitutionality of Legislation — Lack of clarity in a legislative enactment is no justification for declaring it ultra vires (Apr) 160I

— Art. 14 — See also

(1) Ibid, Art. 19 (1) (g) (Jun) 253C

(2) Ibid, Art. 31 (2) (Sep) 366A

(3) Advocates Act (1961), S. 34 (2) (Nov) 470D

(4) Calcutta High Court (Jurisdictional Limits) Act (1919), Pre. (Nov) 470B

(5) Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (1950), S. 9 (1) (f)

(Oct) 41I

(6) Public Premises (Eviction of Unauthorised Occupants) Act (1958), S. 7 (2) (Aug) 350

(7) W. B. Land Development and Planning Act (1948), S. 8 (2) (Nov) 487

(8) W. B. Public Land (Eviction of Unauthorised Occupants) Act (13 of 1962), S. 4 (Jan) 1B

— Art. 14 — Order fixing employees' similarly circumstanced and enjoying similar scales of pay, in different scales of pay is discriminatory (Apr) 174

— Art. 14 — Challenge to constitutionality of statute on ground of unreasonable classification — Burden of proof

(Nov) 470C

Constitution of India (contd.)

—Art. 19 (1) (f) — See

(1) Ibid, Art. 31 (2) (Sep) 366A

(2) Houses and Rents— W. B. Premises Rent Control (Temporary Provisions) Act (1950), S. 9 (1) (f)

(Oct) 411

—Art. 19 (1) (f) (5) — W. B. Premises Tenancy Act (12 of 1956), S. 17 (4), Proviso (as amended by Act IV of 1968 or Act XXX of 1969) — Validity — Provisions are reasonable — Not invalid

(Dec) 524B (SB)

—Art. 19 (1) (g) — See also

(1) Ibid, Art. 31 (2) (Sep) 366A

(2) West Bengal Public Land (Eviction of Unauthorised Occupants) Act (13 of 1962), S. 4 (Jan) 1C

—Art. 19 (1) (g) — Acceptance or rejection of tender—No question as to infringement of Art. 19 (1) (g) or Art. 14 arises

(June) 253C

—Arts. 31 (2), 19 (1) (f) and (g) and 14

—Provisions of West Bengal Fisheries (Requisition and Acquisition) Act for requisition of fisheries and payment of compensation for same do not violate Arts. 31 (2), 19 (1) (f) and (g) and 14 (Sep) 366A

—Art. 31B — See West Bengal Land Development and Planning Act (1948), S. 8 (2) (Nov) 487

—Art. 133 (1) — Defence of India Act (No. 35 of 1939), S. 19 (1) (b) and (f) — High Court while hearing appeals under the Defence of India Act, functions as a Court and not as an Arbitration Tribunal — But its decision is not a judgment, decree or final order within Art. 133 (1)

(Nov) 465

—Art. 133 (1) — Judgment, decree or final order — Decision of High Court in appeal against award of compensation under S. 19 (1) — Leave to appeal — Defence of India Act

(Nov) 467

—Art. 133 (1) (c) — Certificate of fitness for appeal — Judgment of affirmance — Petitioner must establish that the appeal involves some substantial questions of law notwithstanding that the requirement of value under Clause (b) is satisfied — Substantial question of law — What is

(July) 273

—Art. 226 — See also

(1) Customs Act (1962), S. 115 (2) Proviso (Aug) 306

(2) Tenancy Laws — W. B. Estates Acquisition Act (1954), S. 44 (2a)

(Nov) 455A

—Art. 226 — Complicated question of fact — They will not be decided in the

Constitution of India (contd.)

summary proceedings under Art. 226

(Feb) 61C

—Art. 226 — Other remedy open — Where a right or liability is created by a statute which gives a special remedy for its enforcement, the remedy provided by the statute only must be availed of

(Feb) 61D

—Art. 226 — Necessary parties — Petition against order rejecting tender — Persons who have participated in the scrutiny and recommended for acceptance of tender are necessary parties (June) 253A

—Art. 226 — Breach of rules or regulations in accepting or rejecting tenders — No writ will lie (June) 253B

—Art. 226 — Natural Justice — Tenderer is not entitled to opportunity of being heard before rejection of his tender

(June) 253D

—Art. 226 — Writ application against acquisition of land — For maintaining the application petitioners must make out a prima facie case that they are affected by such acquisition (Aug) 320F

—Art. 226 — Parties to petition — Two independent acquisition proceedings based on two independent notifications and two independent declarations — Any or all of the petitioners not jointly interested in lands involved in proceedings — They cannot be joined in one petition

(Aug) 320G

—Art. 226 — Writ petition — Public Service Commission exercising its discretion regarding matter within its independent jurisdiction — Commission whether answerable to High Court (Aug) 348A

—Art. 226 — Petitioner called for interview by Public Service Commission — List revised and petitioner held rightly excluded on ground of ineligibility

(Aug) 348B

—Art. 226 — Questions of fact and law — Complicated questions of title and possession requiring oral evidence to be taken and also involving title of persons who are not even parties in the proceedings cannot be decided in a writ petition. (Case law discussed) (Sep) 355

—Art. 226 — Who can apply — President of Administrative Committee formed by Wakfs Commissioner cannot by himself challenge order dissolving the Committee (Sep) 389A

—Art. 226 — Principles of natural justice — Decision dependent on finding whether petitioner was heard or not — Petitioner to seek remedy other than by writ petition (Sep) 389F

Constitution of India (contd.)

—Art. 226 — Domestic Enquiry — Charge-sheet—Interpretation of—Natural justice —Violation of (Oct) 401A

—Art. 226 — Alternative remedy open —Writ jurisdiction cannot be invoked (Oct) 417

—Art. 226—Alternative Remedy—Provision for appeal under S. 44 (3) of W. B. Act 1 of 1954 did not bar writ challenging proceeding and order under S. 44 (2a) which was beyond the jurisdiction of the Officer and also suffered from breach of rules of natural justice (Nov) 455D

—Art. 226 — Powers of High Court — High Court has no authority to decide whether a legislature while enacting a law has or has not applied its mind (Dec) 497A

—Art. 245 — State Legislature enacting provision whereby State Government could apply provisions of State law with necessary changes to territories transferred to it—Provision does not amount to excessive delegation (Dec) 497C

—Art. 246— Constitutionality of Legislation—Test to determine whether statute is intra vires (Apr) 160F

—Art. 247—See also *ibid*, Pre. (Apr) 160D

—Art. 247 — Parliament has no authority to establish additional Courts for matters in State List (Apr) 160C

—Art. 248—See *ibid*, Art. 247 (Apr) 160C

—Art. 309 — No specific rule under Article—Resignation when takes effect (Sep) 378

—Art. 311—See also *ibid*, Art. 309 (Sep) 378

—Art. 311— Reasonable opportunity — Whether by refusal of the assistance of a lawyer to the delinquent there is any denial of reasonable opportunity is essentially a question of fact (Jan) 27D

—Art. 311— Where, to find out whether assessments of taxes were properly made by delinquent Income-tax Officer proper investigation was necessary, events more than 3 years prior to framing of charges could form basis of charges (Jan) 27E

—Art. 311 — Inquiry against Government servant — It is only when President is disciplinary authority that consultation with Union Public Service Commission is required (Jan) 27F

—Art. 311 — If reasons can be found out either from order or from other documents, quasi-judicial order cannot be struck down merely because formal

Constitution of India (contd.)

reasons are not recorded in the order itself (Jan) 27H

—Art. 311 (2) — Second show cause notice sent in compliance with Art. 311(2) cannot be bad on grounds that disciplinary authority was disagreeing with findings of the enquiry officer or that notice was only against penalty proposed (Jan) 27G

—Art. 372 read with Art. 225 — See Letters Patent (Cal.) (1865), Pre. (Nov) 470A

—Sch. 7, List I, Entry 97 — See *ibid*, Art. 247 (Apr) 160C

—Sch. 7, List II, Entry 3 — Interpretation of Power to establish additional Courts is included within the entry (Apr) 160B

—Sch. 7, List III, Entry 13—Expression "Civil Procedure"—Interpretation (Apr) 160E

Contempt of Courts Act (32 of 1952), S. 1—

Contempt—What amounts to (Aug) 352

—S. 3 — Contempt — No liability will arise if the order claimed to have been flouted has not been served on the contemner but only communicated to him and the act complained of is anterior to such communication (Mar) 84

Contract Act (9 of 1872), S. 7— Acceptance of proposal—Tender—Special conditions—Applicability (May) 217

—S. 21—See *ibid*, S. 72 (Oct) 420D

—S. 22—See *ibid*, S. 72 (Oct) 420D

—S. 72 — Payment made by mistake of law—It is recoverable (Oct) 420B

—S. 72— Payment made under mistake of fact or law — Party is entitled to get back money in absence of circumstances like estoppel, waiver, limitation or the like — Equitable consideration is not a bar to such a relief (Oct) 420C

—S. 72 — Word 'mistake' would comprise both mistake of law and fact — Section is not in conflict with Ss. 21 and 22 (Oct) 420D

Copyright Act (14 of 1957), Ss. 2 (o),

13 (1) (a), 14 (1) (a), 45 — 'Literary Work'

—Works of religious preacher or compilations of his discourses or teaching are 'literary work' — Registration of 'works' not condition precedent for acquisition of copyright (Dec) 533

—S. 13 (1) (a)—See *Ibid*, S. 2 (o) (Dec) 533

—S. 14 (1) (a)—See *Ibid*, S. 2 (o) (Dec) 533

—S. 45—See *Ibid*, S. 2 (o) (Dec) 533

COURT FEES AND SUITS VALUATIONS

— **W. B. Court Fees Ordinance (17 of 1969)**, S. 50 (2), Sch. II Art. 1, Cl. (g), Proviso — Probate proceeding before Ordinance — Benefit of S. 50 (2) if can be claimed

(May) 189

— Sch. II, Art. 1, Cl. (g) — See *Ibid*, S. 50 (2)

(May) 189

Criminal Procedure Code (5 of 1898), S. 100 — See *Guardians and Wards Act* (1890), S. 12

(Apr) 143C

Customs Act (52 of 1962), S. 115 (2), Proviso — Option to pay in lieu of confiscation — If the adjudicating authority was not called upon to give option the order of such authority shall not be interfered by High Court in a writ proceeding

(Aug) 306

— S. 131 — Revision by Central Government — Duty of revisional authority to give opportunity of personal hearing to petitioner

(Dec) 539

DEBT LAWS

— **Bengal Agricultural Debtors Act (7 of 1936)**, S. 37-A — Effect of setting aside sale — Applicant joint debtor alone is entitled to retain possession till the extinguishment of debt. Non-applicant joint debtors are free to alienate their shares and the alienee becomes entitled to declaration of title and joint possession

(Feb) 74

— **Bengal Money Lenders Act (10 of 1940)**, S. 37-A as inserted by *Bengal Money Lenders (Amendment) Act* (21 of 1965), S. 37-A applies to transactions entered into even prior to Amending Act of 1965

(Dec) 541

Defence of India Act (35 of 1939), S. 19 (1) (b) & (f) — See *Constitution of India*, Art. 133 (1)

(Nov) 465

EDUCATION

— **Burdwan University Regulations**, Regns. 7 and 18 — Regulation 7 is not controlled by Regn. 18 — On the other hand Regn. 18 is controlled by Regn. 7

(Nov) 482

— Regn. 18 — See *Ibid*, Regn. 7: (Nov) 482

— **Calcutta University Act (2 of 1886)**, S. 58 — First Statutes under (1968), Statute 100 (1), Proviso — Trust managing a college though executed prior, registered after the commencement of the Statutes — Approval of Syndicate of the University — Necessity — Absence of approval — Effect

(Feb) 61A

Electricity (Supply) Act (64 of 1948), Sch. 7, Item C (a) (iii) — Life of diesel electric set — In computing its actual number of hours the set had run, cannot be taken into account

(Oct) 408

Essential Commodities (Amendment) Act (14 of 1967), Ss. 6A and 6B — Competent authority issuing show cause notice for confiscating goods without hearing representation of the person affected — Held, that the notice was bad in law

(Oct) 405

— S. 6B — See *Ibid*, S. 6A

(Oct) 405

Evidence Act (1 of 1872), S. 17 — See *Houses and Rents — W. B. Premises Tenancy Act* (1956), S. 17 (3)

(Oct) 446

— S. 64 — Objection to admissibility of document — Objection relating to admissibility of document under law — Objection can be taken even at appellate stage

(May) 190F

— Ss. 91, 92 — Oral evidence to show real nature of the transaction was admissible and is not barred by Ss. 91 and 92

(May) 207A

— S. 92 — See *Ibid*, S. 91

(May) 207A

— S. 101 — Burden of proof — Where a defendant alleges payment of amount deposited with him in a suit for its recovery the onus is on him to prove such payment

(Sep) 393B

— S. 115 — *Bengal Tenancy Act* (8 of 1885), S. 26-C — Notice under S. 26-C on cosharer about sale of holding describing him as occupancy tenant — Kobala describing holding as occupancy holding — Co-sharer seeking pre-emption as occupancy tenant — Purchaser estopped from challenging capacity of pre-emptor as occupancy tenant

(Dec) 520B (FB)

— S. 116 — See *Houses and Rents — W. B. Premises Tenancy Act* (1956), S. 17 (3)

(Oct) 446

Forward Contracts (Regulation) Act (74 of 1962), S. 2 (b) — *Arbitration Act*, 1940, S. 33 — Non-transferable specific delivery contract — Arbitration clause in contract — Assignment of contract — Reference to arbitration by assignee on basis of assignment — Can be challenged under S. 33

(Dec) 542

Guardians and Wards Act (8 of 1890), S. 10 (3) — See *Ibid*, S. 11

(Apr) 143B

— S. 10 (3) — Requirement as to attestation by two witnesses not complied with — Application is liable to be rejected in limine (Point conceded)

(Apr) 143A

— S. 11 — Procedure on admission of application — An application for being appointed as guardian of the person and property of a minor which is not in con-

Guardians and Wards Act (contd.)

formity with S 10 (3) is not one that can be proceeded on under S. 11 (Apr) 143B

—S. 12 — Power to make interlocutory order — Section 12 gives power to make interlocutory orders for the temporary custody and protection of the person and property of the minor — It does not include power to injunct against Search Warrant issued by Magistrate under S. 100, Cri. P. C. (Apr) 143C

HIGH COURT RULES AND ORDERS

—**Calcutta High Court Original Side Rules**, Ch. 4, R. 5 and Ch. 38, R. 44 — Summons returnable on 31.1.72 served on the respondent at 4.40 P. M. on 28.1.72, i. e., before close of Court hours, would leave 2 clear days and hence provisions are not violated (Sep) 372B

—Ch. 4, R. 5 and Ch. 38, R. 44 and 46 — Where circumstances demand the Court can abridge time (Ch. 38, R. 46) notwithstanding provisions in Ch. 4, R. 5 and Ch. 38, R. 44 relating to service of summons (Sep) 372C

—Ch. 4, R. 5 and Ch. 38, R. 44 — Just relief should not be refused for some infraction of rules of procedure, mistake inadvertence or negligence (Sep) 372D

—Ch. XVII, R. 10 — See Limitation Act (1963), Art. 136 (Apr) 172

—Chap. 20, R. 3 — See Ibid, Chap. 26, R. 51 (Feb) 77

—Chap. 26, R. 51 — Chamber Summons — Application relating to conduct of a reference pending before Special Referee filed by a party whose request to that Referee to make a special report was declined has to be moved by way of Chamber Summons and not by way of a notice of Motion (Feb) 77

—Ch. 38, R. 44 — See Ibid, Ch. 4, R. 5 (Sep) 372B, C, D

—Ch. 38, R. 46 — See Ibid, Ch. 4, R. 5 (Sep) 372C

Hindu Law — Joint family — Mitakshara — Partition (May) 177B

—Joint family — Partition — See Tenancy Laws — West Bengal Estates Acquisition Act (1954), S. 14 (3): (May) 177A

—Religious endowments — Shebaitship — Nature of — If can be transferred by gift or will — Principles (Mar) 95

Hindu Marriage Act (25 of 1955), S. 25 — Benefit of the section is available to either party to a marriage that has been annulled by a decree of nullity under S. 12 (Jan) 4

HOUSES AND RENTS

—**West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950)**, S. 9 (1) (f) (as amended by Act 62 of 1950) — Section 9 (1) (f) does not violate Art. 19 (1) (f) or Art. 14 of Constitution (Oct) 411

—**West Bengal Premises Tenancy Act (12 of 1955)**, S. 2 (h) — See Ibid, S. 10 (Dec) 516A (SB)

—S. 10 — Application for standardization of rent by tenant — Application does not cease to be maintainable because subsequently, tenancy is determined by notice or promises are requisitioned by Government (Dec) 516A (SB)

—S. 12 (1), Proviso (h) — Requirement of premises for building and rebuilding (Nov) 484

—S. 13 — Tenant is not, in a suit for eviction under the Act, entitled to relief under S. 114, T. P. Act (Oct) 404A

—S. 13 (1) (e) — Nuisance or annoyance to neighbours including landlord — Single instance of obstruction by tenant to inspection of pump room and water reservoir would not amount to nuisance (Feb) 52A

—Ss. 17, 18, 21 and 22 — Sections 21 and 22 even as amended by Act XXXIV of 1969 would not control S. 17 (1) (Oct) 404B

—S. 17 (1) — Period of limitation for deposit under S. 17 (1) will not be extended by operation either of S. 21 or S. 22 (Feb) 56A

—S. 17 (1) — Expression "Payment" means actual delivery of or parting with money physically and the principle of tender as contemplated by law of contract is not applicable to and included in the word "payment" (Feb) 56B

—S. 17 (1), (2) — Application under, sub section (1), when can be treated as one under sub-section (2) (Feb) 52

—S. 17 (1) and (4) — Tenant fully complying with sub-s. (1) is entitled to relief under sub-s. (4) (Apr) 150B

—S. 17 (3) — Bona fide dispute as to existence of relationship of landlord and tenant — Duty of Court to settle before striking out defence against delivery of possession (Oct) 443

—S. 17 (3) — Striking out defence against delivery of possession — Defendant denying that plaintiff was his landlord — Dispute about their relationship must be settled before defence is struck out (Oct) 446

Houses and Rents — W. B. Premises Tenancy Act (contd.)

—S. 17 (4), Proviso (as amended by Act IV of 1968 or Act XXX of 1969) — See Constitution of India, Art. 19 (1) (4) (5)

(Dec) 524B (8B)

—S. 17B — See Ibid, S. 39 (Oct) 430B

—S. 17-B (1) Time limit within which tenant has to apply for reliefs under S. 17-B (1) — Commencement of

(Oct) 430A

—Ss. 17-D and 13 (1) (i) — Consent decree passed in a suit for ejectment filed on ground of default can be set aside under S. 17-D (June) 255

—S. 18 — See Ibid, S. 17 (Oct) 404B

—S. 20 — Decree passed by City Civil Court for recovery of possession is appealable (Apr) 150A

—S. 20 — Applicability — Applies to a suit or proceeding by landlord against tenant for recovery of possession simpliciter — Other suits or proceedings by a landlord against tenant in a competent court, not barred (Aug) 313A

—S. 20 — Joinder of parties and causes of action — Provisions of O. 1, Rr. 3 and 5 and O. 2, R. 3, Civil P. C. govern joinder of parties and causes of action — They are not abrogated or repealed by S. 20 (Aug) 313B

—S. 21 — See

(1) Ibid, S. 17 (Oct) 404B

(2) Ibid, S. 17 (1) (Feb) 56A

—S. 22 — See

(1) Ibid, S. 17 (Oct) 404B

(2) Ibid, S. 17 (1) (Feb) 56A

—S. 29 (6)—See Ibid, S. 20: (Apr) 150A

—Ss. 39, 17-B — Application under S. 17-B—"Within a period of 60 days" in S. 17-B (1) — Reference is to period of limitation —S. 5, Limitation Act, applies by virtue of S. 39 of Tenancy Act (Oct) 430B

—**W. B. Premises Tenancy (Amendment) Act (4 of 1968)**, S. 17-B — See Houses and Rents—W. B. Premises Tenancy (Amendment) Ordinance (1967), S. 17-C: (Nov) 496

—**W. B. Premises Tenancy (Amendment) Ordinance (1967)**, S. 17-C — Benefit is not available to cases where decree for possession has been passed after 22-8-1967 when Ordinance came into force (Nov) 496

—**W. B. Premises Tenancy (Second Amendment) Act (34 of 1969)**, S. 8 — See Houses and Rents—W. B. Premises Tenancy Act (12 of 1956), S. 17 (Oct) 404B

—S. 9—See Houses and Rents — W. B. Premises Tenancy Act (12 of 1956), S. 17 (Oct) 404B

Income-tax Act (43 of 1961), S. 297 (2) (a) — Assessee filed return under Income-tax Act (1922) — Assessment order passed under S. 143 (3) of Act (1961) — Order held valid (Oct) 417

Industries (Development and Regulation) Act (68 of 1951), S. 18C — Proceeding instituted by Authorised Controller of company — Order of liquidation of company — Proceeding abates (Sep) 361

Interpretation of Statutes — Reference to objects and reasons — When can be made (Dec) 524A (8B)

—When can Court supply omission in language of a statute (Sep) 385B

Land Acquisition Act (1 of 1894), Ss. 4 and 6—Notification for acquisition and declaration under S. 6 neither invoking delegate powers nor issued in appropriate form — Acquisition not vitiated for such irregularity (Aug) 320A

—S. 5-A—Second opportunity of hearing to owner of land not envisaged (Aug) 320E

—S. 6—See also Ibid, S. 4 (Aug) 320A

—S. 6 — Acquisition for establishment of subsidiary Port—Competency of State Government (Aug) 320B

—S. 6 —'Purpose'—Undeclared purpose cannot be supported by declared purpose —However, real purpose, though undeclared, if it is well known it can be supported (Aug) 320C

—S. 18—See Ibid, S. 23 (1) (Jun) 225B

—S. 19 (1) (d) — No disclosure of basis of valuation by Collector—Onus to prove valuation to be incorrect is on claimant (Jun) 225C

—S. 23 — In the absence of proper material enabling the court to determine the value of the tank in a logical and scientific manner it would not be unreasonable for the Court to value the tank at one-half the value of solid land (Aug) 333B

—S. 23—The accepted modes of valuation of lands acquired under the Act are (1) price paid, in bona fide transactions of purchase of land acquired or adjacent lands (2) prospective profit from the lands acquired and (3) the opinion of valuers or experts (Aug) 333C

—S. 23—In capitalising the rental value of the premises for 20 years the rent must be the fair rent or the rent prevailing in the locality in respect of buildings having similar advantages and amenities (Aug) 333D

—S. 23 (1) — Determination of market value — Post notification sales — When can be considered (Jun) 225A

Land Acquisition Act (contd.)

—S. 23 (1)—Sale transactions not relied by Collector — Whether Government can rely on them in reference (Jun) 225B

—Part 7 (Ss. 38 to 44)—Acquisition for establishment of subsidiary port — Grant of land to Indian Oil Corporation or Fertilizer Corporation of India — Propriety (Aug) 320D

—S. 54 — In an appeal by the Government against the award the respondent can abandon part of his claims under the cross-objection so as to confine his claims within the limit of the valuation of the cross-objection. But this does not mean that he cannot press any of the claims made in the cross-objection (Aug) 333A

Letters Patent (Calcutta) (1866)—Constitutional validity — Letters Patent is still in force within meaning of Art. 372 read with Art. 225 of the Constitution—It cannot also be struck down as ultra vires the Preamble of the Constitution (Nov) 470A

—Clause 12—Leave under — If defendant will be put to great hardship amounting to injustice when the suit is permitted to be tried in Calcutta High Court leave granted at the time of institution of the suit must be cancelled on a revocation (Mar) 82

—Cl. 15—See Civil P. C. (1908), O. 43, R. 1 (Sep) 398

—Cl. 15 —“Judgment”—Tests stated—An order setting aside abatement under O. 22, R. 9, Civil P. C. is not a ‘judgment’ as it does not relate to the merits of the dispute but only a step towards final adjudication of the dispute and as such is not a ‘judgment’ within the meaning of Cl. 15 of the Letters Patent (Nov) 449 (FB)

—Cl. 15—Judgment — Order refusing to grant injunction restraining execution of judgment decree is appealable (Nov) 469

Limitation Act (9 of 1908), S. 18—See Tenancy Laws — Bengal Tenancy Act (1885), S. 26F (Dec) 502B (FB)

—Art. 181—See also Tenancy Laws — Bengal Tenancy Act (1885), S. 26F (Dec) 502B (FB)

—Art. 181 — Scope — Article applied only to applications under Civil P. C. (Sep) 381B

Limitation Act (36 of 1963), S. 1—Law of Limitation applies to Calcutta City Civil Court (Apr) 160C

—S. 5 — See also Houses and Rents — W. B. Premises Tenancy Act (12 of 1956), S. 39 (Oct) 430B

Limitation Act, 1963 (contd.)

—S. 5—Sufficient cause— Ignorance of law arising from not taking any legal advice on petitioner's rights under S. 17, B. W. B. Premises Tenancy Act (1956), held not sufficient cause within S. 5, Limitation Act (Oct) 430C

—S. 29 (2) — See Houses and Rents — W. B. Premises Tenancy Act (12 of 1956), S. 39 (Oct) 430B

—Art. 22—Deposit or loan — Determination of — Intention of parties and all circumstances of case have to be considered (Sep) 393A

—Arts. 64-65 — See Tenancy Laws —Bengal Tenancy Act (1885), S. 48C Proviso (Mar) 81

—Art. 136—Execution of decree—Time required for obtaining certified copy of decree cannot be excluded (Apr) 172

—Art. 137 — Scope—Article applies to application under special laws (Sep) 381A

Marine Insurance Act (41 of 1963), S. 55 (1)—Liability of insurer—Nature of (Jun) 228A

—S. 57 — ‘Proximate cause’ of loss—What is (Jun) 228B

—S. 60—‘Actual loss’—What it includes (Jun) 228C

Maxims—See Houses and Rents — W. B. Premises Tenancy Act (12 of 1956), S. 17B (1) (Oct) 430A

Monopolies and Restrictive Trade Practices Act (64 of 1969), S. 2 (g) (iii) — Exercise of control by a company over another company — Concept of “control” implies dominant and a dominated undertaking (Mar) 105C

—S. 22 — Applicability — Companies which are incorporated prior to commencement of the Act of 1969 do not come within ambit of Section 22 (Mar) 105C

—S. 22 — The section is intended for State intervention (Mar) 105D

Motor Vehicles Act (4 of 1939), S. 110-B—

Purpose of compensation — Factor for consideration (Aug) 305

MUNICIPALITIES

—Calcutta Municipal Act (33 of 1951), Ss. 6, 24, 34, 414 and 414-A—Powers and position of commissioner—Order to demolish unauthorised construction — Review of order rejected—Appeal beyond limitation — Commissioner not impleaded — Appeal held bad and defective (Aug) 318

—S. 24—See *ibid*, S. 6 (Aug) 318

—S. 34—See *ibid*, S. 6 (Aug) 318

—S. 414 — See also *ibid*, S. 6 (Aug) 318

Municipalities — Calcutta Municipal Act (contd.)

—S. 414 — Even in respect of matters which involve violation of an unrelaxable building rules the Commissioner has discretion not to order demolition if the violation is not of serious nature — That discretion must however be used bona fide stating reasons therefor

(Nov) 459 (FB)

—S. 414A—See *ibid*, S. 6 (Aug) 318

Partnership Act (9 of 1932), S. 19 (c) — See Arbitration Act (1940), S. 21

(Feb) 45A

Patents and Designs Act (2 of 1911), S. 51-A sub-s. (1), Cl. (a) (iii) — Even if a design which is original but is published earlier than the date of registration such design loses its novelty or newness on the date of registration and hence the registration may be revoked

(Aug) 339A

—S. 51-A (1), Cl. (a) — Word 'or' between sub-clauses (i), (ii) and (iii) of Cl. (a) should be read as 'and' Person is entitled to take one or all of the grounds mentioned in the said sub-clauses for cancellation of the registration

(Aug) 339B

—S. 51-A, Cls. (a) and (b)—Forums prescribed in two clauses for applying for cancellation of registration are not mutually exclusive

(Aug) 339C

Public Premises (Eviction of Unauthorised Occupants) Act (32 of 1953), Ss. 7 (2) 10-E — Section 7 (2) is void being in contravention of Art. 14 of the Constitution — Doctrine of eclipse has no application to post-Constitution laws that infringe fundamental rights — Section 4 of Amendment Act 1948 which adds S. 10-E cannot make S. 7 (2) valid—Constitution of India, Art. 14

(Aug) 350

—S. 10-E — See *ibid*; S. 7 (2)

(Aug) 350

PUBLIC SAFETY

—**West Bengal (Prevention of Violent Activities) Act (19 of 1970), S. 3—**Detention under — Essentials of

(Feb) 35A

—S. 3—Detention under—Grounds for —Vagueness

(Feb) 35B

—S. 3—Acting in any manner prejudicial to the maintenance of public order

(Feb) 35C

—S. 3 — Detention—Pendency of criminal case on same ground on which order of detention is made — Order of detention not rendered invalid or malicious

(Feb) 35D

Registration Act (16 of 1908), S. 17 —Registration of trust, requirement as to

(Feb) 61B

—S. 17 (1) (b)—Surrender of lease—Surrender by instrument in writing purporting to extinguish right of tenant valued at over Rs. 100—Deed is compulsorily registrable even though invalid because of surrender on future date

(May) 190E

Requisitioning and Acquisition of Immovable Property Act (30 of 1952), S. 8 (3) (a)—Assessment of compensation

(Aug) 343A

—S. 8 (3) (b) — Acquisition of land — Compensation to be determined

(July) 292

SALES TAX

—**Bengal Finance (Sales Tax) Act (6 of 1941), S. 2—**Construction contracts — Material supplied by contractor cannot be assessed for payment of sales tax

(Oct) 420A

Specific Relief Act (1 of 1877), Ss. 20, 22

—Contract for sale — Hard and unconscionable bargain — Discretion to enforce specific performance

(May) 207B

—S. 21 (b) — Wrongful termination of service—Suit for declaration that service continues

(Jan) 19B

—S. 22—See *ibid*, S. 20

(May) 207B

Specific Relief Act (47 of 1963), S. 34 —Relief of declaratory decree, when available

(July) 283B

—S. 34 — Declaratory suit — Application for injunction — Maintainability

(Jul) 283C

Succession Act (39 of 1925), S. 63 —Proof of execution

(May) 210B

—S. 222 — Application for probate — Delay — Effect

(May) 210

—S. 283 — Probate proceedings — Probate Court cannot pass decree in terms of private agreement between parties

(Jul) 283A

—S. 295 — See Court fees and, Suits Valuations — W.B. Court fees Ordinance (1969), S. 50 (2)

(May) 189

TENANCY LAWS

—**Bengal Tenancy Act (8 of 1886), S. 26-C**

—See also Evidence Act (1872), S. 115

(Dec) 520B (FB)

—S. 26-F—Right of pre-emption under Section 26-F whether survives W. B. Estates Acquisition Act, 1953 after Chapter VI thereof comes into force

(Dec) 502A (FB)

—S. 26-F—Application by non-notified co-sharer—Limitation

(Dec) 502B (FB)

Tenancy Laws — Bengal Tenancy Act (contd.)

—S. 26-F — West Bengal Estates Acquisition Act (1 of 1954), S. 6 (1) — Landlord leasing land to tenant as "occupancy tenant"—Such tenant has no right of pre-emption when part of his co sharer's land is sold—Effect of vesting of raiyati interest in State (Dec) 520A (FB)

—S. 26.F (2) — See also Tenancy Laws — W. B. Lavel Reforms Act (10 of 1956), S. 8 (Oct) 409B

—S. 26.F (2) — Applicant not required to deposit compensation for the improvement made by the transferor (Dec) 502C (FB)

—S. 48-C, Proviso — Tenant remaining in continuous possession by asserting title as Korfa-tenant for more than 12 years after expiry of lease — Tenant acquires non-ejectable right under proviso to Section 48-C (Mar) 81

—Schedule III, Art. 3 — To attract the provisions of Art. 3 of the Schedule III of the Bengal Tenancy Act, dispossession must be effected by the landlord in his capacity as landlord (Sep) 376

—Calcutta Thika Tenancy Act (2 of 1949), S. 5—Landlord not in possession of property at the time of execution of lease—Lease nonetheless comes into operation and lessee can maintain suit for eviction of thika tenant in his own right (Apr) 149A

—S. 5—Registered lease for more than 12 years — No structure constructed or acquired by lessee on the land — Suit by lessee for eviction of thika tenant—Lessee cannot be thika tenant under Section 2 (5) and hence question of starting eviction proceeding by tenant of first degree against tenant of second degree does not arise (Apr) 149B

—S. 5 — Suit by lessee for eviction of thika tenant — Order of ejectment passed —Appeal against the order disposed of before coming into force of amended Act 29 of 1969 —Held, no protection of amended Act could be given against ejectment —Moreover grounds whereupon the order was passed were not deleted by Amending Act (Apr) 149C

—S. 7-A (as inserted by Second Amendment Act of 1969) — Power of Controller to set aside order for ejectment — Applicability (Jun) 256

—Calcutta Thika Tenancy (Second Amendment) Act (29 of 1969), S. 13—See Tenancy Laws—Calcutta Thika Tenancy Act (2 of 1949), S. 7A (Jun) 256

Tenancy Laws (contd.)

—West Bengal Estates Acquisition Act 1953 (1 of 1954), S. 2 (b)—Tank and bund thereof are not agricultural lands (Nov) 458

—S. 6

See (1) Ibid, S. 14 (3) (May) 177A

(2) Tenancy Laws — Bengal Tenancy Act (1885), S. 26F

(Dec) 502A (FB)

(3) Tenancy Laws — W. B. Non-Agricultural Tenancy Act (1949), S. 24

(July) 258B

—S. 6 (1)—See Tenancy Laws—Bengal Tenancy Act (1885), S. 26-F

(Dec) 520A (FB)

—Ss. 14 (3), 6 — Intermediary — Joint Hindu family — Holding property before vesting in an "intermediary" can be treated as a single individual or a single unit for the purpose of retention of land and also for compensation

(May) 177A

—S. 44—See Tenancy Laws—W. B. Non-Agricultural Tenancy Act (1949), S. 24

(July) 258B

—S. 44 (2a) — Notice requiring holder to show cause against action under section without giving grounds for initiation of proceeding and without stating why and in what manner the finally published record of rights needs revision is liable to be quashed as being incompetent exercise of suo motu power and as violating rules of natural justice (Nov) 455A

—S. 44 (2a)—Revenue Officer or Assistant Settlement Officer cannot enquire into the title of holder — He has only to decide on basis of possession (Nov) 455B

—S. 44 (2a) and Sch. B, R. 6 — Correctness of entry in record of rights has to be enquired into by the Assistant Settlement Officer himself and not by deriving any impression from enquiry held by another officer (Nov) 455C

—Ss. 44 (3) and 44 (2a) — See Constitution of India, Art. 226 (Nov) 455D

—S. 61 (as introduced by Bengal Act (4 of 1963)) — There is no delegation of legislative power to executive—Assuming that there is delegation it is neither excessive nor unguided so as to amount to abdication of legislative powers

(Dec) 497B

—S. 61 (2), Proviso (ii) (as amended by West Bengal Act 40 of 1963) — Provision neither vague nor unworkable (Dec) 497F

—Chap. IV—See Tenancy Laws—Bengal Tenancy Act (1885), S. 26F

(Dec) 502A (FB)

Tenancy Laws — West Bengal Estates Acquisition Act (contd.)

- Sch. B, R. 6—See *Ibid*, S. 44 (2a) (Nov) 455C
- W. B. Land Reforms Act (10 of 1986), S. 2 (10)—'Raiyat' — Test to determine (Sep) 381D
- S. 4 (2-A) (a)—Quarrying sand—Provision cannot apply where sands found on surface land during excavation of tank were allowed by owner to be removed by licensee for business purpose since there is no quarrying of sand in such case (Oct) 447
- Ss. 5 (5) and 8 (1) — Non-notified co-sharer could apply for pre-emption under S. 8 (1) within 8 years from date of notice of transfer under S. 5 (5) (Oct) 409A
- S. 8 — Section does not provide for rejection of application for pre-emption for non-deposit of consideration amount while applying (Oct) 409B
- S. 8 (1)—See also *Ibid*, S. 5 (5) (Oct) 409A
- S. 8 (1)—Application for pre-emption — Limitation (Sep) 381C
- S. 8 (1)—Application for pre-emption — Co-sharer raiyat—Condition precedent for enforcing right of pre-emption (Sep) 381E
- Ss. 8 (1) and 9 (1)—Where consideration money is in dispute pre-emptor may without suffering rejection of his application deposit deficiency if any determined by the Revenue Officer within time allowed by him (Oct) 409C
- S. 8 (2) (a)—Heba-bil ewaz — Consideration not money but some other commodity — Transaction is an exchange which is excepted under S. 8 (2) (a)—Application for pre-emption not maintainable (July) 293A
- S. 8 (2) (b) — Heba-bil-ewaz — Whether a gift (July) 293B
- S. 9 (1)—See *Ibid*, S. 8 (1) (Oct) 409C
- S. 21—Jurisdiction of Civil Court is not barred when the Act depriving the Civil Court of its jurisdiction in respect of the suit is brought into force during the pendency of the suit (Mar) 104
- W. B. Non-Agricultural Tenancy Act (20 of 1949), S. 6—Applicability (Jul) 258A
- S. 24 — Pre-emption — Finally published record of rights showing separation of interests of co-sharers — Transfer by one of them of his share—Others have no right of pre-emption (Jul) 258B
- S. 24 (2)—See Tenancy Laws—W. B. Land Reforms Act (10 of 1956), S. 8 (Oct) 409B

Trade and Merchandise Marks Act (43 of 1988), S. 11 — Registration of trade mark — Proposed mark not likely to deceive or confuse—Onus to prove lies on applicant (July) 261A

—S. 12—Prohibition of registration of identical or deceptively similar trade marks (Jul) 261B

—S. 109 (5)—Appeal under—Questions of facts can be gone into (Jul) 261C

Transfer of Property Act (4 of 1882), Ss. 11, 54—Sale—Vendee gets all interest in property — A habendum in sale-deed cannot override provisions of S. 54 — Habendum imposing conditions or limitation in conveyance deed is repugnant to S. 11 (Aug) 310A

—S. 54 — See also *Ibid*, S. 11 (Aug) 310A

—S. 54—Sale — Rules of English mode of conveyancing cannot prevail over the conception of sale in T. P. Act. (Aug) 310B

—S. 105—See Tenancy Laws—Calcutta Thika Tenancy Act (1949), S. 5 (Apr) 149A

—S. 111 (e)—Determination of lease by surrender—Surrender mentioned in Cl. (e) provides for immediate yielding of the interest — Surrender in future is not warranted by law (May) 190D

—S. 114—See Houses and Rents—W. B. Premises Tenancy Act (12 of 1956), S. 13 (Oct) 404A

—S. 115 — Surrender of lease—Under-lessee becomes lessee directly under lessor by operation of statute and not by devolution of lessee's interest on lessor (May) 190A

—S. 116 — See Tenancy Laws—Bengal Tenancy Act (1885), S. 48C, Proviso (Mar) 81

—S. 122 — See Tenancy Laws — W. B. Land Reforms Act (1956) (July) 293B

Trusts Act (2 of 1882), S. 63—See

(1) *Ibid*, S. 64 (Mar) 88D

(2) *Ibid*, S. 66 (Mar) 88C

—S. 64 — "Transferee" and "conveyance" meaning of (Mar) 88D

—S. 66—Beneficiary's charge — Where the trustee has mixed up his own fund with the funds of the trust estate, the beneficiary is entitled to a charge on the property bought or acquired out of mixed fund to the extent of trust money applied (Mar) 88C

W. B. Court Fees Ordinance (17 of 1969)

See under Court Fees and Suits Valuations.

W. B. Estates Acquisition Act (1 of 1954)

See under Tenancy Laws.

West Bengal Fisheries (Requisition and Acquisition) Act (20 of 1968), S. 2(5)—See also Constitution of India, Art. 31(2)

(Sep) 366A

—S. 2(5)(iii)—Words “any other object”—Meaning of (Sep) 366B

—S. 8 — See Constitution of India, Art. 31(2) (Sep) 366A

—S. 8(4), Expln. (c)—Words “average income”—Meaning of (Sep) 366C

West Bengal Land Development and Planning Act (21 of 1948), S. 8(2) — Provisions have reduced and curtailed quantum of compensation payable in Land Acquisition proceedings and are therefore violative of Art. 14 of the Constitution; and are not saved by Art. 31-B and 9th Schedule thereto (Nov) 487

West Bengal Land Reforms Act (10 of 1956)

See under Tenancy Laws.

West Bengal Land (Requisition and Acquisition) Act (2 of 1948), S. 3 — Resort to requisition proceedings under this Act cannot be said to be bad or mala fide on ground that the Act does not provide for same or similar opportunity as provided in some provision of another Act (Jan) 8A

—S. 3 — Provision for notice cannot be read into the Act on the basis of principles of natural justice: (Jan) 8B

—S. 3 (as amended by West Bengal Land (Requisition and Acquisition) Ordinance (1969) — Requisition of area for residence of people living outside that area would not be invalid (Jan) 8E

—S. 3(1) — Requisition — Validity of requisition cannot be challenged on ground that requisition involves permanent change in character of property (Jan) 8C

—S. 3(1) — Requisition order is not invalid on ground that it required deli-

West Bengal Land (Requisition and Acquisition) Act (contd.)

very of requisitioned property on next day of service of notice (Jan) 8D

W. B. Non-Agricultural Tenancy Act (20 of 1949)

See under Tenancy Laws.

West Bengal Public Land (Eviction of Unauthorised Occupants) Act (13 of 1962), S. 4—Eviction of unauthorised occupant

— No public purpose is necessary for ordering it (Jan) 1A

—S. 4 — Constitutionality — Section 4 cannot be struck down as providing arbitrary discretion (Jan) 1B

—S. 4 — Constitutionality — The Special procedure in S. 4 for eviction of unauthorised occupants cannot be said to impose unreasonable restriction on right of citizens to hold property (Jan) 1C

W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950)

See under Houses and Rents.

West Bengal Premises Tenancy Act (12 of 1956)

See under Houses and Rents.

West Bengal Premises Tenancy (Amendment) Act (4 of 1968)

See under Houses and Rents.

W. B. Premises Tenancy (Amendment) Ordinance (1967)

See under Houses and Rents.

W. B. Premises Tenancy (Second Amendment) Act (34 of 1969)

See under Houses and Rents.

West Bengal (Prevention of Violent Activities) Act (19 of 1970)

See under Public Safety.

Words and Phrases—“Mutatis Mutandis” implications of (Dec) 497D

CALCUTTA CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN A. I. R. 1972

Diss.=Dissented from in; Not F.=Not followed in; Over.=Overruled in; Revers.=Reversed in.

- (1899) ILR 26 Cal 839, Bodh Narain v. Md. Moosa —Diss. AIR 1972 Ker 64 (Mar).
- AIR 1919 Cal 325 (2)=23 Cal W N 513, Hashmat v. Jamir—Diss. AIR 1972 Orissa 136B (July).
- AIR 1922 Cal 335 =ILR 49 Cal 62, Sarat Chandra Sarkar v. Maihar Stone and Lime Co., Ltd.—Over. AIR 1972 Cal 449 (FB) (Nov).
- AIR 1928 Cal 184 = 47 Cal L J 82, Naimuddin Biswas v. Maniruddin Laskar — Over. AIR 1972 Cal 449 (FB) (Nov).
- AIR 1931 Cal 211=35 Cal W N 238, Smt. Golmu Bibi v. Abdus Samad — Held not good law in view of (1913) 40 Ind App 132 (PC) as interpreted AIR 1972 Pat 17D (Jan).
- AIR 1936 Cal 576=ILR (1937) 1 Cal 112=40 Cal W N 1023, Sachindra Nath Chakraborty v. Trailokyanath Chakraborty — Diss. AIR 1972 Cal 409B (Oct).
- AIR 1941 Cal 244 = 194 Ind Cas 730, Hansraj Bhuteria v. Askaran Bhuteria — Not F. AIR 1972 All 357A (Aug).
- AIR 1953 Cal 548 = 57 Cal W N 397, Atulya Kumar v. Directorate of Procurement and Supply—Diss. AIR 1972 All 401B (Sep).
- AIR 1955 Cal 626=97 Cal L J 9, Anath Bhandhu Deb v. Dominion of India—Not good law in view of AIR 1959 S C 135 as interpreted AIR 1972 Cal 420D (Oct).
- (1958) 62 Cal W N 360 = ILR (1959) 1 Cal 250, Ganesh Chandra v. Sudarshan Dey — Over. AIR 1972 Cal 502A (Dec).
- (1961) 65 Cal W N 354 = ILR (1961) 2 Cal 316, Panchu Sundari Das v. Haripada Biswas—Over. AIR 1972 Cal 502A (Dec).
- (1961) 65 Cal W N 811, Shiba Prasad Gerua v. Manmatha Nath Gupta—Over. AIR 1972 Cal 502A (Dec).
- (1962) Civil Revn. C. No. 3366 of 1961, D/- 21-9-1962 (Cal), Sudhir Kumar Ghosh v. Sarat Chandra Ghosh — Over. AIR 1972 Cal 502A (Dec).
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- (1964) A. F. O. D. No. 136 of 1960, D/- 10-3-1964 (Cal)—Revers. AIR 1972 S C 378 (Feb).
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- (1967) I. T. Ref. Nos. 274 of 1961 and 114 of 1963, D/- 10-2-1965 and 17-7-1967 (Cal)—Revers. AIR 1972 S C 156 (Jan).
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- (1967) N. I. T. 3 of 1967, D/- 23-10-1967 (Cal)—Revers. AIR 1972 S C 2195A (Oct).
- AIR 1967 Cal 269, Asstt. Collector of Central Excise v. National Tobacco Co. of India Ltd. —Revers. AIR 1972 S C 2563C (Dec).
- AIR 1968 Cal 74, Sm. Latika Ghosh v. Nirmal Kumar Ghosh—Revers. AIR 1972 S C 2119B (Oct).
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- (1970) App. No. 148 of 1969, D/- 14-9-1970 (Cal) —Revers. AIR 1972 S C 1826C (Sep).
- (1970) Appeal No. 76 of 1970, D/- 9-7-1970 (Cal) —Revers. AIR 1972 S C 542 (Mar).
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- (1971) Cri. Misc. Cases Nos. 169, 177, 330 and 331 of 1971, D/- 13-9-1971 (Cal) — Revers. AIR 1972 S C 1660A (Aug).
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- (1971) 82 I T R 567 (Cal), Commr. of Income-tax v. Sardar Indra Singh Trust — Revers. AIR 1972 S C 34 (Jan).

COMPARATIVE TABLES

Supplement to Comparative Tables of Previous Years.

Owing to late receipt of other Journals the following *supplement* to
Comparative Tables of A. I. R. = Other Journals is issued

A. I. R. Calcutta = Other Journals

AIR 1968 Calcutta		AIR 1971 Calcutta		AIR 1971 Calcutta		AIR 1971 Calcutta	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
196	ILR (1972) 1 Cal 438	98	41 F J R 227	252	ILR (1971) 2 Cal 47	424	ILR (1971) 2 Cal 615 -
—		122	ILR (1971) 2 Cal 276	286	1972 Ren O J 184	455	ILR (1972) 1 Cal 185
AIR 1970 Calcutta		162	ILR (1972) 1 Cal 275	301	76 Cal W N 883	476	85 I T R 443
AIR	Other Journals	213	ILR (1971) 2 Cal 79	319	ILR (1972) 1 Cal 146	480	1972 A O J 1
192	ILR (1971) 2 Cal 489	218	ILR (1972) 1 Cal 626	330	ILR (1971) 2 Cal 66	482	ILR (1971) 2 Cal 257 -
199	ILR (1972) 1 Cal 281	219	ILR (1971) 2 Cal 42	335	ILR (1971) 2 Cal 560	494	1972 A O J 862
349	ILR (1972) 2 Cal 14	224	ILR (1972) 1 Cal 25	376	1972 Ren O J 351	534	ILR (1972) 1 Cal 859
497	ILR (1971) 2 Cal 884	244	ILR (1971) 2 Cal 435	381	ILR (1971) 2 Cal 244	539	ILR (1971) 2 Cal 78
—				388	1972 Ren O J 679	540	ILR (1972) 1 Cal 150
				398	ILR (1971) 2 Cal 366	548	76 Cal W N 772
				407	76 Cal W N 558		

A. I. R. 1972 Calcutta = Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	---	174	1972 Lab I O 591	380	---	409	78 Cal W N 784
4	75 Cal W N 982	177	78 Cal W N 137	389	78 Cal W N 575	411	---
8	75 Cal W N 831		ILR (1972) 1	388	---	417	1972 Tax L R 1088
19	1972 Tax L R 1620		Cal 684	389	---	420	1972 Tax L R 2501
37	1972 Lab I O 221	185	78 Cal W N 501	343	---	430	78 Cal W N 488
35	75 Cal W N 751	189	---	345	---	443	78 Cal W N 720
	1972 Cri L J 244	190	78 Cal W N 217	348	---		1972 Ren O R 858
	ILR (1971) 2		1972 Ren O R 172	350	---	446	78 Cal W N 897
	Cal 595	198	---	352	1972 Cri L J 1299		1972 Ren O J 878
45	---	207	78 Cal W N 116		ILR (1972) 1	447	78 Cal W N 878
50	1972 Tax L R 1882	210	---		Cal 484	449FB	78 Cal W N 1039
	42 Com Cas 802	217	---	355	ILR (1972) 1	455	78 Cal W N 149
52	---	221	78 Cal W N 281		Cal 613	458	78 Cal W N 267
56	---	225	78 Cal W N 288	361	---	459FB	78 Cal W N 983
61	---	228	78 Cal W N 286	366	78 Cal W N 797	465	---
37	---	253	78 Cal W N 153	372	---	466	---
74	78 Cal W N 158	255	---	376	---	467	78 Cal W N 865
77	---	256	---		---	469	78 Cal W N 781
81	ILR (1972) 1	258	78 Cal W N 480	378	1972 Lab I O 1148	470	78 Cal W N 881
	Cal 140	281	78 Cal W N 459	381	78 Cal W N 426	482	78 Cal W N 787
82	---	273	78 Cal W N 575	383	---	484	---
84	---	276	78 Cal W N 881	385	78 Cal W N 83	487	78 Cal W N 971
88	78 Cal W N 127	281	---		(1972) 1 Lab	489	---
95	---	283	---		L J 868	494	ILR (1972) 1
104	---	291	---		(1971) 1 Serv		Cal 703
105	78 Cal W N 181	292	78 Cal W N 46		L R 816	496	---
	ILR (1972) 2 Cal 84	293	78 Cal W N 57	388	---	497	78 Cal W N 808
123	---	295	---	393	ILR (1972) 2	502FB	78 Cal W N 1058
141	---	305	---		Cal 104	516	SB77 Cal W N 122
143	78 Cal W N 48	306	---	398	---	520FB	---
149	---	308	78 Cal W N 404	401	75 Cal W N 797	524	SB77 Cal W N 80
150	---		41 F J R 481		(1972) 1 Lab L J 54	533	---
153	---	310	---		1972 Lab I O 1292	539	---
160	75 Cal W N 286	313	78 Cal W N 518	404	75 Cal W N 301	541	---
172	---		1972 Ren O J 84	405	---	542	---
		318	---	408	---		

Other Journals = All India Reporter

ILR (1971) 2 Cal			ILR (1971) 2 Cal			ILR (1972) 1 Cal			ILR (1972) 1 Cal			ILR (1972) 2 Cal		
ILR		AIR				ILR		AIR				ILR		AIR
42	1971 Cal	219	278	1971 Cal	122	ILR			281	1970 Cal	199	(July 1972 only)		
47	"	252	365	"	388	25	1971 Cal	224	438	1988	"	198		
66	"	380	384	1970	497	185	"	455	484	1972	"	352		
76	"	589	435	1971	214	140	1972	81	618	"	"	355		
79	"	218	489	1970	182	146	1971	319	626	1971	"	218	14	1970 Cal 349
244	"	381	560	1971	368	150	"	540	659	"	"	584	64	1972 " 105
357	"	482	595	1972	85	275	"	162	684	1972	"	177	104	" " 398
			615	1971	424				709	"	"	494		

THE All India Reporter 1972 Calcutta High Court

AIR 1972 CALCUTTA 1 (V 59 C 1)

ANIL KUMAR SEN, J.

Dhanomoy Thapa, Petitioner v. The State of West Bengal and others, Respondents.

Civil Order No. 2079 (w) of 1971, D/- 6-8-1971.

(A) West Bengal Public Land (Eviction of Unauthorised Occupants) Act (13 of 1962), Section 4 — Eviction of unauthorised occupant — No public purpose is necessary for ordering it even though the ultimate purpose is to de-requisition the land in question and hand over its possession to the real owners thereof. (Para 5)

(B) West Bengal Public Land (Eviction of Unauthorised Occupants) Act (13 of 1962), Section 4 — Constitutionality — As Section 4 provides guidance in the matter of exercise of power to evict unauthorised occupants of public land by requiring the authority to reach an objective satisfaction on two points it cannot be struck down as providing arbitrary discretion. (X-Ref:— Constitution of India, Article 14). ILR (1971) 1 Cal 470, Followed. (Para 9)

(C) West Bengal Public Land (Eviction of Unauthorised Occupants) Act (13 of 1962), Section 4 — Constitutionality — As Section 4 gives to the person alleged to be in unauthorised occupation, an opportunity to prove the contrary by requiring a reference to a Civil Court and also provides an appeal against the order of eviction, the special procedure in the section for eviction of unauthorised occupants cannot be said to impose an unreasonable restriction on the right of the citizens to hold property. (X-Ref: Constitution of India, Article 19 (1) (g).) (Para 10)

Cases Referred: Chronological Paras

(1971) ILR (1971) 1 Cal 470, Indurani Saha v. The State	9
(1968) AIR 1968 Cal 560 (V 55) — 72 Cal WN 787 (FB), Rajendra Prasad Singh v. Union of India	7
(1967) AIR 1967 SC 1581 (V 54) — 1967-3 SCR 399, Northern India Caterers Ltd. v. State of Punjab	7

Kashi Kanta Maitra, Ashis Kumar Sanyal, for Petitioner; B. S. Bagchi, Saktinath Mukherjee, for Respondents Nos. 7, 8 and 9.

ORDER:— This writ petition is being heard on notice to the respondents and on contest by them. In this application the petitioner is disputing the validity of a proceeding under the West Bengal Public Land (Eviction of Unauthorised Occupants) Act, 1962 and an order dated July 5, 1971 passed by the Appellate Tribunal under Section 7 of the Act.

2. Facts are shortly as follows: On an application by the Commissioner of Police, Calcutta a proceeding under Section 3 of the West Bengal Public Land (Eviction of Unauthorised Occupants) Act 1962 (hereinafter referred to as the said Act) was initiated against the present petitioner. The dispute relates to plot No. 54 in the Cossipore/Chit-pore open space at Talla Park since renumbered as No. 6, Talla Park Avenue. There is no dispute that this plot which belongs to respondents Nos. 7 to 9 is still under requisition by State of West Bengal. In the said proceeding under Section 3, on a due notice issued to the petitioner the collector held the necessary adjudication on June 11, 1964 passed an order under Section 4 (1) (a) directing petitioner's eviction therefrom. The petitioner preferred an appeal being Appeal Case No. 39 of 1964-65 before the Commissioner, Presidency Divi-

sion. Although she succeeded at first and the appellate tribunal by an order dated February 8, 1965 set aside the order of the Collector, on review by an order dated July 31, 1965 the appellate tribunal confirmed the order of eviction passed by the collector. The petitioner moved this court under Article 226 of the Constitution and my learned brother P. K. Banerjee, J. by an order dated June 26, 1970 set aside the appellate order and directed rehearing of the appeal. The appeal being so reheard has again been dismissed by the impugned order dated July 5, 1971 and the Commissioner has now re-affirmed the original order of eviction passed by the Collector. It is this proceeding and the order which are the subject-matter of challenge in this writ petition.

3. The application is being contested both by the State as also by respondent Nos. 7-9 who were allowed to be made parties to the proceeding by the lower Appellate Tribunal.

4. The petitioner, it should be made clear in the very beginning, is not claiming any title to possess the plot and that she is in unauthorised occupation, is not seriously disputed by her. Two points have been pressed by Mr. Maitra in support of the application at the hearing. In the first place it has been contended by Mr. Maitra that the land under requisition being sought to be de-requisitioned in favour of the respondent Nos. 7 to 9 and for that purpose the present petitioner is being evicted from the said land but all these are being done without any public purpose. In particular, Mr. Maitra contends that there is no public purpose behind the present proceeding for eviction. Secondly, Mr. Maitra contends that the order should be struck down as it has been passed under the provisions of a statute which are void under the Constitution. The provisions are unconstitutional because they are violative of Article 14 and Article 19 (1) (f) of the Constitution.

5. So far as the first point raised by Mr. Maitra is concerned it does not appear to me that such a contention is at all well conceived. The statute lays down no requirement that there should be a public purpose for initiating proceeding under the provisions thereof except evicting people in unauthorised occupation of public lands. Furthermore I am unable to appreciate how a person in unauthorised occupation can seek to protect such possession against eviction under the process of law by pleading that he cannot be evicted except for a public purpose. It is not a case of requisition at all. Mr. Maitra may be right that the ultimate aim of

the government is to de-requisition the plot but there is nothing irregular in it and in my view it would be just and proper for the State Government to de-requisition a plot and hand it back to the real owners if the purpose for its requisition has since ceased to exist and the land is being enjoyed by a person in unauthorised occupation. This being the position the first contention raised by Mr. Maitra is overruled.

6. The second point raised by Mr. Maitra is of some importance. It relates to the constitutional validity of the provisions of Sections 3 and 4 of the said Act. According to Mr. Maitra these provisions are unconstitutional from two aspects. Firstly, it is so because it violates Article 14 and secondly because it violates Article 19 (1) (f) of the Constitution. Further according to him these two provisions are discriminatory in so far as they provide for a supplementary procedure for eviction of persons from public lands which are far more prejudicial and drastic in nature than the ordinary procedure by way of a suit and the statute has left it to the discretion of the collector to decide whether he would adopt such a drastic procedure laid down in the Act in a particular case or not. Mr. Maitra also contends that the impugned provisions provide for unguided powers for collectors under the Act to evict people from properties solely on their subjective satisfaction and as such are not only discriminatory but impose unreasonable restriction on the fundamental right of citizens to hold property.

7. Giving anxious consideration to these contentions I find little substance in either of the two contentions of Mr. Maitra. To support the contention to the effect that the provisions are discriminatory Mr. Maitra naturally placed great reliance on the decision of the Supreme Court in the case of Northern India Caterers Ltd. v. State of Punjab, AIR 1967 SC 1581. But there the Supreme Court was considering the provisions of Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1951 which are materially different from the statute now under consideration. There the Supreme Court found that the statute not only provided supplementary remedy more drastic in nature than the ordinary available remedy by way of a suit but also found that the statute had left it to the absolute discretion of the collector to adopt one out of the two remedies. The Supreme Court observed:

"Section 5 does not lay down any guiding principle or policy under which the Collector has to decide in which cases he should follow one or the other

procedure and, therefore, the choice is entirely left to his arbitrary will."

This court in the case of *Rajendra Prasad Singh v. Union of India*, 72 Cal WN 787 = (AIR 1968 Cal 560) (FB) adopted the same reasons in declaring Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 to be void being violative of Article 14. The relevant provisions of both the Central and the Punjab Act are on same terms and as pointed out by the Supreme Court, Section 5 left the matter entirely to the absolute discretion of the competent authority but provided no guidance.

8. But in the statute now under consideration by me the provisions are materially different. Here the adjudication is by an independent authority. Under Section 3 when the collector forms an opinion on an appropriate application that the public land is in unauthorised occupation of any person or persons, he initiates the proceeding and issues the necessary show cause notice on the person or persons concerned. On cause being shown, the collector proceeds to dispose of the application under Section 4 the terms whereof are set out herein:

"4. (1) If, after considering the cause, if any, shown by the person in pursuance of a notice issued under Section 3 and any evidence adduced in support thereof, and any evidence which may be adduced by the owner and after making such further inquiry, if any, as he deems necessary,—

(a) the Collector is satisfied that no bona fide dispute regarding title to the public land exists and that the public land is in the unauthorised occupation of any person, he shall make an order directing such person—

(i) to vacate the public land and deliver possession thereof to the owner, and

(ii) to pay for the entire period during which he has been and continues to be in unauthorised occupation of the public land, damages at such rate, not exceeding double the rate of rent prevailing for similar lands with similar advantages in the vicinity, as may be prescribed, within such time as may be specified in the order; or

(b) the Collector is satisfied that the person concerned is not in unauthorised occupation of the public land or is of opinion that a bona fide dispute regarding title to the public land exists, he shall make an order cancelling the proceedings and referring the parties to the civil Court:

Provided that no order under this sub-section shall be made to the preju-

dice of any person who has had no opportunity of being heard.

(2) Where an order has been made under clause (a) of sub-section (1), the collector shall cause a copy of the order to be served in the manner referred to in sub-section (2) of Section 3." Section 7 provides for an appeal against the order of the Collector.

9. It is significant to note that here the statute had not left the matter entirely to the unguided exercise of discretion by the collector to decide whether remedy provided under the Act should be adopted and an order of eviction should be made or not. It may be true that he proceeds on his satisfaction but the satisfaction is not wholly subjective. The statute itself has laid down the guidance on two points. The statute requires that before the collector can pass an appropriate order of eviction he is first to be satisfied that no bona fide dispute regarding title to the public land exists and secondly that the person or persons are in unauthorised occupation. If on any of these two points the collector comes to an adverse decision then the mandatory direction of the statute is to refer the matter to the Civil Court. This in my view distinguishes the statute now under consideration from the one under consideration by the Supreme Court and this distinguishing feature takes it out of the mischief which led the Supreme Court to condemn the Act under their consideration. Even in that case the Supreme Court held there exists intelligible differentia between the occupiers of public premises and land and other occupiers. So if on my findings made hereinbefore the relevant provision cannot be struck down as providing arbitrary discretion, it cannot also be struck down only because it makes special provision for eviction of persons in unauthorised occupation of public land. This court in the case of *Indurani Saha v. The State*, ILR (1971) 1 Cal 470 overruled similar objection to the provisions now under consideration and I respectfully agree with the view expressed therein.

10. On the same reason as aforesaid I must also overrule the other contention that the statute imposes any unreasonable restriction on the right of the citizens to hold property. If a person is found to be in unauthorised occupation of public land, he cannot complain that the special procedure adopted for his eviction is unreasonable so long as such procedure is not condemned as discriminatory. If he is not a person in unauthorised occupation, the statute gives him ample scope to raise even a bona fide dispute and have the matter

referred to a Civil Court. Further the order made by the collector is subject to a statutory appeal under Section 7 so that if the collector goes wrong, he can be corrected by the appellate tribunal. Such being the scheme of the Act and its provisions I am unable to accept the contention of Mr. Maitra that it imposes any unreasonable restriction on the citizens' right to hold property.

11. As all the points raised by Mr. Maitra in support of this application fail, the application fails and is dismissed on contest. There will be no order as to costs.

Petition dismissed.

AIR 1972 CALCUTTA 4 (V 59 C 2)

GUPTA, J.

(On difference of opinion between S.K. CHAKRAVARTI AND S. K. DATTA, JJ.)

Sisir Kumar Kundu, Petitioner v. Smt. Sabita Rani Mandal, Opposite Party.

F. M. A. No. 195 of 1970 and C. R. No. 4136 (w) of 1969, D/- 26-7-1971.

Hindu Marriage Act (1955), Section 25 — "Passing any decree" — Benefit of the section is available to either party to a marriage that has been annulled by a decree of nullity under Section 12.

(Para 11)

A voidable marriage must be regarded as good and valid until annulled and there does not seem to be any difference between a decree passed under Section 12 and another under Section 13, so far as the availability of the benefit under Section 25 is concerned if it depends upon an existing marital relationship between the parties. The words "the wife or the husband" in Section 25 have been used as convenient terms to refer to the parties to a marriage whether or not the marriage is valid or subsisting, just as the word 'marriage' has been used in the Act to include a purported marriage which was void ab initio. Thus a wife who got her marriage with her husband annulled by a decree of nullity on the ground of impotency of the husband under Section 12 (1) (a) is entitled to get maintenance on her application under Section 25 subsequent to the passing of the decree of nullity.

(Paras 10, 11)

Cases Referred: Chronological Paras

(1963) AIR 1963 Guj 242 (V 50) =

4 Guj LR 943, Mehta Gunavantray

v. Bai Prabha 6, 9, 10

(1961) AIR 1961 Guj 202 (V 48),

Harilal v. Lilavati 8, 9

Dipak Sengupta, for Petitioner; Sib Sankar Sarkar, for Opposite Party.

HO/JO/E40/71/SSG

JUDGMENT:— As S. K. Chakravarti and S. K. Datta, JJ. composing a Division Bench were divided in their opinion on a point of construction of Section 25 (1) of the Hindu Marriage Act, 1955, the case was assigned to me for hearing on that point. The point is stated by their Lordships as follows:

"Whether a wife who got her marriage with her husband annulled by a decree of nullity on the ground of impotency of the husband under Section 12 (1) (a) of the Hindu Marriage Act, is entitled to get any maintenance on her application under Section 25 of the Hindu Marriage Act, 1955, subsequent to the passing of the decree of nullity".

2. The point arises for decision in this way. On August 1, 1968 a decree of nullity was passed by the learned District Judge of 24-Parganas on a petition under Section 12 (1) (a) of the Hindu Marriage Act, 1955 presented by Sabita Rani Mondal, the opposite party in this Revisional Application, alleging that Sisir Kumar Kundu with whom she was married was impotent at the time of the marriage and continued to be so until the institution of the proceeding. On May 3, 1969 she applied to the Court of the District Judge under Section 25 (1) of the Hindu Marriage Act, 1955 for an order on the said Sisir Kumar Kundu to pay to her a monthly sum of Rs. 75/- for her maintenance and support. Contesting this application Kundu raised a preliminary objection that an application under S. 25 (1) was not maintainable after a decree of nullity had been made. This objection was overruled by the court below. Kundu preferred an appeal to this Court from the order and also filed an alternative application in revision. S. K. Chakravarti and S. K. Datta, JJ. before whom the matter came up for hearing held that the appeal was not maintainable but entertained the revisional application taking different views on the point stated above. S. K. Chakravarti, J. was of opinion that Section 25 would not apply to a case where a decree of nullity has been passed declaring a marriage as null and void under Section 11 of the Act or where a marriage has been annulled under Section 12 and "would apply only to Section 13 and Sections 9 and 10". S. K. Datta, J. on the other hand took the view that "Section 25 is applicable to all decrees including decrees for nullity of marriages"

3. Section 25 (1) of the Hindu Marriage Act, 1955 is in these terms:

"Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or

the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent".

Section 25 (1) thus provides *inter alia* that either the wife or the husband can apply to the Court at the time when it passes any decree under the Act or subsequently for an order on the other side to pay a gross or periodical sum for the applicant's maintenance and on such an application the Court may make an order as prayed for but an order for payment of a periodical sum can only be for a term not exceeding the life of the applicant and shall be in force only so long as the applicant remains unmarried. We are concerned here with an application made subsequent to the passing of the decree. To find an answer to the question that arises in this case it will be necessary to refer to certain other provisions of the Act which may be done conveniently at this stage.

4. Section 5 of the Hindu Marriage Act, 1955 lays down the conditions that must be fulfilled before a marriage may be solemnized between two Hindus. Of the six conditions specified in the section, Clause (i) requires that neither party should have a spouse living at the time of marriage, clause (iv) lays down that the parties must not be within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two, and clause (v) enjoins that the parties are not to be sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two. Section 9 provides for a decree for restitution of conjugal rights when either the husband or the wife has unreasonably withdrawn from the society of the other. Section 10 provides for a decree for judicial separation on any of the grounds specified in the section. Section 11 states that a marriage "shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5". Section 12 (1) dealing with voidable marriages pro-

vides that a marriage may be annulled by a decree of nullity if,—

(a) the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding; or

(b) the marriage is in contravention of the condition specified in clause (ii) of Section 5; or

(c) the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force or fraud; or

(d) the respondent was at the time of the marriage pregnant by some person other than the petitioner.

Clauses (b), (c) and (d) are not relevant for the present purpose. Section 13 (1) specifies the grounds upon which a marriage may be dissolved by a decree of divorce. Section 16 provides that children of marriages in respect of which a decree of nullity has been passed under either Section 11 or Section 12 shall be deemed to be legitimate children of the parties to the marriage notwithstanding such decree.

5. The Act thus contemplates five classes of decrees, for restitution of conjugal rights under Section 9, for judicial separation under Section 10, for nullity of marriage under Section 11 or Section 12, and for divorce under S. 13. A decree declaring a marriage as null and void under S. 11 is made in a case where the marriage was solemnized in contravention of any of the essential conditions for a Hindu marriage. Such a marriage is automatically void or void *ipso jure* and is regarded as never having taken place; a decree of nullity passed in such a case only serves to put that fact on record. A voidable marriage may also be annulled by a decree of nullity under Section 12. However, the distinction between a void and a voidable marriage is well known. A voidable marriage is valid marriage until annulled, though a decree of nullity passed in such a case purports to put the parties retrospectively to the position as if the marriage had been void from its inception. A voidable marriage however remains valid if not annulled during the lifetime of the parties to it, and cannot be impeached after the death of either of them.

6. Turning now to the point at issue, Chakravarti, J., seems to have reached his conclusion on the following steps of reasoning. The effect of a voidable marriage being annulled by a decree of nullity is that the marriage is to be regarded as null and void from its inception. Thus there is no difference between a void marriage and a

voidable marriage annulled by a decree of nullity, in both cases the marriage is to be regarded as never having taken place. Section 25 (1) entitles only the 'wife' or the 'husband' to apply under the section. If the position after a decree of nullity has been passed is that no marriage had ever taken place between the parties, the relationship of husband and wife cannot be said to have ever subsisted between them; in any event, in case of a voidable marriage the relationship cannot be said to be subsisting after a decree of nullity has been passed. His Lordship finds support for the view taken by him from the difference in language employed in Sections 11 and 12 dealing with void and voidable marriages respectively, and in Section 13 which provides for the dissolution of marriage by a decree of divorce. His Lordship points out that Section 13 (1) describes the parties who can apply under the section as the 'husband' or the 'wife' whereas this description is absent in Section 11 and Section 12. Chakravarti, J. also refers to a decision of the Gujarat High Court, *Mehta Gunavantray v. Bai Prabha*, AIR 1963 Guj 242 in support of his view. This decision which is of a learned single Judge holds that "under Section 25 no application for permanent alimony or maintenance can be made subsequent to the passing of the decree for dissolution or annulment of marriage in proceedings for dissolution of marriage by divorce or for annulment of marriage by a decree for nullity" because "after the decree the parties cease to be related as husband and wife". I shall come back to this case later but it may be pointed out here that the decision does not altogether support the view taken by Chakravarti, J. in holding that Section 25 has no application where a decree for divorce under Section 13 has been passed.

7. The reasons given by S. K. Datta, J. in support of his opinion that "Section 25 is applicable to all decrees which a Court under the Hindu Marriage Act is entitled to pass including decrees of nullity of voidable or void marriages" may be summarised as follows:

(i) Section 25 gives to the Court the power to grant permanent alimony and maintenance at the time of passing any decree or at any time subsequent thereto. The expression "any" has been used in the widest connotation without any limitation and the provisions of the section would, therefore, apply to all the various kinds of decrees permissible under the Act.

(ii) As a matter of public policy, in the context of social condition prevail-

ing in a Hindu society, Section 25 ought to be made applicable to cases where decrees of nullity have been passed.

(iii) It is a cardinal rule of interpretation that a statute should be given a meaning which is in harmony with its relevant provisions and consistent with the object which it seeks to achieve. Applying this principle of interpretation and having regard to the "intended object" of the Hindu Marriage Act which was to secure to the parties to a marriage "rights which are beneficial to them in the present context of social relations", the provisions of Section 25 must be held to apply to the wife or the husband as the case may be.

8. Section 25 (1) of the Hindu Marriage Act 1955 empowers a Court exercising jurisdiction under the Act to make an order under the section at the time of passing "any decree" or at any time subsequent thereto. "Any decree" would apparently include all possible decrees under the Act. The provision, however, has to be read as a whole to see if it contains any other word or expression limiting the application of the provision. One apparent qualification seems to be that an order passed under the section directing payment of alimony or maintenance shall remain in force "while the applicant remains unmarried". This would seem to suggest that the operation of the section was restricted to cases where a party was in a position to contract another marriage and would exclude decrees for restitution of conjugal rights and judicial separation from the scope of the section. It has however been held by a Division Bench of the Gujarat High Court in the case of *Harilal v. Lilavati*, AIR 1961 Guj 202, that it would not be correct to read in the expression "while the applicant remains unmarried" the legislature's intention to restrict the operation of the section only to decrees of nullity of marriage and for divorce but that the operation of the expression should be confined to those cases only where it is applicable, that is, to cases where the applicant is in a position to contract a lawful marriage. In coming to this conclusion their Lordships observed: "The intention was not to restrict the powers of the Court in granting permanent alimony and maintenance to an extremely limited class of cases, namely where the Court had passed a decree for divorce or of nullity of marriage The words "any decree" would not have been used if it was the intention of the legislature to restrict the operation of the section only to cases where a decree for divorce or of nul-

lity of marriage was passed. The power was intended to be exercised at the time of the passing of any of the decrees referred to in the earlier provisions of the Act or at any time subsequent thereto".

9. The expression "while the applicant remains unmarried" does not arise for consideration in the present case; I referred to it so that the observations of the Gujarat High Court in AIR 1961 Guj. 202 quoted above may appear in the proper context. This decision supports the view taken by S. K. Datta, J. that Section 25 should be held to apply to all kinds of decrees permissible under the Act. The case of AIR 1963 Guj. 242, relied on by S. K. Chakravarti, J., does not appear to have noted this earlier and contrary decision of a larger bench of the same High Court.

10. It remains to be seen whether the words "wife" or the "husband" used in Section 25 refer to persons who can apply under the section were deliberately chosen to exclude parties to a voidable marriage that has been annulled under Section 12. The other classes of decrees do not arise for consideration in this case except incidentally. Whether the words have a significance as found by Chakravarti, J. and as held in Gunvantray's case, AIR 1963 Guj. 242 can be tested by reference to the point of time when an application under Section 25 is made. Section 25 permits an application to be made at any time subsequent to the passing of any decree under the Act. If it were essential that the person applying must be the 'wife' or the 'husband' in the sense that marital ties must be subsisting between the parties when the application is made, then persons whose marriage has been dissolved by a decree of divorce under Section 13 of the Act would also be excluded from the coverage of the section because at that point of time the parties no longer remain husband and wife. This is a position which follows logically if the terms 'wife' and 'husband' are read as indicative of an existing marital relationship and this is what has been held in Gunvantray's case. But the view that the benefit of the section is available when a marriage has been dissolved by a decree of divorce under Section 13 but not when the marriage has been annulled by a decree of nullity under Section 12 seems to be somewhat inconsistent if the words 'wife' and 'husband' are read in the sense in which Chakravarti, J. thinks they should be read. A voidable marriage must be regarded as good and valid until annulled and there does not

seem to be any difference between a decree passed under Section 12 and another under Section 13, so far as the availability of the benefit under Section 25 is concerned if it depends upon an existing marital relationship between the parties. In the context of Section 25 the terms 'wife' and 'husband' occurring therein do not seem to have been chosen to signify an existing relationship at the point of time when an application under the section is made. If the terms are to be interpreted as Chakravarti, J. suggests, the section would apply only to two classes of decrees, decrees for judicial separation and restitution of conjugal rights. Such an interpretation which excludes from the scope of the section the majority of the five different classes of decrees that may be passed under the Act, does not appear to me to be a reasonable way of reading the section which states that it would apply to 'any decree' under the Act. It seems to me that the words "the wife or the husband" in Section 25 have been used as convenient terms to refer to the parties to a marriage whether or not the marriage is valid or subsisting, just as the word 'marriage' has been used in the Act to include a purported marriage which was void ab initio. No special significance also seems to attach to the fact that unlike Section 13, Sections 11 and 12 of the Act do not use the description 'husband' or 'wife' to refer to persons entitled to apply under these sections; the description is also absent from Section 10 under which "either party to a marriage" can present a petition for judicial separation. In the English matrimonial statutes also persons whose marriage has been dissolved by a decree for divorce or annulled or declared a nullity have been frequently described as the husband and the wife. S. 1 (1) of the Matrimonial Causes Act, 1907 states that the Court may on any decree for dissolution or nullity of marriage order that "the husband shall secure to the wife" such gross sum or annual sum of money as it may deem reasonable. A similar provision with the same description of the parties occurs in Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 and S. 19 (2) of the Matrimonial Causes Act, 1950. Section 16 (1) of the Matrimonial Causes Act, 1965 provides that in granting a decree of divorce or at any time thereafter, the Court may make an order requiring the husband to secure to the wife a lump or periodical sum and Section 19 of the Act states that Section 16 (1) shall apply in relation to nullity of marriage as it applies in relation to divorce.

11. Giving the words of S. 25 the meaning which they appear to bear in the context, I agree with S. K. Datta, J. that the benefit of the section is available to either party to a marriage that has been annulled by a decree of nullity under Section 12; whether it also extends to all other kinds of decree under the Act is not a matter on which it is necessary to express a concluded opinion in this case. I would not however like to rest my conclusion on the supposed public policy or the "intended object" of the Act which appear to have weighed with Datta, J. The Court is not concerned with public policy except so far as such policy is apparent from the provisions of the statute, and the object of the Hindu Marriage Act, 1955 manifested in its various sections did not disclose to me any special clue to the construction of S. 25.

12. Let the case be placed before the Chief Justice so that it may now be disposed of by the appropriate Bench.

Order accordingly.

AIR 1972 CALCUTTA 8 (V 59 C 3)

P. B. MUKHARJI, C. J. AND B. C. MITRA J.

Mihir Kumar Sarkar and others, Appellants v. State of West Bengal and others, Respondents.

A. F. O. O. No. 126 of 1970, D/- 5-7-1971, from judgment and order of Anil Kumar Sen, J., D/- 5-3-1970.

(A) West Bengal Land (Requisition and Acquisition) Act (2 of 1948), Section 3 — Resort to requisition, whether mala fide — As the Act itself is constitutionally valid, resort to requisition proceedings under this Act cannot be said to be bad or mala fide on the ground that the Act does not provide for the same or similar opportunity as provided in some provision of another Act such as Section 5A of Land Acquisition Act. (Case law discussed).

(Paras 13, 14)

Where two statutes cover the same field there is no constitutional bar which prevents the application of one or the other. (Para 14)

(B) West Bengal Land (Requisition and Acquisition) Act (2 of 1948), Section 3 — Notice in case of requisition — As this special Act expressly excludes notice to owners of property in the event of requisition, provision for notice cannot be read into the Act on the basis of principles of natural justice. (Case law discussed). (Para 40)

(C) West Bengal Land (Requisition and Acquisition) Act (2 of 1948), S. 3 (1) — Requisition — Validity of requisition cannot be challenged on the ground that requisition involves permanent change in the character of the property. (Para 42)

Thus requisition of fishery is not open to challenge. (Para 42)

(D) West Bengal Land (Requisition and Acquisition) Act (2 of 1948), Sec. 3 (1) — Requisition order — Validity — Requisition order is not invalid on the ground that it required delivery of requisitioned property on the next day of the service of notice. (Para 34)

(E) West Bengal Land (Requisition and Acquisition) Act (2 of 1948) (as amended by West Bengal Land (Requisition and Acquisition) Ordinance 1969), Section 3 — Requisition of area for residence of people living outside — In spite of presence of the words "for the people residing in such areas" in the preamble after the amendment in view of their deletion from the section, requisition of an area for residence of people living outside that area would not be invalid, (Case law discussed). (Para 44)

Cases Referred: Chronological Paras

- (1971) AIR 1971 SC 963 (V 58)
= Civil Appeal No. 500 of 1967
D/- 19-2-1971, S. M. Nandy v. State of West Bengal 17, 25, 40, 45
(1971) AIR 1971 SC 40 (V 58)
= 1971 Lab IC 8, Union of India v. J. N. Sinha 24, 26
(1970) AIR 1970 SC 150 (V 57)
= 1970-1 SCR 457, A. K. Kraipak v. Union of India 23, 24
(1969) AIR 1969 SC 401 (V 56)
= 1969 Cri LJ 659, State Bank of India v. Rajendra Kumar Singh 23
(1969) 1969-2 WLR 337
= 1968-2 All ER 795, Schmidt v. Secy. of State for Home Affairs 36
(1968) AIR 1968 SC 240 (V 55)
= 1968 Lab IC 216, M. Gopal-krishna Naidu v. The State of Madhya Pradesh 22
(1967) AIR 1967 SC 1269 (V 54), State of Orissa v. Dr. (Miss) Binapani Del 38
(1967) AIR 1967 SC 1581 (V 54)
= 1967-3 SCR 399 Northern India Caterers (P) Ltd. v. State of Punjab 16
(1967) 1967-2 WLR 962 = 1967-1 All ER 226, In re, H. K. (An Infant) 34, 36
(1965) AIR 1965 SC 1296 (V 52) = (1965) 1 SCR 276, State of Rajasthan v. Mrs. Leela Jain 44
(1963) AIR 1963 Cal 373 (V 50) Sachindra Mohan Nandy v. State of West Bengal 14

(1960) AIR 1960 Assam 18 (V 47)
 Nadir Shah v. State of Assam 15
 (1957) AIR 1957 SC 521 (V 44)
 = 1957 SCJ 557, Sm. Lilavati
 Bai v. State of Bombay 32
 (1957) 1957 AC 436 = 1957-2
 WLR 1, Att. General v. Prince
 Ernest Augustus of Hanover 44
 P. K. Ray, Nani Coomar Chakrabarty,
 Ganendra Narayan Roy and S. Nandi,
 for Appellants; B. Das, Advocate-General,
 Arun Kr. Jana and Mani Bhusan
 Sarkar, for Respondents.

P. B. MUKHARJI, C. J.:— This is an appeal from the judgment and order of Mr. Justice Anil Kumar Sen dated the 5th March, 1970, discharging the Rule obtained by the appellants.

2. The appellants moved this court under Article 226 of the Constitution against the State of West Bengal, the Additional District Magistrate, 24-Parganas and the Collector (under West Bengal Act II) Alipore. In that application the appellants prayed *inter alia* for a writ of mandamus commanding the respondents to withdraw, recall and cancel the Order of requisition issued by the State of West Bengal on or about 5th November, 1969 and for incidental relief for injunction restraining the respondents, their officers and servants and agents from interfering with the possession of the appellants in respect of the said land notified. The appellants' challenge in this appeal is against the Government's Order of requisition of appellants' lands under the West Bengal Land (Requisition and Acquisition) Act, 1948.

3. The facts briefly appear from the Order of Requisition itself. In the first place the Order recites:

"Whereas in my opinion it is necessary for creation of better living conditions in rural or urban areas by the construction or reconstruction of dwelling places in Mouza Dhapanagar, P. S. Bhangar, District 24-Parganas for I. W. Department of the West Bengal to requisition the land described in the Schedule below."

4. The Order then traces the authority for requisition of land to the Government Notification No. 20500 dated the 3-12-1963 read with the Notification No. 3094 LA dated 17-2-1963 published in the Calcutta Gazette Extra-ordinary of the 21st. October, 1963 at page 367. This notification authorises the Collector to exercise the power conferred by Sec. 3 (1) of the West Bengal Land (Requisition and Acquisition) Act, 1948 (West Bengal Act 2 of 1948) as amended by Act VIII of 1954, XII of 1967 of 1962, XXII of 1963 and Act III of 1967.

5. In exercise of the power conferred by Section 3 (1) of the West Ben-

gal Land (Requisition and Acquisition) Act 1948 the Collector requisitioned the land mentioned in the schedule and ordered:

"(1) possession of the land as described in the sch. by the Surveyor Shri S. Roy/Shri Ganguli on and from 8th November, 1969.

(2) the plan of the land may be inspected in the office of the Special Land Requisition Officer, Alipore."

6. The land in question falls within the reclamation of the Southern Salt Lake area in the Eastern outskirt of the city of Calcutta which is a well known big project of urban development.

7. The Order of Requisition is challenged on diverse grounds.

8. The first objection is that this requisition has been made by the Government in violation of the Court's order in Civil Rule No. 7132 (W) of 1968 giving opportunity to the respondents to proceed afresh in accordance with the law under the provisions of the Land Acquisition Act. The appellants' contention is that the respondents violated those directions by taking recourse to a different Statute, viz. West Bengal Land (Requisition and Acquisition) Act, 1948 and not proceeding under the Land acquisition Act for which opportunity was given by these directions of the Court in that Civil Rule.

9. The context of this argument is provided by the following facts. The appellants claimed to be the owners of certain fisheries which are included in this requisition. The same area was covered by the declaration made by the Government under the Land Acquisition Act and dated the 21st. May, 1968. The appellants then disputed the validity of that declaration under the Land Acquisition Act in proceedings which were marked as Civil Rule No. 7132 (W) of 1968. By a judgment and order dated the 15th July, 1969 Mr. Justice B. C. Mitra set aside the said acquisition proceedings under the Land Acquisition Act on the finding that the object set out in the declaration was not the actual object for which the acquisition was being made.

10. On a close scrutiny of the nature and scope of the aforesaid proceedings under the Land Acquisition Act and the order made in the Civil Rule No. 7132 (W) of 1968 setting aside such proceedings under the Land Acquisition Act, the contention of the appellants that the present proceedings under the West Bengal Land (Requisition and Acquisition) Act, 1948 violates such order cannot be sustained. In making the said Rule in the land acquisition proceedings under the Land Acquisition Act the material

portion of the order of the court was as follows:-

"This Order will not debar the State Government from taking fresh proceedings under the Land Acquisition Act in accordance with the law, if it is so advised."

11. The order in these terms cannot be construed in our judgment to mean that it was a positive direction that any further proceedings for acquisition must have to be taken under the Land Acquisition Act and not under any other Statute permitting it or that it prevented the respondents from invoking the West Bengal Land (Requisition and Acquisition) Act, 1948. The words of the Order "if so advised" make that plain. Secondly the Rule made absolute in Civil Rule No. 7132 (W) of 1968 was not concerned at all with the West Bengal Land (Requisition and Acquisition) Act, 1948. Therefore in those proceedings there could be no occasion for any pronouncement by the Court about the rights under the West Bengal Land (Requisition and Acquisition) Act, 1948. Thirdly the order of the court as stated above proceeded on the short point in the Civil Rule No. 7132 (W) of 1968 that the object set out in the declaration under the Land Acquisition Act was not the actual object for which the acquisition was made under that Act. It is in the light of that finding that the order of the Court quoted above permitting the State Government to take fresh proceedings under the Land Acquisition Act in accordance with the law will have to be read. In other words the proper construction of the Order of the Court as set out above is in the first place that it permitted the State Government to invoke even the Land Acquisition Act "if so advised" provided the Government avoided the mistake of disparity between the objects set out in the declaration under the Land Acquisition Act and the actual object, and in the second place the Court did not fetter by that order in any manner the Government's statutory rights under any other statute like the West Bengal Land (Requisition and Acquisition) Act and to take proceeding thereunder. We, therefore, overrule the first objection of the appellants.

12. The second objection of the appellants depends on the first to this extent that the appellants contend that the Government's recourse to the West Bengal Land (Requisition and Acquisition) Act was mala fide because it could not proceed under the Land Acquisition Act. It was contended that the present step was a subterfuge on the part of the Government to deny the more liberal rights to the appellants which they could have enjoyed if fresh proceedings

were taken under Land Acquisition Act. The main contention of the appellants on this ground was that the Government proceeded under this Statute, the West Bengal Land (Requisition and Acquisition) Act, 1948 to deprive the appellants of the opportunity to raise an objection under Section 5A of the Land Acquisition Act.

13. This objection must also fail in our judgment. If the special statute like the West Bengal Land (Requisition and Acquisition) Act, 1948 under which the present requisition is made is otherwise valid and if it does not provide for the same or similar opportunity as provided in Section 5A of another Act like the Land Acquisition Act, then that by itself does not make the proceedings under this Act viz. The West Bengal Land (Requisition and Acquisition) Act, 1948 mala fide or bad on that ground. If different powers are provided by different Statutes it is open to the authority empowered thereby to take recourse to or even to change over from one to the other, so long as it is not a fraud upon the Statute or made with any collateral or mala fide motives. I shall cite three authorities on this point and in support of the view I am taking.

14. I shall begin with the decision of my own delivered as early as the 30th August, 1963 in Sachindra Mohan Nandy v. The State of West Bengal, AIR 1963 Cal 373. I held there (1) at pages 376-77 of that Report that the West Bengal Land (Requisition and Acquisition) Act of 1948 as contemplated in Article 31 (2) of the Constitution cannot be held ultra vires on the ground that it violates Article 19 (f) of the Constitution of India and I also held at p. 396 that (2) the unqualified proposition that where two Statutes are available, one giving larger rights to the subject or the citizen and the other lesser, than the choice of Statute must be left to the subject or citizen and not to the State and must always be made in favour of the subject and against the Government, cannot be accepted as correct. A statute applies by force of its own strength and if two statutes cover the same field there is no constitutional law which prevents the application of the one or the other or compels the preference of one to the other. If both can be applied either one or the other can be applied or invoked by the State empowered to do so. If the statutes prescribed unequal procedure or law then the only way they can be challenged is on the ground of infringement of equal protection or equality of laws under Article 14 of the Constitution. If they survive the test of the challenge of Article 14 of the Constitution then no further question of unconstitutional

preference in the application of one or the other statute on the ground of discrimination can any longer arise and (3) I further held at pages 379-80 of that report that the West Bengal Land (Requisition and Acquisition) Act, 1948 were indeed different in so far as they were intended to meet different purposes. Therefore if in the exigencies of a particular case the State Government chooses to apply the West Bengal Land (Requisition and Acquisition) Act, 1948 for acquisition of certain land instead of applying the slower proceedings prescribed by the Land Acquisition Act, the order of requisition cannot be challenged as discriminatory or unconstitutional. I maintain the view I expressed there. The Supreme Court in a recent Judgment, to which I shall make a reference, has also upheld the constitutional validity of the West Bengal Land (Requisition and Acquisition) Act of 1948.

15. The next decision is of the Assam High Court in *Nadir Shah v. State of Assam*, AIR 1960 Assam 18. Although this case does not deal with West Bengal Land (Requisition and Acquisition) Act, 1948 yet it is relevant because it was concerned with a similar problem of competition between the Assam Land (Requisition and Acquisition) Act, 1948 and the Land Acquisition Act. There a Division Bench of the Assam High Court made the following observations at pages 19-20 of that report:

"As to the second point that the land was not acquired under the Land Acquisition Act but was being requisitioned under Assam Act 25 of 1948, we have examined the argument and, in our opinion, that is not ground for invalidating the requisition order made under Section 3 of the Assam Act. Once it is found that the order was for a public purpose, and that the order comes within the ambit of Section 3 (1) of the Assam Act, the question as to whether the acquisition should have been under the Land Acquisition Act, becomes immaterial for the purpose of examining the validity of the order of requisition. Apart from that, the ultimate purpose, as it appears, of the State Government is to acquire this land."

I respectfully agree with that view.

16. I shall close this series of citations by the next authority of the Supreme Court in *Northern India Caterers (P) Ltd. v. State of Punjab*, AIR 1967 SC 1581. Then the Supreme Court had to consider the correlated question between the Punjab Public Premises and Land (Eviction and Rent Recovery) Act (31 of 1959) with other Statutes. The principles were laid down by the Supreme Court in that decision at pages 1584-85 and at page 1588. The Supreme

Court expresses the view there that the objects and reasons of the Punjab Act (31 of 1959) show that the legislature intended to provide a remedy which it thought was speedier than the one by way of suit under the ordinary law of eviction. There is nothing in this Act to warrant the conclusion that it impliedly takes away the right of suit by Government or that, therefore, it is substitutive and not supplemental. The significant observations made by Shelat J. delivering the majority judgment of the Supreme Court are in the following terms:

"With these reasonings I cannot agree. The Act does not create a new right of eviction. It creates an additional remedy for a right existing under the general law. It does not repeal the law giving the remedies of a suit or bar the jurisdiction of Civil Court to try a suit for eviction. The Government is at liberty to proceed against the occupants either under the Act or by way of a suit."

17. It will however be appropriate to conclude these citations with the latest observations of the Supreme Court in *S. M. Nandy v. State of West Bengal* where the Supreme Court takes the same view on the 19th February 1971 as I did on the 30th August, 1963. That Supreme Court decision is as yet unreported and was delivered in Civil Appeal No. 500 of 1967 (Since reported in AIR 1971 SC 963). Sikri C. J. delivering the judgment of the Supreme Court emphasised the point that the impugned Act viz. the West Bengal Land (Requisition and Acquisition) Act was enacted in order to provide for requisition and speedy acquisition of land for public purpose. The learned Chief Justice of India was considering the challenge to the Bengal Act in these terms:

"Whether the West Bengal Land Acquisition Act, 1948 was ultra vires under Article 19 (1) (f) of the Constitution read with Article 19 (5)."

The Supreme Court in that case held the West Bengal Land (Requisition and Acquisition) Act, 1948 to be constitutional and made the following observations:

"We are, therefore, of the opinion that it is difficult to hold that restrictions imposed by the impugned Act are unreasonable. Fair price has been provided for requisition, which is determinable by Civil Court and ultimately by the High Court or the Supreme Court. Regarding the necessity for requisition it must necessarily be left to the State Government. It is true that there is no express provision to make a representation against an order of requisition but there is no bar to a representation be-

ing made after the order is served under Section 3 (2) of the Act. If representation raises a point which overrides the public purpose it would be favourably considered by the State Government or other Government authorities as the case may be."

18. This last point in the above observations is important inasmuch as it is also one of points of challenge made in the present appeal before us because it is contended that this West Bengal Land (Requisition and Acquisition) Act permits a requisition without giving even a hearing or opportunity to the person whose land is requisitioned. The answer of the Supreme Court is that although the West Bengal Act does not expressly provide for a representation, yet there is nothing to prevent a representation being made after the order has been served and the Government considering it, if such representation raises a point which overrides the public purpose. The view expressed by the Supreme Court is supported by a reference also to Section 6 of the West Bengal Land (Requisition and Acquisition) Act of 1948 providing expressly for releasing requisitioned land which "is not acquired", and "is to be released."

19. The substance of this objection is that the West Bengal Land (Requisition and Acquisition) Act, 1948 permits requisition to be made without notice to the person concerned. This is contended to be against the principles of natural justice. Section 3 of this Statute provides *inter alia* that

"If the State Government is of the opinion that it is necessary so to do for maintaining supplies essential to the life of the community or for providing proper facilities for transport, communication, irrigation or drainage, or for the creation of better living conditions in rural or urban areas, not being an industrial or other area excluded by State Government by a notification in this behalf, by the construction or reconstruction of dwelling places, the State Government may, by order in writing, requisition any land and may make such further orders as appear to it to be necessary or expedient in connection with the requisitioning."

20. It goes on to provide in Section 3 (2) of that Act that an order under sub-s. (1) shall be served in the prescribed manner on the owner of the land and where the order relates to land in occupation of an occupier not being the owner of the land, also on such occupier.

21. It also appears from this provision that it does not require notice to be given to the owner or occupier before the order of acquisition is made, although

it requires that the order of requisition after having been made, shall be served in the prescribed manner on the owner and/or the occupier of the land.

22. It is contended by the appellants that this is against the principles of natural justice and is a most unreasonable interference with the rights to property. In support of this contention the appellants have relied on a number of decisions and authorities of the Supreme Court. The first reliance is placed on the decision of the Supreme Court in *M. Gopalkrishna Naidu v. The State of Madhya Pradesh*, AIR 1968 SC 240. This case however has no application to the facts and principles involved in the present appeal. That was a case under disciplinary jurisdiction concerned with the Fundamental Rules of service and departmental proceedings whose principles are not on a par with the principles of acquisition and requisition of property under special statutes. The Supreme Court observed there at page 243 of that report.

"The very nature of the function implies the duty to act judicially. In such a case if an opportunity to show cause against the action proposed is not afforded, as admittedly it was not done in the present case, the order is liable to be struck down as invalid on the ground that it is one in breach of the principles of natural justice."

23. These principles in my judgment relating to disciplinary jurisdiction under Rule 54 of the Fundamental Rules have no application to the principles and facts involved in the instant appeal. The second case on which reliance was placed by the appellants is the decision of the Supreme Court in *the State Bank of India v. Rajendra Kumar Singh*, AIR 1969 SC 401. That case also in my view has no application to the principles and facts involved in appeal. That was the case concerning Sections 517 and 520 of the Criminal Procedure Code relating to the order of return of seized property and laying down the principle that in such a context there should be given an opportunity of being heard to the aggrieved party before passing such order. That is a judicial proceeding and the order is the order of the Court and naturally the Court must hear the rival claimant before making any order of return of the seized property. The third case on which reliance was placed by the appellants is *A. K. Kraipak v. Union of India*, AIR 1970 SC 150. This again relates to an administrative enquiry under the All India Services Act, 1951 and discussed the principles of administrative or quasi-judicial power and in that context made the observations about the concept of natural

justice. It will be thus seen that all these cases to which the appellants made reference have nothing to do with the principles of acquisition and requisition under Special Statutes with which the present appeal before us is concerned.

24. The importance, however, of the last decision in *Kraipak's case*, AIR 1970 SC 150 is that it tried to indicate that since the aim of quasi-judicial as well as administrative enquiries is to arrive at a just decision these rules should apply to both and the former classical distinction between the administrative action on the one hand and judicial or quasi-judicial action on the other, attracting the principles of natural justice to the latter and not to the former is breaking down in modern jurisprudence. In making that observation the Supreme Court discussed the recent trends in some decisions of the English Court of Appeal which I shall notice later in this judgment. That is the importance of this Supreme Court decision. It might only help the appellants to this extent in their argument that even if the order of requisition is to be regarded as a purely administrative decision or executive order the principles of natural justice must nevertheless be applied. This point of view can be accepted so far as it goes but must always be read subject to the limitations that when a special statute either expressly or by necessary implication excludes notice to the aggrieved party then the statute is to be obeyed provided of course the statute is constitutional in India. See the later decision of the Supreme Court in *Union of India v. J. N. Sinha*, AIR 1971 SC 40 at p. 42.

25. The appellants at this point tried to avail of the other observations in the Supreme Court Judgment in Civil Appeal No. 500 of 1987 (reported in AIR 1971 SC 963) quoted above in *S. M. Nandy v. the State of West Bengal* that although there is no express provision to make representation against the order, yet there is no bar to the representation being made after an order is served under Section 3 (2) of the West Bengal Act. That observation goes against the appellants because in the first place the Supreme Court in that decision upheld the constitutional character of the West Bengal Land (Requisition and Acquisition) Act, 1948 even without express provision for notice before requisition. The absence of notice clause under that Act did not vitiate the validity of the Statute and it was open to the aggrieved party to make a representation against the order of requisition made without notice in the first instance but to come forward with a representation after the order has been served. In the second

place no representation was in fact made in this appeal even after the order of requisition was served but an outright application was made to the Court challenging it under Article 226 of the Constitution. Thirdly even after requisition, the requisitioned land can be released if it is not acquired as provided in Sec. 6 of the West Bengal Land (Requisition and Acquisition) Act of 1948.

26. The last case on which the appellants relied on this point is a decision of the Supreme Court in, AIR 1971 SC 40. This decision is really against the contention of the appellants. It is clearly laid down there that when there is conflict between rules of natural justice and statutory provisions, statutory provisions must prevail and not rules of natural justice. See the observations of K. S. Hegde, J. at page 42 of that report. The learned Judge explained this doctrine by observing,

"It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, purpose for which it is conferred and the effect of the exercise of that power."

27. The real enquiry therefore in this appeal is whether the West Bengal Land (Requisition & Acquisition) Act, 1948 specifically or by necessary implication excludes the provision of notice as part of natural justice claimed by the appellants. In order to determine this question the words used in this statute, the nature of the power used or conferred and the purpose for which it is conferred and the effect of the exercise of such power are all relevant considerations.

28. I, therefore, proceed to examine this scheme of West Bengal Land (Requisition and Acquisition) Act, 1948 to determine whether notice is expressly or by necessary implication excluded so far as requisition is concerned. I find from the analysis of this Statute that there is conscious and deliberate departure in the

Act from the natural justice of giving prior notice in the case of requisition. This becomes apparent when the contrast is made between acquisition where the statute expressly provides for notice and requisition where it deliberately avoids provision for notice. I have already quoted Section 3 which does not mention any notice before requisition under this Act. On the other hand acquisition under the Act is provided in Section 4. In Section 4 (1) (a) it is expressly provided that the State Government may acquire any land requisitioned under Section 3 by public notice in the official gazette that such land is required for public purpose referred to in sub-s. (1) of Section 3. Immediately upon such publication the requisitioned land vests absolutely in the State Government free from all encumbrances and the period of requisition ends by reason of the provision of sub-sec. (2) of Section 4 of this Act. Section 4 immediately follows Section 3 of the Act. When Section 3 deals with requisition it does not mention the requirement of notice to be given before requisition, but immediately in the next Section when acquisition is mentioned in Section 4 there is the express provision for notice. I read these two sections in close juxtaposition to indicate the object and purpose of the statute to exclude notice in the case of requisition and to include notice in the case of acquisition.

29. Between the Land Acquisition Act of 1894 and the West Bengal Land (Requisition and Acquisition) Act, 1948 there is a time gap of more than half a century. Over this gap of more than 50 years the problems of compulsory acquisition and requisition of land have undergone many changes in law and in legal attitudes. They have acquired an urgency in the modern sociological context of law. Problems of modern society, congestion, density of population, influx of refugees, industrialisation, mechanisation, technology and urbanisation are some of the main forces which have produced different laws and legal attitudes in respect of acquisition and requisition. Social responsibilities attached to individual ownership of property are being recognised in laws gradually and slowly. I shall indicate briefly these changes by contrasting Land Acquisition Act, 1894 with the West Bengal Land (Requisition and Acquisition) Act, 1948. The contrast reveals the changing law on this subject.

30. The preamble of the Land Acquisition Act, 1894 describes it "as an Act to amend the law for acquisition of land for public purpose and for company." It makes elaborate provisions for preliminary investigation and hear-

ing of objections in Part II of that Statute, specially in Sections 4 and 5A of that Act. Section 4 deals with publication of preliminary notification and powers of officers. The first step there is to have a notification in the official Gazette declaring the Government's intention that land in locality is needed or is likely to be needed, for any public purpose. It is followed by giving any person interested in any land the right to object to the acquisition under Section 5A of that statute. The aggrieved person has a right to be heard in support of his objection. This is followed by an enquiry by the Collector who makes ultimately a report to the Government. The decision of the appropriate Government on that report is provided in that statute to be final.

31. The first difference between the West Bengal Land (Requisition and Acquisition) Act, 1948 and the older Land Acquisition Act 1894 is, therefore, that all preliminary investigation in Part II of the Land Acquisition Act is obviated in the former Act in the case of requisition thereunder. Secondly all the process of hearing objection under Section 5A of the Land Acquisition Act, 1894 is avoided under the West Bengal Land (Requisition and Acquisition) Act, 1948 in the case of requisition. Thirdly the vesting of the land under the West Bengal Land (Requisition and Acquisition) Act 1948 in case of acquisition is immediate under Section 4 (2) of that Act, when a notice of acquisition is issued under Section 4 (1a) of the West Bengal Land (Requisition and Acquisition) Act, 1948. This is provided in Section 4 (2) of the West Bengal Land (Requisition and Acquisition) Act, 1948. But this is not so immediate under the old Land Acquisition Act, 1894 by reason of Section 16 of that Act where vesting in the Government takes place only after the Collector has made the award and taken possession of the land. Fourthly, the preamble of the West Bengal Land (Requisition and Acquisition) Act, 1948 expressly describes it to be "an Act to provide for the requisition and speedy acquisition of land for certain purposes". Therefore, requisition and speedy acquisition of land are the primary object of the West Bengal Land (Requisition and Acquisition) Act, 1948. I, therefore, read this preamble and the substantive provisions in the sections of the West Bengal Land (Requisition and Acquisition) Act, 1948 to mean this that they were intended to provide for speedy acquisition. In order to do so they have provided that no notice would be required for requisition. Notice is only required under the West Bengal Act in the case of acquisition as provided in Sections 4

and 5 of that West Bengal Act. That is why acquisition under the West Bengal Act can only be made of land which has been requisitioned. Express recognition of this principle is to be found in Section 4 of the West Bengal Land (Requisition and Acquisition) Act, 1948 which permits in sub-section (1a) the State Government to acquire any land requisitioned under Section 3 by publishing a notice in the Official Gazette that such land is required for public purposes. This is a significant difference between the Land Acquisition Act of 1894 which does not provide for land requisition but provides only for acquisition with perhaps the exception in the case of temporary occupation in respect of waste and arable land under S. 35 of the Land Acquisition Act 1894. Fifthly, while under the West Bengal Land (Requisition and Acquisition) Act of 1948 there can be no acquisition of land without there being a requisition first, yet such requisition need not lead invariably to acquisition under the West Bengal Act because of the express provision made in Section 6 of the West Bengal Land (Requisition and Acquisition) Act, 1948 providing that "Where any Land requisitioned under Section 3 is not acquired and is to be released from requisition, the State Government may, after making such inquiry, if any, as it considers necessary, specify by order in writing the person who appears to it to be entitled to the possession of such land." In appropriate cases the aggrieved party can invoke this Section 6 for release of the requisitioned land. There are other differences between Land Acquisition Act, 1894 but they are not material for purpose of this appeal. The general conclusion that follows from this comparative analysis and contrast of these two Acts is that no construction should be placed on the West Bengal Land (Requisition and Acquisition) Act, 1948 which will stifle or impede the main declared object of requisition and speedy acquisition of land.

32. A few more words are necessary to revert to the subject of the legal nature of requisition having regard to the argument made about administrative action on the one hand and judicial and quasi-judicial action on the other. The Supreme Court in *Smt. Lila Vati Bai v. State of Bombay*, AIR 1957 SC 521 in considering the legality and validity of the Bombay Land Requisition Act, 1948 as amended by Bombay Act 2 of 1950 observed at page 529,

"An order like the one passed under Section 6 (4) (a) of the Bombay Land Requisition Act, 1948 is not in the nature of an order in Judicial proceedings

between the Government on the one hand and other parties named." Apparently the order of requisition under the West Bengal Land (Requisition and Acquisition) Act, 1948 is of a similar nature. It is not in the nature of an order in judicial proceedings. Therefore, absence of express provision for notice before requisition of land under Section 3 of the West Bengal Land (Requisition and Acquisition) Act, 1948 cannot ordinarily vitiate such requisition either on the ground of principles of natural justice or on the ground of infringement of fundamental rights of property under the Constitution of India.

33. To overcome these difficulties on the ground of natural justice the argument was advanced on behalf of the appellants that natural justice must be made applicable whether it is in the sphere of judicial or quasi-judicial acts or in purely administrative or executive decisions. I have already noticed that argument and I have expressed my view. I shall not repeat them here again. But it is, necessary to notice this new doctrine and observe its limits.

34. I shall begin by noticing a few decisions at this stage because they seem to indicate the wind of change in this branch of the law on this point. The pioneer to express this changing view is Lord Parker C. J. in *Re H. K. (An Infant)* 1967-2 WLR 962 where the learned Lord Chief Justice of England presiding in the Court of Appeal in the Queen's Bench Division made the following significant observations at pages 971 and 972 of that report,

"Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially. It has sometimes been said that if there is no duty to act judicially or quasi-judicially there is no power in the court whatever to interfere I do not understand him to be saying that if there is no duty to act judicially, then there is no duty even to be fair."

35. These observations of the learned Lord Chief Justice of England were made in connection with actual words and language of the Commonwealth Immigrants Act, 1962 and the duties of the Immigrant Officers under that Act, which are very different from the provision of the West Bengal Land (Requisition and Acquisition) Act, 1948, which must ultimately govern and determine this appeal. See particularly the provisions of Sections 2, 3 and Sch. I of the Commonwealth Immigrants Act requiring notice on which this English decision is based and on which the Lord Chief Justice of England made the above observations. These observations were made in the most guarded language and with specific limitations plain from such words of the Lord Chief Justice as "limited extent," "the circumstances of any particular case allow," and "within the legislative framework under which the administrator is working." It will be inappropriate to take the Lord Chief Justice's observation without these limitations.

36. The next spokesman for this new view and attitude is Lord Denning M. R. in *Schmidt v. Secretary of State for Home Affairs* (1969) 2 WLR 337 where the learned Master of the Rolls observed at page 350 of that report:

"I quite agree, of course, that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf Some of the judgments in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in *Ridge v. Baldwin* (1964) A. C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which I would not be fair to deprive him without hearing what he has to say."

Thereafter Lord Denning M. R. cites the observations of Lord Parker C. J. in the case above namely in *Re H. K. (An Infant)* 1967-2 WLR 962.

37. Lord Denning M. R. was dealing with a case in the Court of Appeal under the Aliens Order, 1953 whose provisions are not comparable with those of the West Bengal Land (Requisition and Acquisition) Act, 1948 relating to requisition.

38. The Supreme Court decision of two learned Judges J. C. Shah and G. K. Mitter, JJ. in *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269 made the following observations at page 1272.

"It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence."

39. These observations however, were made in connection with an enquiry depending on complicated questions of fact where an order of compulsory retirement based on a certain disputed date of birth was involved and where the petitioner was not given the report of the Enquiry Officer who conducted the enquiry into the correct date of birth. These observations were made on the basis of facts and law which have no application to the facts and law of the present appeal before us.

40. As at present advised this Court is not prepared to subscribe to the doctrine that there is no distinction between judicial or quasi-judicial decisions on the one hand and purely executive and administrative decisions on the other. The very nature of the writs like mandamus on the one hand and Certiorari or Prohibition on the other stems from that distinction. If all administrative or executive decisions were to follow judicial or quasi-judicial procedures then that would in this Court's view lead to utter confusion and an impossible state of affairs and will mean disregard of the basic principles of executive action and judicial action which do not represent a merely formal or theoretical distinction but a qualitative distinction springing from the nature of the act itself. No doubt Lord Parker's observation that good and honest administration must act fairly is basic to law and any good legal administration but that only means that the executive or the administrative action should not be mala fide or for collateral purpose. Lord Parker's proposition must be read subject to the express limitations that the learned Lord Chief Justice himself used and which I have quoted above. Lord Denning's observations that the distinction is no longer valid following as they did Lord Parker's view, must be read subject to the same limitations. As at present advised this Court is of the opinion that an executive decision

or action or an administrative decision is liable to be struck down if it is used mala fide or for a collateral purpose, on that ground alone, and not on the ground that there is no legal and juristic distinction between executive action and the judicial action. In any event in the case of an area completely covered by a special statute and specially in a field which is not covered by the common law I maintain the view that the statute must govern and its language and words are the determining factors. Many principles of natural justice today have been overcome by dictates of statute passed because of the needs of modern society and social welfare. To conclude where a statute either expressly or by necessary implication excludes notice to the aggrieved party in case of requisition of land for public purpose as in the West Bengal Land (Requisition and Acquisition) Act, 1948, is to fly in the face of this statute. Where there is statutory silence there is scope for applying the principles of natural justice but where on a proper interpretation of the statute itself, expressly or by necessary implication, such notice is excluded then it will not be justifiable for any court to re-introduce it on the ground of principles of natural justice. That is also how read the latest pronouncement of the Supreme Court in Civil Appeal No. 500 of 1967 (reported in AIR 1971 SC 963) quoted above.

41. The next objection of the appellants to the order of requisition is that it is not for any public purpose but for the purpose of converting fisheries into dwelling places. The contention further is that it involves a total change in the character of the property. In short the appellant's argument on this point is that such an object cannot come within the sanction of Section 3 (1) of the West Bengal Act. In support of this argument it is contended for the appellants that requisition under Section 3 (1) of the West Bengal Act does not permit change in the character of the property and in particular it does not permit permanent change in the character of the property which is requisitioned under the statute. What is said by the appellants is that if the property is subsequently de-requisitioned after converting the fisheries into a highland the owners thereof are likely to suffer irreparable injury.

42. I have carefully considered this objection and I am unable to accept it. Among the expressed purposes for which land can be requisitioned under Section 3 (1) of that Act it is stated inter alia "for providing proper faci-

lities for transport, communication, irrigation or drainage, or for the creation of better living conditions in rural or urban areas by the construction or reconstruction of dwelling places." The expressed declaration of such specific objects does not in my opinion put any limitation upon the Government about changing the character of the property requisitioned. We are of the opinion that so long as these purposes are carried out by "the construction or reconstruction of dwelling places," such requisition cannot be challenged on the ground that it involves permanent change in the character of the property requisitioned. The right to change the character of the property requisitioned appears expressly and is inherent in the Section itself. It is plain from the language of S. 3 (1) of the West Bengal Act that the property requisitioned may undergo the fundamental change in its character to serve the statutory purpose of requisition mentioned therein. Construction of dwelling places is an expressed purpose in Section 3 (1) of this Statute. That permits and means permanent change in the character of the property requisitioned. The further argument of the appellants is that conversion of the fisheries into highland or dwelling place would mean irreparable injury to the appellants as owners of fisheries is met by the same answer. To prefer men and their dwelling places to fisheries in an overcongested city like Calcutta howling for space for human habitation is a "public purpose" in modern sociology of law and statutes. The alleged injury to the owners of fisheries is a matter of compensation as provided in Section 7 of the West Bengal Act. We, therefore, overrule this objection of the appellants.

43. The next challenge to the order of requisition is that it is high-handed giving no time or hardly any time to the appellants. The argument for the appellants is advanced on the following lines. The impugned order is dated the 5th November, 1969. The order itself was served on the 7th November, 1969, calling upon the appellants to deliver possession on the very day following. The appellants contend that this is grossly insufficient notice and as such the order should be struck down. In the very first instance, Section 3 (1) as quoted above does not speak of any notice whatever. That section provides in Section 3 (2) that the order shall be served in the prescribed manner on the owner or occupier of the land. That has been done. The statute, therefore, does not provide for any particular notice or any minimum period of notice. The requirements of Section 3 (2) of the West Bengal Act have

on the facts of this case been satisfied. No question of any notice or reasonableness of a period of notice in such circumstances can arise. The owner or occupier of a land upon whom the order of requisition has been served under Section 3 (2) of the West Bengal Act is expected to know what he is required to deliver by that order. It is, there, in our judgment not open to the appellants to urge that the order of requisition is bad because it stated "the plan of the land may be inspected in the office of the Special Land Acquisition Officer, Alipore" or that the schedule given thereunder should have given more specific details of the land to be requisitioned. The schedule is reasonably specific and clear and offer to have the plan inspected in the order of requisition was adequate enough even though time was short. In addition, the fact is that the owner or occupier of the land served with a notice of requisition of this character is expected to know what are his lands, of which he is required to make delivery of possession. In any event this consideration cannot in our judgment vitiate the order of requisition in the facts of this case and on the terms of the statute. It must also be borne in mind in this connection that the whole statute is for the object of "speedy acquisition" and requisition.

44. The next objection of the appellant to the order of requisition is that S. 3 (1) of the West Bengal Act permits only requisition for the purposes set out there "by the construction or reconstruction of dwelling places for people residing in such areas." The appellants contend that the limitation is contained in the words in the statute "for people residing in such area." They contend that construction or reconstruction of dwelling places for people who do not reside in such areas is not permissible under this Statute. It is the basis of this contention that the Salt Lake Reclamation Scheme provides also for people from outside who will also be entitled to come and reside in the dwelling places that may be constructed or reconstructed there. This argument proceeds on a wrong assumption of present law. This particular provision was amended by an Amendment Ordinance and known as the West Bengal Land (Requisition and Acquisition) (Amendment) Ordinance, 1969 (West Bengal Ordinance 13 of 1969). This Ordinance was promulgated and published on the 16th October, 1969 before the order of requisition was made in this case. By virtue of Clause 2 of that Ordinance the express words "for people residing in such areas" in Section 3 (1) of the West Bengal Act were deleted and completely

omitted from that section. The ambit therefore, of Section 3 (1) of the West Bengal Act has been widened. It is no longer intended for people residing in such areas. This Ordinance came into force on the 16th October, 1969 before the order of requisition and therefore this requisition is covered by that Ordinance amending the West Bengal Act of 1948. Since then the amendment made by the Ordinance has been re-enacted in West Bengal Land (Requisition and Acquisition) Amendment Act of 1970 (West Bengal Act XVI of 1970). The argument was advanced for the appellants that although Section 3 (1) of the Act was amended as aforesaid, the preamble of the statute did not omit the words "for the people residing in such areas". But on well settled principles of the construction the preamble cannot override the express, clear and unambiguous language of the sections of the Act. See Lord Normand's observations in the House of Lords in *Att. General v. Prince Ernest Augustus of Hanover*, 1957 AC 436 at pages 467-68. See also the Supreme Court decision in *The State of Rajasthan v. Mrs. Leela Jain*, AIR 1965 SC 1296 at page 1299. This argument in any event has completely lost its force by reason of Section 4 (2) of the West Bengal Land (Requisition and Acquisition) Amendment Act of 1970 (West Bengal Act XVI of 1970) which validates past action inter alia in these terms: "Anything done or action taken under the said Act as amended by the Ordinance shall be deemed to have been validly done or taken under the said Act as amended by this Act as if this Act had commenced on the 16th October, 1969".

45. This disposes of all the arguments advanced for the appellants in this appeal. Certain additional grounds had been taken by the appellants but they were not pressed. They relate to the constitutional validity of the West Bengal Land (Requisition and Acquisition) Act under Articles 19 and 31 of the Constitution of India. Those points are already concluded by the latest Supreme Court pronouncement in favour of the constitutional validity of the West Bengal Act in Civil Appeal No. 500 of 1967 (reported in AIR 1971 SC 963) quoted above and in my own judgment in that case cited earlier in this judgment. These grounds are no longer available to the appellants. A minor point was also taken in the additional grounds alleging that on the face of the affidavit-in-opposition affirmed by Shri Atul Das Gupta in the Rule in question though it was Shri Das Gupta and not the Additional District Magistrate who passed the order of re-

quisition, the order of requisition is bad because it was signed by the Additional District Magistrate who is alleged not to have applied his mind but mechanically signed the order of requisition. This was not seriously pressed before us in the appeal. We must state however that there is no substance in this ground at all. Section 3 (1) speaks of the "opinion" of the State Government. The opinion of the Government can be formed and based on the report of administrative officers and when the authority signs on the basis of that report it does not necessarily follow that the authority signs mechanically and without applying his mind. Non-application of the mind must be established as a fact. It is not so in this case. That ground must, therefore, fail.

46. For reasons stated above this appeal fails and is dismissed with costs assessed at five gold Mohurs.

B. C. MITRA, J.:— 47. I agree.
Appeal dismissed.

AIR 1972 CALCUTTA 19 (V 59 C 4)

SALIL KUMAR DATTA, J.

The Asansol Electric Supply Co. and others, Appellants v. Chunnilal Daw, Respondent.

Second Appeal No. 558 of 1966, D/- 24-2-1971.

(A) Companies Act (1956), Section 172 — Non-compliance — Effect — Provisions of Section 172 have been made expressly mandatory and for good reasons and the same must be strictly complied with to ensure the validity of resolutions placed at the meeting. Non-compliance of the said provisions would make such resolutions void and ultra vires. (Para 30)

(B) Specific Relief Act (1877), Section 21 (b) — Wrongful termination of service — Suit for declaration that service continues — (Civil P. C. (1908), Section 9).

The relationship between master and servant is often a matter of contract and if such contract is wrongfully terminated, the remedy of the aggrieved party lies in an action for damages and the court will not grant a declaration that a contract of service still subsists. Such declaration will amount to an order for specific performance of personal service which is practically forbidden in law. The position will however, be different when a statute intervenes in the relationship of master and servant and the employee is given a statu-

tory status. If there is a violation of the provisions of the statute in terminating the service of such an employee, he will be eligible for a declaration that the order terminating the service is a nullity and that he continues to be in service.

Where the company by a resolution purported to terminate the employment of the plaintiff and according to the plaintiff such resolution was void and ultra vires, though the plaintiff cannot sue for enforcement of a contract for personal service, being barred under Section 21 (b) of Specific Relief Act, 1877, he is entitled to establish in a court of competent jurisdiction that the impugned resolution being in violation of mandatory provisions of the statute is a nullity and of no effect and thus has no existence in law. If it is found so, he would be entitled to such declaration and be further entitled to consequential and ancillary reliefs which flow from such declaration inter alia namely that he is the employee of the company and for an injunction restraining the defendants from interfering with the plaintiff's service under the company. Case Law discussed.

(Paras 13, 15, 23, 24)

Cases Referred: Chronological Paras

- (1970) AIR 1970 SC 1244 (V 57) = 1970 Lab IC 1044, Executive Committee of the U. P. State, Warehousing Corporation v. Chandrakiron Tyagi 19, 25, 26, 27
(1964) AIR 1964 SC 847 (V 51) = (1964) 5 SCR 528, Life Insurance Corporation of India v. Sunil Kumar Mukherjee 20
(1964) 3 All ER 865 = (1965) 1 WLR 77, Vidyadaya University of Ceylon v. Silva 18
(1962) (1962) 3 All ER 633 = (1962) 1 WLR 1411, Francis v. Municipal Councillors of Kuala Lumpur 17
(1958) AIR 1958 SC 1050 (V 45) = 1959 SCR 1236, Dr. S. Dutt v. University of Delhi 13
(1958) (1958) 1 All ER 322 = (1958) 1 WLR 181, Barber v. Manchester Regional Hospital Board 16, 26
(1956) (1956) 3 All ER 939 = (1957) 2 WLR 106, Vine v. National Dock Labour Board 14, 16, 26
(1950) AIR 1950 PC 81 (V 47) = 77 Ind App 128, Ram Kissendas v. Staya Charan Law 21
(1948) AIR 1948 PC 121 (V 35) = 75 Ind App 225, High Commr. for India and Pakistan v. I. M. Lall 27
(1946) 50 Cal WN 310, Ramkissendas Dhanuka v. Satyacharan Law 21
(1918) (1918) 1 KB 315 = 87 LJ KB 466, Rubel Bronze and Metal Co. Ltd., In re 28

(1900) 1900-1 Ch 408 = 69 LJ Ch
213 In re Trench Tubeless Tyre
Co.

32

S. D. Banerjee, Dwijendra Nath Das and Nirmal Kumar Ganguly, for Appellants; Mrigen Sen and Provat Kumar Mukherjee, for Respondent.

JUDGMENT :— This is an appeal by a public company, the Asansol Electric Supply Company Ltd. and its four Directors against a judgment and decree of affirmance. The plaintiff Chunnilal Das, as an employee of the company instituted a suit inter alia for a declaration that certain resolutions purported to have been passed by the Board of Directors of the Company as also by its shareholders were illegal, void, inoperative and not binding on the plaintiff and also for some other reliefs. The plaintiff's case in short is that he was firstly appointed a Manager of the Company which appointment was confirmed by a special resolution passed at its General Meeting held on September 25, 1957 of the shareholders of the company, the plaintiff's designation was however changed from Manager to Supervisor, and, the remuneration fixed was Rs. 750/- per month with effect from January, 1958 and of annual increment of Rupees 10/- and dearness allowance of Rs. 180/- per month unless otherwise determined by the Board. It may be mentioned here that the plaintiff is a relative of the Defendant No. 2, the Managing Director of the Company and accordingly shareholders' approval was considered necessary in view of Section 314 of the Companies Act, 1956. By another resolution dated April 24, 1963 passed by the Board of Directors of the Company, the post of Supervisor was abolished with effect from May 1, 1963 and the plaintiff was appointed Store-in-Charge on the same pay and allowances. While he was engaged in the said office, a notice was issued on July 5, 1963 by the Board for a proposed extra ordinary general meeting of the company to be held on July 29, 1963 to consider and if thought fit to pass the resolution appended thereto, with or without modification, as a special resolution, also in view of Section 314 of the Act. In the said proposed resolution it was stated that the plaintiff was to be appointed a Store-in-Charge with effect from May 1, 1963 at a basic salary of Rs. 810/- per month. It appears that on that date a meeting of the shareholders was held when the plaintiff objected to the defendant No. 2 being in the chair which objection was overruled. The resolution which was notified to be proposed at the meeting by the notice of July 5, 1963 was neither placed nor moved and accordingly not

passed at the said meeting. On the contrary a resolution was passed to the effect that the plaintiff was not to be appointed Store-in-Charge with effect from May 1, 1963 and further that the plaintiff had ceased to hold office as a Store-in-Charge with effect from the said date. On the same day, the defendant No. 2 informed the plaintiff by a letter that the plaintiff's service had been terminated with effect from May 1, 1963.

2. The plaintiff on the above allegations instituted the suit for declaration that the resolution of the Board dated April 24, 1963 as also the resolution of the General Meeting of July 29, 1963 were void, invalid, inoperative and not binding on the plaintiff, and, that further the service of the plaintiff as a Supervisor of the company had been continuing and the plaintiff was entitled to arrears of salary and allowances on account thereof. There was a claim for Rs. 3,000/- as damages for mental pain and agony as also loss of prestige in public estimation suffered by the plaintiff. The plaintiff was refused access to the company by the defendant and accordingly he instituted this suit for the aforesaid reliefs and for permanent injunction restraining the defendants from interfering with the plaintiff in the discharge of his duties under his service with the company.

3. The suit was contested by the defendants who filed separate written statements denying the claims made in the plaint. The common defence as it appears from the written statement was that the plaintiff's service was lawfully and validly terminated and the resolution passed by the Board as also in the extra ordinary general meeting of the shareholders impugned in the plaint were valid and legal. It was also contended that the suit for enforcement of the personal contract of service was not maintainable and was barred under the provisions of the Specific Relief Act, 1877.

4. On a trial on evidence, the learned Munsif held that the resolution of the Board dated April 24, 1963 was legal and valid but the resolution passed at the extra ordinary general meeting of the shareholders on July 29, 1963 was bad, invalid and of no binding effect. Accordingly, the plaintiff was still in the employment of the company in the post of a Store-in-Charge and not as Supervisor as claimed and was entitled to the monthly salary and allowances from July, 1963 till the date of the filing of suit on September 30, 1963 which was determined at Rs. 1,168/-, as he was prevented by the defendants from doing the work of the company though the plaintiff had been willing

to do his work in his service under the company. The claim for damages was rejected as not pressed. The defendants and their servants were restrained by injunction from interfering with the plaintiff's service in the said post until his service was determined according to law.

5. An appeal was preferred by the defendants and the appellate court also affirmed the judgment and decree of the trial court and dismissed the appeal. The present appeal is against the said decision.

6. Before we proceed to consider the merits of the appeal, it will be proper for an adjudication of the issues involved in the case, to have a clear idea about the resolution and letter impugned in the plaint. The resolution of the shareholders passed at the extra ordinary general meeting of the company on December 25, 1967 is to the following effect:—

"Resolved further that the designation of Sri Chuni Lal Daw be changed from Manager to Supervisor with immediate effect and that his remuneration be Rs. 750/- per month with effect from 1st January 1958 with an annual increment of Rs. 10/- and a dearness allowance of Rs. 180/- per month until otherwise determined by the Board of Directors". (Ex. 2).

7. The next resolution of the Board of Directors held on April 24, 1963 as communicated to the plaintiff by the letter of the company is to the following effect.

30th April, 1963.

Sri Chunnilal Daw,

Asansol.

Dear Sir,

We are appending below an extract of the resolution passed at the Board's meeting held on 24-4-1963 which will speak for itself.

"Regarding item No. 2 — it is resolved that the post of Supervisor be abolished from 1-5-1963 and Sri Chunnilal Das be appointed as Store-in-Charge on the same pay and Dearness Allowance from 1-5-1963. He will have to look after the Stores issue and receipts of materials, outdoor works, such as service connections, maintenance works etc, including store accounts".

Hence, you are hereby directed to take charge of the above on and from 1-5-1963.

Yours faithfully,

Ex. 2/h. For The Asansol Electric Supply Co. Ltd.

Sd/- Sanatan Daw,
Managing Director.

8. The next document is a notice of July 5, 1963 and the extracts from the said notice are as follows:

Notice is hereby given that an extra ordinary general meeting of the members of the company will be held on Monday the 29th day of July 1963 at the registered office of the company at Asansol at 3 P.M. to consider and if thought fit to pass the following resolution with or without modification as special resolution as required under Section 314 of the Companies Act, 1956.

"Resolved that Sri Chunnilal Daw be appointed as Store-in-Charge on a basic pay of Rs. 810/- and a Dearness Allowance of Rs. 180/- per month with effect from 1-5-1963, along with other usual amenities i.e. Provident fund, Bonus, Attendance Bonus, Gratuities Travelling Allowance etc. as are granted by the company to other employees. It is also resolved that members of the company consent to Sri Chunnilal Daw, who is a relative of Sri Sanatan Daw, the Managing Director of the company, holding and continuing to hold his present office as Store-in-Charge of the company with effect from 1-5-1963".
Explanatory Notes.

"Sri Chunnilal Daw was appointed as Manager from 1-1-1951 in the eighteenth ordinary general meeting held on 28-9-1951. Consent was given in the extra ordinary general meeting held on 11-4-1956. His designation from Manager to supervisor was changed in the extra ordinary general meeting held on 25-12-1957. His post of Supervisor was abolished from 1-5-1963 and he was appointed as store-in-charge from 1-5-1963 in the Directors' meeting held on 24-4-1963. Sri Chunnilal Daw being a brother of the Managing Director, Sri Sanatan Daw, the above said resolution requires the consent of the company to be accorded by a Special Resolution. Hence the proper resolution is sought to be passed as a Special Resolution of the company."

Asansol

Dated the 5th July 1963.

By order of the Board,
Ex. 1/f For the Asansol Electric Supply Co. Ltd.,
Sd/- Sanatan Daw,
Managing Director.

9. The minutes of the proceeding of the extra ordinary general meeting held on 29-7-1963 are to the following effect:—

Sri Joy Deb Daw proposes the name of Sri Sanatan Daw as Chairman, Sri Bijoy Daw seconded the proposal.

Sri Sanatan Daw was voted to the Chair.

The notice convening the meeting was read.

Requisite quorum was present.

Sri Bijoy Daw proposes the following modified resolution to be passed as special resolution.

Resolved that the post of supervisor be abolished from 1-5-1963. Further resolved that Sri Chunnilal Daw be not appointed as Store-in-Charge with effect from 1-5-1963. It is also resolved that Sri Chunnilal Daw ceases to hold and continue to hold his present office as store-in-charge of the company with effect from 1-5-1963.

Sri Ajoy Kumar Daw seconded the proposal of Sri Bijay Daw.

Sri Chunnilal Daw places on record that by virtue of the notice dated 23-7-1963 given by Sri S. C. Deb, Solicitor to the Company, Sri Sanatan Daw, Ex-Managing Director of the company cannot preside over today's Extra Ordinary General Meeting.

Further to place on record that this extra ordinary general meeting cannot be held which is illegal.

Chairman does not accept the contention of Sri Chunnilal Daw and proceeds with the meeting and holds the meeting to be legal.

The modified resolution of Sri Bijoy Daw was passed as Special Resolution.

With a vote of thanks to the Chair the meeting terminated. Ext. 2/i.

10. The last document which is a letter dt. July 29, 1963 by the company to the plaintiff is as follows:
No. 396/64.

Asansol 29th July 1963.

Sri Chunnilal Daw,

Asansol.

Dear Sir,

As your appointment as store-in-charge has not been passed in the extra ordinary general meeting held on 29-7-1963, your service has been terminated with effect from 1-5-1963.

You are therefore informed to have your dues on 6-8-1963.

Ext. 2/i.

Your faithfully,
for The Asansol Electric
Supply Co. Ltd.
Sd/- Sanatan Daw.
Managing Director.

11. Mr. Sankar Das Banerjee, assisted by Mr. D. N. Das, the learned counsel for the defendants appellants has contended firstly that suit as framed was not maintainable. According to him the suit was really one for wrongful dismissal for which the only remedy of the plaintiff was for damages as would be established in a court of law. There cannot be a suit for enforcement of a personal contract of service either by the master or by the servant and the court will not compel a man to continue to employ another man in service of a personal nature nor compel

one to serve another. In support he also referred to Section 21 (b) of the Specific Relief Act, 1877 (Section 14 (1) (b) of the Specific Relief Act, 1963). Mr. Banerjee further contended that a suit which prays for a declaration that the plaintiff is still in the service of the defendant employer is also not contemplated under Section 42 (new 34) of the Act. In short Mr. Banerjee's contention is that assuming the impugned resolution or letter terminating the service is bad in law, it is none-the-less a wrongful termination of service and the court under general law cannot direct the reinstatement nor make a declaration that the plaintiff continues to be in service of the company.

12. Mr. Mrigendra Mohan Sen, assisted by Shri Pravat Kumar Mukherjee the learned counsel for the plaintiff respondent contended that the suit was maintainable as a suit for declaration that the impugned resolution was bad, invalid, ultra vires and inoperative and if it is found to be so, his client would be entitled to ancillary reliefs which flow from such declaration. The plaintiff's case is not one of wrongful dismissal but of a declaration that the resolution passed by the shareholders was void so that in law there has been not a termination of service at all. As the resolutions in absence of compliance of the statutory requirement which was mandatory were invalid, illegal, ultra vires and so void, such resolutions did not exist in the eye of law and accordingly, the plaintiff was entitled to the declaration that the impugned resolution and also to the additional declaration that he continued to be in service and to other ancillary reliefs.

13. We shall now examine the respective contentions of the parties and consider the various rulings cited at the bar. The relationship between master and servant is often a matter of contract and if such contract is wrongfully terminated, the remedy of the aggrieved party lies in an action for damages and the court will not grant a declaration that a contract of service still subsists. Such declaration will amount to an order for specific performance of personal service which is practically forbidden in law. This will appear from Section 21, Clause (b) of the Specific Relief Act, 1877 (new Section 14, clause (b)) which is in following terms.

"Section 21. The following contracts cannot be specifically enforced:—

(a)

(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of parties, or other-

wise from its nature is such, that the Court cannot enforce specific performance of its material terms;". In *Dr. S. Dutt v. University of Delhi*, AIR 1958 SC 1050, the Supreme Court was considering the case of an award which held that a Professor of an University had been dismissed wrongfully and mala fide, that the dismissal thus had no effect on his status and that he still continued to be a professor of the University. It was held that the award directed specific performance of contract of personal service, and as such a legal proposition is clearly erroneous in view of Section 21 (b) of the Specific Relief Act, 1877.

14. In the case of *Vine v. National Dock Labour Board* (1956) 3 All ER 939 it was held, in a case where the plaintiff's employment as a registered Dock Worker employed in the reserve pool by National Dock Labour Board was terminated by a disciplinary committee of the local board, that the local board, under the statutory scheme set up under the Dock Workers Regulation of Employment Order, 1947 had no power to delegate its functions to the disciplinary committee and that the order of dismissal accordingly was a nullity. It was held in such a case that the plaintiff was entitled to a declaration that his name was never validly removed from the register as he would otherwise be disabled to work as dock worker and he continued to be an employee of the National Board. It was observed by Viscount Kilmuir, L. C., as follows:—

"This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving any insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity he continued to have the right to be treated as registered dock worker with all benefits which, by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme, the court should declare his rights." It was also observed by Lord Keith of Avonholm that:

"Normally, and apart from the intervention of statute there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but it could only sound in damages."

15. As enunciated in the above case the position will however be different when a statute intervenes in the

relationship of master and servant and the employee is given a statutory status. If there is a violation of the provisions of the statute in terminating the service of such an employee, he will be eligible for a declaration that the order terminating the service is a nullity and that he continues to be in service.

16. In *Barbar v. Manchester Regional Hospital Board* (1958) 1 All ER 322, the Hospital Board determined the plaintiff's employment who made an appeal under Clause 16 of the terms and conditions of service of hospital medical staff which had a statutory force. It was maintained on the part of the Minister that no appeal lay to him and no decision was reached by the Minister required under Clause 16. The plaintiff claimed that his service was never validly determined. It was held that the plaintiff's contract with the board was between master and servant, the termination of which could not be nullity and the plaintiff was not, therefore, entitled to a declaration that his employment had never been validly determined but he was entitled to recover damages for breach of the contract. A declaration was also granted as against the Minister that he acted in breach of statutory duty required under Clause 16 of the terms and conditions of service. This case was not equated to the case of (1956) 3 All ER 939 (supra). Here, the Court was of the opinion that despite the strong statutory flavour attaching to the plaintiff's contract, it was in essence an ordinary contract between master and servant and nothing more.

17. In *Francis v. Municipal Councilors of Kuala Lumpur* (1962) 3 All ER 633 the plaintiff was dismissed by the President but there was some irregularity and the dismissal was technically a wrongful dismissal. The plaintiff asked for a declaration that the termination of his employment was wrongful and he had the right to continue in the employment of the respondents and alternatively he claimed all damages for dismissal. It was observed by the Privy Council as follows:—

".....when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will be normally in the discretion of the court." In that case it was found that there was no circumstance which made it just or proper to make such a declaration.

18. In *Vidyadaya University of Ceylon v. Silva* (1964) 3 All ER 865, it was held by the Privy Council again that although the University was established and regulated by statute, that did not involve that contracts of employment made with teachers and subject to Section 18 (e) other than ordinary contracts between master and servant. In this case the respondent was not shown to have any other status than that of a servant and procedure by certiorari was not available where a master summarily terminated a servant's employment.

19. In the case of the Executive Committee of the U. P. State Warehousing Corporation v. Chandrakron Tyagi AIR 1970 SC 1244 after a review of the cases on the subject the Supreme Court observed:—

".....the position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well-recognised exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) a public servant, who has been dismissed from service in contravention of Article 311, (2) Reinstatement of a dismissed worker under Industrial Law by Labour or Industrial Tribunals, (3) A Statutory body when it has acted in breach of a mandatory obligation, imposed by a statute."

20. It was held in that case that the order of termination made in the breach of a service regulations would be contrary to such terms and conditions, but would not be in breach of any statutory obligation, as was the position in the case of *Life Insurance Corp. of India v. Sunil Kumar Mukherjee*, AIR 1964 SC 847. In the Warehousing Corporation case it was held that a breach had been committed by the appellant Corporation of regulation 16 (3) when passing the order of dismissal inasmuch as the procedure indicated therein had not been followed. The Act does not guarantee any statutory status to the respondent employee, nor did it impose any obligation on the appellant in such matters. Further there was no dispute that an authority who could pass an order of dismissal had passed the order. Accordingly the order was held to be merely wrongful making in consequence the Corporation liable for damages but such order could not be held to be one which had not terminated the service however wrongfully, or which entitled the employee to ignore it and ask for being treated as still in service.

21. Mr. Sen, in support of his contention about the maintainability of the suit for violation of mandatory provisions of law relied on the Bench deci-

sion in *Ramkissendas Dhanuka v. Satyacharan Law* (1946) 50 Cal WN 310, in which the Court was concerned with the purported resolution terminating employment of the Managing Agents. As such action was taken in violation of the provisions of the Articles of Association of the Company, though not those of 87B of the Indian Companies Act, 1913 as amended in 1936, it was held that the resolution was ultra vires. The Bench affirmed the judgment of McNair, J. who granted a declaration that the impugned resolution was void, inoperative and of no effect and also an injunction restraining the defendants from interfering with the management of the plaintiff company by its Managing Agents. The decision of this Court on this issue was affirmed on appeal by the Privy Council in *Ram Kissendas v. Satya Charan Law* AIR 1950 PC 81 and it was observed that the decree merely prevented dismissal or termination of the appointment of the Managing Agents and had not the effect of enforcing a contract of personal service.

22. Mr. Banerjee sought to distinguish this case pointing out that the said suit was by and on behalf of the shareholders of the plaintiff company while the managing agents were not even a party to the proceeding. He further contended that the present suit was not by and on behalf of the shareholders of the defendant company and an employee should not be granted a declaration prayed for as he for himself alone is not competent to challenge the legality or otherwise of the impugned resolution.

23. The contention need not detain us long; under Section 9 of the Code of Civil Procedure person who has a cause of action against another would be entitled to institute a suit for such reliefs as he may have against the offending party unless its cognizance is barred expressly or impliedly. In the instant case, the company by a resolution purported to terminate the employment of the plaintiff and according to the plaintiff such resolution is void and ultra vires. Though the plaintiff cannot sue for enforcement of a contract for personal service, being barred under Section 21 (b) of Specific Relief Act, 1877, there is no bar in his seeking a declaration from court that the impugned resolution is void and ultra vires. As pointed out by Mr. Sen, the plaintiff is most vitally affected by the said resolution which affords him the cause of action for the suit against the company and the fact that the shareholders are no parties to the suit, cannot in my opinion defeat the suit, nor is their presence necessary for adjudication of the issues involved in the proceeding.

24. The plaintiff has instituted the suit, as we have seen, for a declaration that the impugned resolution was void and ultra vires in that the mandatory provisions requisite for passing such resolution were not complied with. The suit therefore is not one against a wrongful dismissal nor one for enforcement of a contract of personal service. The plaintiff accordingly is entitled to establish in a court of competent jurisdiction that the impugned resolution being in violation of mandatory provisions of the statute is a nullity and of no effect and thus had no existence in law. If it is found so, he would be entitled to such declaration and be further entitled to consequential and ancillary reliefs which flow from such declaration inter alia namely that he is in the employ of the company and for an injunction restraining the defendants from interfering with the plaintiff's service under the company. This is a far cry from a suit for declaration that a termination of service is wrongful or for enforcement of a personal contract of service. Section 21 (b) or Section 42 of the Specific Relief Act, 1877 can thus be no bar to the suit for the said declaration, as it is not for enforcement of a personal contract of service but for a declaration of a legal right that a particular resolution of a company, affecting the claimant's status, is void for non-compliance of statutory provisions which are mandatory. On a consideration of the materials on record and the principles of law referred to above, I have no doubt in my mind that the suit as framed is maintainable in law and the plaintiff would be entitled to the reliefs if he succeeds in establishing that the impugned resolution is ultra vires and void for non-compliance of the mandatory provisions of the statute.

25. Mr. Banerjee strongly relied on the decision of the Supreme Court in Warehousing Corporation case, AIR 1970 SC 1244 and next contended that obviously the plaintiff had no statutory status nor there was any statutory obligation to be observed by the company in terminating the service of the plaintiff. The plaintiff accordingly could not seek for any declaration that he continued in service and his only remedy, if any, was for damages for the alleged wrongful termination and nothing beyond. He referred to Article 992 of Halsbury's Laws of England, Third Edition, Volume 25, wherein it is laid down that the remedy of a wrongfully dismissed servant is either to treat the contract as repudiated by the master and sue for damages or he may acquiesce in the master's wrongful act, treat the contract as rescinded in which case he may sue

as upon a quantum meruit for the value of work done but not paid but he cannot pursue both.

26. It appears that the letter dated July 29, 1963 informing the plaintiff about the termination of his service was merely a communication by the Managing Director. It is not the Company's case that the service was brought to an end, with retrospective effect, by the Managing Director himself. The termination of service accordingly had its authority in the resolution of the shareholders. The plaintiff's case is that the said resolution was in breach of statutory provisions of the Companies Act, 1956 which are mandatory and accordingly was bad, invalid and inoperative. On such case, this suit is not really one for a declaration that the termination of service is illegal and wrongful but of a resolution being void and inoperative. In the Warehousing Corporation's case AIR 1970 SC 1244 there was no dispute that order of dismissal was passed by the competent authority, the dispute being about the non-observance of some regulation which according to the Supreme Court did not impose any mandatory obligation under the statute on the Corporation. In the Vines case, (1956) 3 All ER 939, the declaration that the order of the disciplinary committee terminating the employment of a dock worker was a nullity was granted in view of the finding that the local board had no authority to delegate such power to the disciplinary committee and further such order being a nullity the name of the worker was never removed from the register and he continued in the employ of the National Dock Labour Board. The other cases referred to above were considered as cases of wrongful dismissals arising from ordinary contracts of master and servant and the courts did not grant the specific performance of a personal contract of service though in Barbar's case (1958) 1 All ER 322 a declaration that the Minister acted in breach of statutory duty was given in his failure to hear the appeal against the order of termination of service.

27. The maintainability of a suit for declaration as here will thus depend on whether the impugned resolution terminating the employment is in breach of any statutory provision which is mandatory. This principle has been recognised in the Warehousing Corporation's case, AIR 1970 SC 1244 in which it has been stated that no declaration to enforce a contract of personal service will be normally granted, but there are exceptions and one such exception being when a statutory body acts in breach of a mandatory obligation imposed by a sta-

tute. The same view was taken by the Privy Council in the case of the High Commr. for India and Pakistan v. I. M. Lall AIR 1948 PC 121, in which the procedure in Section 240 (3) of the Government of India Act, 1935 had not been followed and the Court granted the declaration that the purported dismissal of the Civil Servant was void and inoperative and he remained a member of the Civil Service at the date of institution of the suit for such non-observance of the mandatory provisions of the statute.

28. Mr. Banerjee has also contended that a termination of service may also take place by preventing the employee from discharging his duties under the service. Reliance was placed on Batt's "Law of Master and Servant" (5th Edition page 270) in which doctrine of repudiation is also extended to cases when a master refuses to allow the servant to fulfil his contract of service and it was observed that a dismissal may be effected by such conduct. Similar view was taken in re: Rubel Bronze & Metal Co. Ltd. 1918-I KB 315 (321) which was cited in support. According to the plaint the allegations are that the plaintiff was forcibly prevented access into the office by the sons of the defendant No. 2 at his instance on July 30, 1963, when the plaintiff attempted to go to his office. These allegations which are denied in the written statement, constituted according to the company a termination of service and may be a wrongful one, argued by Mr. Das who also addressed me at times, for which the remedy would be a suit for damages. In fact, the plaintiff claimed Rs. 3000/- as damages in the present suit which was not pressed at the hearing.

29. This contention has no substance as it is not the case of the defendant that there was any termination of service apart from the impugned resolution and refusal to allow the plaintiff to discharge his duties must obviously be on the basis of the impugned resolution which is the plaintiff's case. Accordingly there was no occasion for termination of service by mere refusal to allow the plaintiff to discharge his duties from his service under the company.

30. In support of his contention that the resolution of July 29, 1963 was void and ultra vires, Mr. Sen has drawn my attention to Sections 171 and 172 of the Companies Act, 1956. Section 171 provides that a general meeting of a company may be called by not less than twenty one days' notice or a shorter notice, if consent is given thereto by 95% part of its paid up capital having voting right (sic.). Sec. 172 provides for the contents of the notice as also time

and place of the meeting while Section 173 provides for explanatory statements of any special business. According to Mr. Sen the provisions of Section 172 are mandatory and no resolution can be validly passed unless the formalities of the said section are complied with and a resolution passed without compliance of the said requirements will be void and ultra vires. On a careful (sic) of the provisions of Section 172 of the Companies Act, 1956, I have no doubt that the contentions of Mr. Sen are correct and have to be upheld. I hold accordingly that the provisions of the said section have been made expressly mandatory and for good reasons and the same must be strictly complied with to ensure the validity of resolutions placed at the meeting and non-compliance of the said provisions would make such resolutions void and ultra vires.

31. In the instant case, the resolution to the effect that the post of Supervisor was to be abolished and that Chunnilal Daw was to be appointed a store-in-charge from May 1, 1963 and that he ceased to hold and to continue to hold his present office as store-in-charge of the company with effect from May 1, 1963 was never notified to the shareholders. Accordingly for default in compliance with the mandatory provisions of Section 172 of the Act the said resolution cannot but be held as invalid and void. It may be noted that resolutions which were notified to the shareholders were not moved at all and it has not been and cannot be argued that the impugned resolutions were amendments to the resolutions notified as indeed they are not so nor claimed as such.

32. Mr. Banerjee has drawn my attention to a decision of the Court of Appeal in re: Trench Tubeless Tyre Co. 1900-1 Ch. 408. In this case a resolution for voluntary winding up of the company by special resolution was legally passed. The notice of the confirmatory meeting included the appointment of a named person as liquidator; at the meeting the resolution for the appointment of the named liquidator was dropped and another person was appointed liquidator without further notice. This appointment was objected to by some debenture-holders but the Court of appeal overruling the objection held that:

"When a resolution for the voluntary winding-up of a company has been passed at a meeting called upon proper notice any one can at that meeting either with or without notice, propose the appointment of a liquidator....."

Everyone connected with companies should know that, as soon as a resolution for voluntary liquidation has been

passed, the appointment of liquidator can be proposed and carried." The above decision was cited in support of the validity of the impugned resolution.

33. It does not clearly appear from the above decision whether there was any mandatory provision in the statute regarding appointment of a liquidator after a voluntary resolution for winding up is passed. In case of the Companies Act of our country, the provisions are expressly mandatory. In case of companies incorporated or deemed to be so incorporated under the Companies Act, which are accordingly bodies created by the statute, there is this express obligation provided in the Section 172 of the Act before a resolution can be adopted. The language of the obligation in Section 172 as already observed, clearly indicates its mandatory nature and accordingly the non-compliance will have the fatal consequence of rendering the resolution void and ultra vires. In the eye of law, such resolution is to be deemed as being never in existence. Such an event took place when the company, in the instant case, purported to pass a resolution which was not at all notified in gross violation of the mandatory obligations under the statute. The resolution impugned in the suit is accordingly void and ultra vires and has no existence in law. The plaintiff accordingly became entitled to a declaration prayed for in prayer (a) of the plaint. As consequential reliefs the plaintiff is also entitled to further reliefs as decreed by the courts below.

34. As all the contentions raised on behalf of the appellants fail the appeal is dismissed without however any order as to costs in the court.

35. Leave under Clause 15 of the Letters Patent is prayed for and granted.

36. As prayed for by the learned counsel for the appellant, let operation of this decree remain stayed for a period of three weeks from date.

Appeal dismissed.

AIR 1972 CALCUTTA 27 (V. 59 C 5)

SABYASACHI MUKHARJI J.

Hari Prasad Singh, Petitioner v. Commissioner of Income-tax, West Bengal and others, Opposite Parties.

Matter No. 260 of 1969, D/- 1-7-1971.

(A) Civil Services — Central Civil Services (Conduct) Rules (1955), Rule 3 — In an inquiry against a civil servant charges against him must be clear and specific. Whether or not they are so, must be judged in the context of a parti-

cular charge and particular set of facts. Where charges are supported by statement of allegations with detailed facts, the charge is not vague or indefinite. AIR 1956 Mad 220 and AIR 1961 Cal 40 and AIR 1971 SC 752 Distinguished.

(Para 2)

(B) Civil Services — Central Civil Services (Conduct) Rules (1955), Rule 3 — Validity — Rule 3 does not contain a mere pious hope but a clear mandate for the rule of conduct, and as such is not void on the ground of vagueness. AIR 1964 Cal 415 Followed; AIR 1956 Mad 220 Distinguished.

(Para 4)

(C) Civil Services — Central Civil Services (Conduct) Rules (1964), Rule 25 — Rule is prospective. It does not deal with conduct prior to 1964. Even if any action is taken under repealed rules that action shall be deemed to have been taken under the corresponding provisions of the new Rules.

(Para 5)

(D) Constitution of India, Article 311 — Reasonable opportunity — Whether by refusal of the assistance of a lawyer to the delinquent there is any denial of reasonable opportunity is essentially a question of fact. (X-Ref:— Civil Services — Central Civil Services (Classification, Control and Appeal) Rules (1957), Rule 15 (5).) Civil Rule 1988 (W) of 1966 D-26-3-1970 (Cal.) and AIR 1961 Cal 1 (SB) Distinguished.

(Para 7)

Where there was hardly any scope of oral testimony and the delinquent himself was a sufficiently qualified person there was no denial of reasonable opportunity.

(Para 7)

(E) Constitution of India, Article 311 — Although charges against a Government servant should relate to recent offences and stale matters should not be revived, where, to find out whether the assessments of taxes were properly made by the delinquent Income-tax Officer proper investigation was necessary, events more than 3 years prior to framing of charges could form basis of charges.

(Para 8)

(F) Constitution of India, Article 311 — For an inquiry against Government servant, it is only when the President is the disciplinary authority that consultation with the Union Public Service Commission is required.

(Para 9)

(G) Constitution of India, Article 311 (2) — Second show cause notice sent in compliance with Article 311 (2) cannot be bad on grounds that the disciplinary authority was disagreeing with the findings of the enquiry officer or that the notice was only against the penalty proposed. (X-Ref:— Civil Services — Central Civil Services (Classification, Control and Appeal) Rules (1965), Rule 15 (4). (i) (b).) AIR 1960 Andh Pra 473 and

AIR 1968 Madh Pra 132 Rel. on; AIR 1963 SC 1612 Distinguished. (Para 11)

(H) Constitution of India, Article 311 — Although quasi-judicial orders should indicate reasons in the order itself, if the reasons can be found out either from the order or from other documents, it is not proper to strike down the order merely because formal reasons are not recorded in the order itself. (Para 12)

Cases Referred: Chronological Paras

- (1971) AIR 1971 SC 752 (V 58)
= 1971 Lab IC 456, Surath Chandra Chakravarti v. State of West Bengal 2
- (1971) AIR 1971 SC 862 (V 58)
= (1970) 3 SCR 40, M/S Travancore Rayons Ltd. v. Union of India 12
- (1971) 1971 Lab IC 554
= 73 Pun LR 400, Mohinder Singh Babbra v. State of Punjab 12
- (1970) AIR 1970 SC 1302 (V 57)
= (1971) 1 SCJ 256, Mahabir Prasad v. State of U. P. 12
- (1970) Civil Rule No. 1988 (W) of 1966, D/-26-3-1970 (Cal), Harbilas Biswas v. Union of India 7
- (1970) AIR 1970 Guj 1 (V 57)
= 1970 Lab IC 35, (FB), Testeels Ltd. v. N. M. Desai 12
- (1968) AIR 1968 Madh Pra 132 (V 55)
= 1968 Lab IC 939, Ghan-shyamdas Srivastava v. State of Madhya Pradesh 11
- (1964) AIR 1964 Cal 415 (V 51)
Sripati Ranjan Biswas v. Collector of Customs 2
- (1963) AIR 1963 SC 1612 (V 50)
= (1964) 2 SCR 1, State of Assam v. Bimal Kumar Pandit 11
- (1961) AIR 1961 Cal 1 (V 48)
= 65 Cal WN 361 (SB), Nripendra Nath Bagchi v. Chief Secretary Govt. of West Bengal 7
- (1961) AIR 1961 Cal 40 (V 48).
Amulya Ratan v. Deputy Chief Mechanical Engineer Eastern Rly. 2
- (1960) AIR 1960 Andh Pra 473 (V 47)
= (1960) 1 Andh WR 408, Sreedhariah v. Dist. Supdt. of Police 11, 12
- (1958) AIR 1958 SC 232 (V 45)
= 1958 SCR 1052, P. Balakotiah v. Union of India 2
- (1956) AIR 1956 Mad 220 (V 43) = 1956-1 Lab LJ 29, R. Ananthanarayanan v. General Manager Southern Rly. 2, 4

ORDER:— This is an application by an erstwhile Income-tax Officer under Article 226 of the Constitution challenging the order of suspension dated 2nd

September 1965, the memorandum dated 9th September 1965 containing the charge-sheet against the said officer, the orders dated 30th April, 1966, 18th July, 1966, 3rd October, 1966, the enquiry report dated 29th March 1967, the show cause notice dated 29th April 1968 and the order of removal on the said officer dated 10th February 1969. The petitioner was appointed to officiate as an Income-tax Officer, Class II Grade III of the Income-tax Department, Calcutta, with effect from 22nd November 1954. Thereafter from 1956 to 1959 the petitioner served in various capacities in the districts of Bengal as Income-tax Officer as well as in Calcutta. In July 1959 the petitioner was made quasi-permanent and with effect from 8th April 1960 the petitioner was confirmed as the Income-tax Officer. On the 17th August 1960 the petitioner was posted as the Income-tax Officer 'E' Ward, Special Survey Circle IV, Calcutta. The petitioner also served the Special Survey Circle in various capacities as also in other districts of the Income-tax Department in Calcutta. In October 1963 the petitioner was transferred to hold the charge of D and E Wards of District III-A, Calcutta. It will be relevant at this stage to state that with effect from 30th November 1964 the Central Civil Services (Conduct) Rules 1955 were repealed by the Central Civil Services (Conduct) Rules 1964. The significance of this date would be evident later on. On the 2nd September 1965 the order of respondent No. 1 was passed under Rule 12 (1) of the Central Civil Services (Classification, Control & Appeal) Rules 1957 placing the petitioner under suspension. This is one of the orders which is under challenge in this application. On the 9th September 1965 the petitioner was charge-sheeted for violation of Rule 3 of the Central Civil Services (Conduct) Rules 1955. It would be relevant at this stage to refer to the said charge-sheet. There were two charges against the petitioner. It was stated firstly, that the petitioner while functioning as Income-tax Officer in the Special Survey Circle IV, Calcutta during the period from 9-8-58 to 10-5-61 contravened Rule 3 of the Central Civil Services (Conduct) Rules, 1955, inasmuch as,

(a) the petitioner made assessments in several cases in a dishonest and mala fide manner causing wrongful loss of revenue to the Government;

(b) the petitioner displayed gross negligence and/or inefficiency in the discharge of his official duties; and

(c) the petitioner tampered with the official records.

As a result of the enquiry by the enquiring officer the peti-

tioner was exonerated of all the charges under several heads mentioned above by the enquiring officer. The disciplinary authority however disagreed with the findings of the enquiring officer in so far as sub-clause (b) of charge 1 referred to hereinabove, that is to say, that the petitioner displayed gross negligence and/or inefficiency in the discharge of his official duties. The disciplinary authority came to the conclusion that the said charge had been established. The second charge against the petitioner was that while functioning as Income-tax Officer in Special Survey Circle IV, Calcutta during the period 9th August 1958 to 10th May 1961 he failed to comply with the instructions issued by the Commissioner of Income-tax regarding procedure to be followed in making the assessments and thereby contravened Rule 3 of the Central Civil Services (Conduct) Rules 1955. The enquiry officer has exonerated the petitioner in respect of this charge. The disciplinary authority has also agreed with the said finding of the enquiry officer. On the 17th September 1965 the petitioner asked for inspection of certain documents. Thereafter on the 21st of September, 1965 the petitioner was asked to contact the Inspecting Assistant Commissioner of Income-tax, Head Quarters for inspection of documents. On the 20th November 1965 Central Civil Services (Classification, Control & Appeal) Rules 1965 were promulgated by the President and the said Rules came into force on the 1st December, 1965. By the 1965 Rules the 1957 Rules were repealed. It would be necessary later on to refer to the terms in which the said Rules have been repealed in order to appreciate one of the contentions raised in this application. Between 6th December, 1965 and 14th April 1966 the petitioner asked for inspection of certain documents. The said prayers of the petitioner are contained in two letters dated 6th December 1965 which is Annexure F to the present petition and the letter dated 14th April, 1966 which is also Annexure F to the said petition. On the 30th April 1966, the respondent No. 1, the Commissioner of Income-tax, West Bengal I, refused to give the petitioner inspection of certain documents specified in the letters mentioned before on the ground that either these were not relevant or these were not available at that moment with the department. The said order of respondent No. 1 is contained in Annexure G to the present petition. On the 18th July 1966 one Mr. G. B. Seth, Inspecting Assistant Commissioner of Income-tax, Range IV, Calcutta was appointed to present the case before the enquiry officer against the petitioner. On the 18th

July 1966 the respondent No. 1 appointed respondent No. 3 under Rule 14 (2) of the Central Civil Services (Classification, Control & Appeal) Rules 1965 as the enquiring authority. Thereafter on the 30th September 1966 the petitioner requested the respondent No. 1 to permit him to engage a lawyer for representing the petitioner's case and the said prayer was refused. It would be relevant again to refer later on to the terms in which the said prayer has been refused to appreciate certain contentions raised in this application. On the 26th October, 1966 the first hearing took place before the enquiry officer and on the 7th February 1967 the second hearing took place. On the 29th April 1968 the petitioner received from respondent No. 1 a copy of the enquiry report submitted by the respondent No. 3 to the respondent No. 1. In the said report respondent No. 3 found the petitioner innocent of all the charges, as mentioned hereinbefore. In the said notice, however, it was stated by respondent No. 1 that he agreed with the findings of respondent No. 3 in so far as it related to charges 1 (a) and 1 (c) and charge No. 2. The respondent No. 1, however, intimated to the petitioner he had provisionally come to the conclusion that No. 1 (b) had been proved differing from the finding made by the respondent No. 3. The petitioner was given an opportunity of making representation. The petitioner showed cause on the 28th September, 1968. There was a further representation by the petitioner on the 4th January 1969. On the 10th February 1969 the respondent No. 1 passed the order removing the petitioner from service. Thereafter this application was moved under Article 226 of the Constitution and a rule nisi was obtained.

2. Counsel for the petitioner raised several contentions in this case. The first contention, that requires consideration is that the charges are vague, specially the charge in respect of which the petitioner has been found guilty. As mentioned hereinbefore the said charge was that the petitioner had contravened Rule 3 of the Central Civil Services (Conduct) Rules 1955 inasmuch as he had displayed gross negligence and inefficiency in the discharge of his official duties. It was contended that no particulars had been given of what was his duty and what acts he committed which might be termed as negligent. It was also urged that it had not been clearly stated what was the standard of efficiency and duty. I am unable to accept this contention. The said charge-sheet was sent along with the statement of allegations. The statement of allegations have detailed instances of se-

veral assessments and the circumstances under which the said assessments had been made. From the facts enumerated in the said statement of allegations which gave particulars of the dates of assessments, the file numbers, the names of the assesseees and the circumstances as appearing from the documents. The said facts were the basis upon which the charge of negligence was based. The question whether the charges were vague or not, cannot be judged in isolation. It was urged that there was no standard of duty or efficiency. I am of opinion that such standard of duty or efficiency must be judged from a common-sense point of view prevalent in a particular office or a particular department. Counsel for the petitioner referred me to several decisions. He first drew my attention to the decision of the Madras High Court in the case of *R. Ananthanarayanan v. General Manager, Southern Rly.*, AIR 1956 Mad 220. There it was observed by the learned Judge that charges must be clear and specific. In so far as that proposition is concerned no exception can be taken to that proposition. In the aforesaid decision the Madras High Court was concerned with the charge made in the context of Rule 3 of Railway Service (Safeguarding of National Security) Rules 1954. The said Rule was differently worded from the present Rule with which I am concerned in this application. Furthermore, in so far as the Madras High Court expressed the view that the said Rule 3 was indefinite even when read in the context of expression 'national security', the same view has not been approved by the Supreme Court in the case of *P. Balakotiah v. Union of India*, AIR 1958 SC 232. Counsel for the petitioner then referred me to the decision of Sinha J. (as his Lordship then was) in the case of *Amulya Ratan v. Deputy Chief Mechanical Engineer, Eastern Rly.*, AIR 1961 Cal 40. There Sinha J. expressed the opinion that the charges must be specific and must give all particulars. That is a proposition which is well-settled and I respectfully agree with the said observation. But whether charges are specific and give all particulars must be judged in the context of a particular charge and particular set of facts. Reliance was then placed on the decision in the case of *Surath Chandra Chakraborty v. State of West Bengal*, AIR 1971 SC 752. There the Supreme Court observed that if a person was not told clearly and definitely what the allegations were on which the charges preferred against him were founded, he could not possibly by projecting his own imagination, discover all the facts and circumstances that might be in the contemplation of the

authorities to be established against him. The Supreme Court observed that the whole object of furnishing the statement of allegations was to give all the necessary particulars and details which would satisfy the requirement of giving a reasonable opportunity to put up defence. There, it is to be noted, that the statement of allegations was never sent to the delinquent in that case. In the instant case, as mentioned herein-before, the charges were supported by a statement of allegations where detailed facts have been stated. Therefore, in my opinion, the aforesaid decision cannot help the petitioner. Having considered the propositions of law mentioned herein-before and having considered the charges in this case, as well the fact that in the instant case the charges were supported by statement of allegations wherein detailed facts of several assessments had been given, I am of opinion that the charges in respect of which the petitioner had been found guilty cannot be termed as vague or indefinite.

3. The next contention that was urged was that Rule 3 of the Central Civil Services (Conduct) Rules 1955 was vague and as such ultra vires. It was secondly contended that the said rule contained an expression of pious wish and could not be the subject-matter of any charge.

4. R. 3 of the Central Civil Services (Conduct) Rules 1956 states as follows:—

"Rule 3. General— Every government servant shall at all times maintain absolute integrity and devotion to duty."

Rules of conduct may and do vary from time to time. They, however, at a particular point of time reflect the enlightened conscience of a society. Simply because, however, such rules are variable from age to age it cannot be said that at a particular point of time they become either non-existent or vague. They must at all times be judged from a robust commonsense point of view on a reasonable standard. In this connection it may be appropriate to refer to the observations of Banerjee, J. in the case of *Sripati Ranjan Biswas v. Collector of Customs*, AIR 1964 Cal 415 at p. 417. Considering the same identical Rule, that is to say, Rule 3 of the Central Civil Services (Conduct) Rules B. N. Banerjee, J. observed:

"Integrity is uprightness, honesty or purity. Devotion to duty is faithful service. Modern approaches to life have changed many ideals, which used to be held sacred. Such approaches have also worked a change in our sense of the sublime. But even then the

idea of right and wrong has not been forgotten and the difference between honesty and dishonesty, fidelity and faithlessness wholly lost. It is sometimes argued with sophistry that it is difficult to prescribe the outside limits of integrity in a complex system of modern administration, in which considerations of expediency occasionally outweigh other considerations. Considerations of expediency may be irresistible at times but their evils are merely to be put up with and not to be extolled or prescribed as standards of life and work. If a public officer is required to maintain integrity and to be devoted to duty, he is merely asked to keep within the bounds of that administrative decency, which goes by the name of civilized administration. In my opinion, no vagueness or indefiniteness attaches to the language used in Rule 3 above quoted. A public Officer is not at liberty to amass fortune by taking illegal gratifications, even though willingly given. In the view taken by me, Rule 3 does not offend against Article 14 or 19 of the Constitution."

I am in respectful agreement with the aforesaid observations. Counsel for the petitioner in this connection also referred me to the decision in the case of AIR 1956 Mad 220 for the argument that the Rule was vague. It must, however, be remembered that in so far as the Madras High Court expressed the opinion of indefiniteness about the Rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1954, the same has been disapproved by the Supreme Court in the decision referred to hereinbefore. In view of what has been said hereinbefore and the rule read in the manner I have indicated above it appears to me that the said rule does not contain a mere pious hope but a clear mandate for the rule of conduct, and as such is not void on the ground of vagueness.

5. Counsel for the petitioner next contended that the Conduct Rules of 1955 were repealed by Conduct Rules of 1964 and, as such, the same became inoperative. Rules of 1964 came into effect on the 30th November as mentioned hereinbefore. It was, therefore, urged that the petitioner could not be proceeded for breach of 1955 Conduct Rules in the manner as had been done. To consider this argument it would be relevant to refer to Rule 25 of the Central Civil Services (Conduct) Rules, 1964. The said Rule 25 provides as follows:

"25. Repeal and Saving— Any Rules corresponding to these rules in force immediately before the commencement of these rules and applicable to the Government servants to whom these rules apply are hereby repealed;

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules."

It would be apparent from the terms of the repeal that only rules applicable to the government servants after coming into operation of 1964 rules have been repealed. Rules of 1964 cannot be operative in respect of government servants for their past conduct. The significant words are 'to whom these apply'. Rule is operative in future. It is prospective. It does not deal with the past conduct of the government servants. Therefore, strictly it does not apply to the government servants in respect of conduct prior to 1964. Therefore, from that point of view, in this case as the allegations of the charges related to period prior to the coming into operation of the 1964 rules, the said rules of 1964 would not apply and the petitioner would be governed by the 1955 rules. The second aspect of the matter is that if any action is taken under the repealed rules that action shall be deemed to have been taken under the corresponding provisions of the new rules. Under the new rules there is a corresponding provision. Rule 3 sub-clauses (i), (ii) and (iii) taken together provide the same thing in substance as Rule 3 of 1955 Conduct Rules. Rule 3 of 1964 Rules is in the following terms:

"3. General— (1) Every Government servant shall at all times—

- (i) maintain absolute integrity;
- (ii) maintain devotion to duty; and
- (iii) do nothing which is unbecoming of a Government servant.

(2) (i) Every Government servant holding a supervisory post shall take all possible steps to ensure the integrity and devotion to duty of all Government servants for the time being under his control and authority;

(ii) No Government servant shall, in the performance of his official duties or in the exercise of powers conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior and shall, where he is acting under such direction, obtain the direction in writing, wherever practicable, and where it is not practicable to obtain the direction in writing, he shall obtain written confirmation of the direction as soon thereafter as possible."

I am, therefore, of the opinion that there is no substance in this contention on behalf of the petitioner.

6. The main contention that requires consideration in this case is whether reasonable opportunity had been

given to the petitioner to defend himself at the enquiry. Counsel for the petitioner urged several points in support of his argument that no reasonable opportunity had been given. He first urged that in denying inspection, particularly inspection of the documents as mentioned hereinbefore, there had been denial of reasonable opportunity to the petitioner. As I have mentioned before by a letter dated the 6th of December, 1965 the petitioner had asked for inspection of certain documents. These were additional documents, namely, additional to the documents which had been relied on by the prosecution to prove the alleged guilt of the petitioner. The said documents, that is to say, the documents which the prosecution wanted to rely have been given inspection. By another letter dated 14th April, 1966, the petitioner again asked for several other documents. By the letter dated 30th April 1966, inspection of certain documents was allowed by the Commissioner but certain documents were refused inspection on the ground that some of these were not available at that moment and some of these were irrelevant. Looking at the list of the documents, it appears to me that the claim made by the petitioner in respect of some of these was exaggerated. Even, however, there were certain documents which *prima facie* appear to me to be relevant. The petitioner has alleged in paragraphs 15 and 16 of the petition that the petitioner had not been given inspection of all the relevant and necessary documents. In paragraph 9 of the affidavit in opposition filed on behalf of the respondents it has been stated that all relevant and necessary documents had been given inspection and some of the documents which were not allowed inspection were irrelevant. In this state of affairs counsel for the department produced before me the records of the enquiry. It appears from the said records produced that on the 26th October, 1966, the petitioner made another application for inspection including some of the documents which he had claimed previously. On the 26th October, 1966, in the order sheet there was an endorsement by the enquiry officer that documents Nos. 1 to 6 were admitted to be relevant by the officer and should be given inspection and so far as other documents were concerned, certain other directions were given. Thereafter it is recorded in the order sheet that on the 13th December, 1966, the petitioner had completed inspection of the documents and had said that he did not wish to examine any witness. In this connection it would be also relevant to refer to the enquiry report which appears at

page 105 of the present petition. In paragraph 5 the enquiring officer has stated that on the 26th October, 1966, that is to say, when he made the application, the petitioner was heard in person in presence of the presenting officer regarding the relevancy of the documents and the petitioner had stated that he wanted only 453 files to prove from them that the orders made by the other officers in the same district were similar to those made by the petitioner which formed the subject matter of the enquiry. It was suggested to the petitioner that he could inspect certain sample files and then he was asked to give a list of such files to the presenting officer for making arrangement for inspection. On the 13th December, 1966, in the enquiry report it has been stated by the presenting officer that Shri Singh had completed the inspection of the documents. Therefore, it appears to me that reading the enquiry report in the context of the entries in the order sheet the petitioner had inspection of all the relevant documents — documents which he considered relevant for inspection and which he insisted for production at the time of the enquiry. There was some argument by counsel for the petitioner that these documents were not the original documents mentioned in the letters previously referred to hereinbefore. However, I am not able to appreciate this contention. The list of the documents had been mentioned and reading the letter of the 26th October in conjunction with the entries in the order sheet and in conjunction with the remarks of the enquiry officer in the enquiry report it is clear to me that all relevant documents had been given for inspection to the petitioner. I must further observe that the petitioner had not stated in this petition the fact that the petitioner had made further prayers for inspection during the enquiry and that he was allowed inspection of certain documents. Such conduct on the part of the petitioner does not disclose a free and frank approach to the Court.

7. The next contention of counsel for the petitioner on the ground of reasonable opportunity was about the fact that the prayer for being represented by a lawyer had been refused unreasonably. Under Rule 15 (5) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, there was a discretion with the disciplinary authority to permit the petitioner to be represented by a lawyer in certain contingency. That discretion must always be carefully exercised. In this case firstly a contention was raised that that discretion had not been ex-

exercised at all inasmuch as in refusing the prayer by the letter dated the 3rd of October, 1966, the respondent No. 1 had completely misdirected himself. But reading the letter dated 3rd October 1966. I am unable to accept that contention. My attention was drawn to a decision by Anil Kumar Sen, J. in the case of Harbilas Biswas v. Union of India, Civil Rule No. 1988 (W) of 1966 — judgment delivered on 26-3-1970 (Cal). There the enquiry was held against a delinquent officer more or less under similar circumstances and the delinquent in that case had been refused the assistance of a lawyer. The learned Judge came to the conclusion that there was no denial of reasonable opportunity in the facts and circumstances of that case. Whether by refusal of the assistance of a lawyer there is any denial of reasonable opportunity is essentially a question of fact. It must, however, be emphasized that the rule enjoins for the officer to exercise a discretion and before exercising the discretion the officers must consider the complexity of the case and the nature of the case. I must observe that practically in all the departmental enquiry cases that have come up before me I have hardly come across any instance where representation by a lawyer has been permitted. It is sometimes urged that the rule had been made nugatory by the manner in which the discretion was being exercised in refusing the assistance by a lawyer to the delinquents in the departmental enquiries. Such impression should not be created and must be attempted to be avoided. In this case, however, the enquiry was in respect of certain assessments. It was in respect certain assessment in the Income-tax Department and the most relevant fact was the general method of doing assessment in the department, there was hardly any scope of oral testimony. Taking these factors into consideration and taking into consideration the fact that as a result of the enquiry proceedings, the delinquent was found not guilty, I am unable to accept the contention that the petitioner, was, in this case denied reasonable opportunity to defend himself by refusal of the assistance by a lawyer. It has to be remembered that in his representation to the respondent No. 1, the delinquent had not chosen to ask for a personal hearing or to be represented by a lawyer. It also appears from the records that the delinquent himself was a qualified person. He has a degree of the Bachelor of Law and also a degree of Master of Arts, University of Calcutta. Reference may be made to the first annexure of the affidavit in reply from which the

aforesaid qualifications of the delinquent would appear. Counsel for the petitioner drew my attention to the observations of the Special Bench in the case of Nripendra Nath Bagchi v. Chief Secretary, Government of West Bengal, 65 Cal WN 361 = (AIR 1961 Cal 1) (SB). The facts of that case were entirely different and, therefore, it is not necessary for me to consider the said aforesaid decision in detail. I am, therefore, of the opinion that there has been no denial of reasonable opportunity to the petitioner by not affording to him the assistance of a lawyer in the enquiry proceedings.

8. The next contention about the denial of reasonable opportunity was the non-compliance with the provisions of the Office Manual. It was urged that the said Office Manual if not mandatory was directory and there should have been substantial compliance with the said procedure for holding departmental enquiry laid down in the Office Manual. My attention was drawn to Ch. X (c) to Paras 41, 42 & 43. The only point that was urged in respect of breach of the Office Manual was that the charges should have been related to the offences of recent origin. It was urged that events which had taken place more than three years prior to the framing of the charges should not have been the basis for the framing of the charges. Looking at the nature of the charges it appears to me that the rule enjoined in substance that stale matters should not be revived. In this case after the assessments had been made, in order to find out whether these had been improperly made it was necessary to find that out by proper investigation before framing the charges. Taking that factor into consideration I am of the opinion that there has been substantial compliance with the requirements of the procedure for departmental enquiry as laid down in Chapter X (c) of the Office Manual.

9. It was next contended that there was a violation of the rights of the petitioner in not consulting the Union Public Service Commission in respect of this punishment. I am unable to agree. It was only when the President was the disciplinary authority, consultation with the Union Public Service Commission was required. In this connection no rule or provision of law has been shown to me which enjoys consultation with the Union Public Service Commission.

10. Next contention of counsel for the petitioner was that the 2nd show cause notice mentioned hereinbefore indicated that the same was biased and prejudiced. No grounds in sup-

port of this contention was advanced. I am unable to accept this contention.

11. Next contention of counsel for the petitioner was that there should have been another show cause notice, because, counsel for the petitioner contended that it was the disciplinary authority who was disagreeing with the findings of the enquiry officer. Counsel further contended that the 2nd show cause notice was against the penalty proposed and, therefore, it did not offer any reasonable opportunity to the petitioner. I am, however, unable to accept this contention. Article 311 of the Constitution, sub-clause (2) specifically provides for this kind of show cause notice. This is in compliance with Article 311 (2). Reference may be made to the observations of the Andhra Pradesh High Court in the case of Sreedhariah v. Dist. Supdt. of Police, AIR 1960 Andh Pra 473 at para 18, and to the case of Ghanshyamdas. Srivastava v. State of Madhya Pradesh. AIR 1968 Madh Pra 132. The said show cause notice was also in compliance with R. 15 (4) (i) (b) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. I am, therefore, unable to accept the contention that there should have been another show cause notice in the facts and circumstances of this case. I am also unable to accept the contention that the show cause notice was bad because it was only against the penalty proposed. Counsel for the petitioner drew my attention to the case of State of Assam v. Bimal Kumar Pandit, AIR 1963 SC 1612. I am, however, of the opinion that the aforesaid decision does not support the said contention of counsel for the petitioner.

12. Next contention of counsel for the petitioner was that the order of removal was not a speaking order and, as such, was bad. He drew my attention to the decision of the Supreme Court in the case of M/s. Travancore Rayons Ltd. v. Union of India, AIR 1971 SC 862, to the decision in the case of Mahabir Prasad v. State of U. P., AIR 1970 SC 1302, to the decision in the case of Mohinder Singh Babbra v. State of Punjab, 1971 Lab IC 554 (Punj) and to the decision in the case of Tes-teels Ltd v. N. M. Desai, AIR 1970 Guj 1, (FB) and to the decision in the case of AIR 1960 Andh Pra 473. It is true that the quasi judicial authorities should indicate in the orders the reasons for making the orders. In this case, however, the final order of removal, that is, Annexure 'C' cannot and should not be considered in isolation. It is not necessary for me to refer to the aforesaid decisions in detail because in so far as

the aforesaid decisions lay down the proposition that the quasi judicial authorities should indicate the reasons, I am in respectful agreement with the said proposition. But if the reasons can be found out either from the order itself or from other documents it would not be proper to strike down the order merely because the formal reasons had not been recorded in the order itself. In the instant case the order of removal cannot and should not be read in isolation. This has to be considered along with the letter dated 29th of April 1966 whereby the Commr. had given detailed reasons for disagreement with the enquiring officer. If annexure 'A' is read in conjunction with annexure 'L', then it would be apparent what are the reasons that impelled the Commissioner to pass the final order. Furthermore, in paragraph 5 of the order dated 10th of February, 1969, the Commissioner has stated that a representation had been made and he had considered the representation and that was the representation of the petitioner in which the petition had stated that the finding that the disagreement with the enquiring officer was merely based on suspension, surmise, conjecture and presumption. The Enquiring Officer has considered that contention and has not been able to accept the same. The disciplinary authority has referred to his reasons recorded in the Memorandum dated 29th of April 1968. Read in the aforesaid light, it cannot be said that the order for removal passed by the disciplinary authority did not state the reasons and it suffered from the infirmity that it was not a speaking order. I am, therefore, unable to accept this last contention of counsel for the petitioner.

13. This application is, therefore, dismissed.

14. Rule nisi is discharged.

15. Interim order, if any, is vacated.

16. There will be no order as to costs.

17. I direct the Dept. to file a correct copy of the order sheets dated 26th of October, 1966 and 13th of December, 1966. Let the correct copies of the order sheet along with the correct copy of the letter dated 26th of October, 1966 be kept as exhibits in this Court.

18. By consent of parties, there will be a stay of operation of this order from date for six weeks.

Application dismissed.

AIR 1972 CALCUTTA 35 (V 59 C 6)
N. C. TALUKDAR AND AJAY KUMAR
BASU, JJ.

Sunil Kumar Samaddar, Petitioner
 v. The Superintendent, Hooghly Jail
 and others, Opposite Parties.

Criminal Misc. Case No. 55 of 1971.
 D/- 23-6-1971.

(A) Public Safety — West Bengal
(Prevention of Violent Activities) Act
(19 of 1970), Section 3 — Detention
under — Essentials of. (Para 6)

The sine qua non of the provisions incorporated in Section 3 are (a) acting in any manner prejudicial to the security of the State or the maintenance of public order; (b) such acts must be within the bounds of Section 3 (2) (a) to (e); (c) same must take place against the backdrop of violent activities, to prevent which the Act came into force; and (d) the overriding consideration of the State Government for such detention being preventive and not punitive.

(Para 6)

(B) Public Safety — West Bengal
(Prevention of Violent Activities) Act
(19 of 1970), Section 3 — Detention
under — Grounds for — Vagueness —
 Ground that the detenne on a particular day along with his associates formed an unlawful assembly and forcibly harvested the paddy crops from the lands of two specific persons of a particular village is not vague as it does not stand in the way of the detenne to make an effective representation. (Para 8)

(C) Public Safety — West Bengal
(Prevention of Violent Activities) Act
(19 of 1970), Section 3 — Acting in any
 manner prejudicial to the maintenance of public order — Detenne and his associates forming an unlawful assembly and harvested paddy from lands of two specific persons applying force with the intention to deprive the owners of their legal ownership — Act of detenne affects prejudicially maintenance of public order. (Para 9)

(D) Public Safety — West Bengal
(Prevention of Violent Activities) Act
(19 of 1970), Section 3 — Detention —
 Pendency of criminal case on the same ground on which order of detention is made does not make the order of detention invalid — It also does not show malice in law. (Para 10)

Cases Referred: Chronological Paras

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 1970 Cri LJ 843, Sudhir Kumar
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 D/- 18-12-1969 (SC), Ram Singh
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 1969 Cri LJ 405, Mohd. Pearoo
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 (1968) AIR 1968 SC 1509 (V 55) =
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 dwan 8, 15
 (1964) AIR 1964 Cal 231 (V 51) =
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 1963 (2) Cri LJ 499, Priyatosh
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 1957 Cri LJ 316, Dwarka Das
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 Kashmir 15
 (1955) 59 Cal WN 545 = ILR (1956)
 2 Cal 610, Shanichari Debi v. State
 of West Bengal 10
 (1954) AIR 1954 SC 179 (V 41) =
 1954 Cri LJ 456, Shibban Lal Sak-
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 (1953) AIR 1953 SC 318 (V 40) =
 1953 Cri LJ 1241, Dr. Ram Kri-
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 (1952) AIR 1952 Cal 26 (V 39) =
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 (1950) AIR 1950 SC 27 (V 37) =
 51 Cri LJ 1383, Gopalan v. State
 of Madras 12
 (1950) AIR 1950 Bom 202 (V 37) =
 51 Cri LJ 1126, M. B. Malyali
 v. Commr. of Police 10
 (1942) 1942 AC 206 = 1941-3 All ER
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 (1941) 1941 AC 378 = 1941-3 All
 ER 45, Barnard v. Gorman 14

(1917) 1917 AC 260, Rex v. Halliday 12
 (1891) 1891-2 QB 665 = 60 LJ
 QB 726, Gough v. Gough 6
 (1850) 5 Ex 378 = 19 LJ Ex 337,
 Bowditch v. Balchin 14

Naranarayan Gooptu, Indrajit Sen and B. Malkhandi, for Petitioner; Priti Bhushan Burman and Bhaskar Sen, for State.

N. C. TALUKDAR, J.— This Rule was issued on an application under Section 491 of the Code of Criminal Procedure praying for a writ and/or order and/or direction in the nature of habeas corpus on behalf of the detainee, Sunil Kumar Samaddar, and is against the State of West Bengal through the Secretary, Home Department, Superintendent Hooghly Jail, the Assistant Secretary, Home (Special) Government of West Bengal and the District Magistrate, Hooghly.

2. The applicant before us has been detained under Section 3, sub-section (1) read with sub-section (3) of the West Bengal (Prevention of Violent Activities) Act, 1970 (President's Act No. 19 of 1970) by an order, being Order No. 247/J. M./P. V. A. dated the 25th December, 1970 passed by the District Magistrate, Hooghly. By a further order No. 248/J. M./P. V. A. dated 25-12-1970, the applicant was directed by the said District Magistrate to be detained in the Hooghly Jail. The petitioner is stated to have been arrested on the 24th December, 1970 and served with the grounds of detention.

3. A copy of the order of the detention marked as annexure 'A' to the petition moved in this Court is as follows:

"No. 247/J. M./P. V. A. dated, Chinsurah, the 25-12-1970

Whereas I am satisfied with respect to the person known as Shri Sunil Samaddar S/o Lt. Rajendra Nath Samaddar of Bhunpur P. S. Pandua, Dist. Hooghly that with a view to preventing him from acting in any manner prejudicial to the maintenance of Public Order, it is necessary so to do. I, therefore, in exercise of the powers conferred by sub-section (1) read with sub-section (3) of Section 3 of the West Bengal (Prevention of Violent Activities) Act, 1970, (President's Act No. 19 of 1970) make this order directing that the said Shri Sunil Samaddar be detained.

Given under my hand and seal of office. District Magistrate, Hooghly."

The grounds of detention as annexed are:

"(1) On 5-12-1969 at about 08.30 hrs. at Sargoria Mouza you along with your associates after forming unlawful assembly forcibly harvested the paddy crop

from the lands of Shri Bejoy Keshob Kumar and Shri Charan Tulshi Bhattacharjee of Baidyapur, P. S. Kalna and took away same depriving them from their legal ownership of the crop. (2) On 7-6-1970 at about 07.00 hrs. at Bhunpur you along with your associates assaulted Shri Tarak Das Kumar and others of Bhunpur and wrongfully confined them till the arrival of police party while they were proceeding to Boinchee with a cart load of boiled paddy for husking purposes. (3) On 23-6-1970 morning you along with your associates went to the land of Shri Tara Pada Banerjee of Inchura, P. S. Pandua and did not allow his labour to cultivate land.

(4) On 23-6-1970 morning you along with your associates went to the land of Shri Tara Pada Banerjee of Inchura, P. S. Pandua and assaulted the labourers who were ploughing land and threatened to murder them.

(5) On 28-6-1970 at about 22 hrs. you along with your associates being armed with bomb formed an unlawful assembly in front of the Bhunpur Police Camp and exploded towards the police personnel with a view to injure them.

(6) On 19-12-1970 at about 14.30 hrs. you along with your associates formed an unlawful assembly and violated the order promulgated u/s 144, Criminal Procedure Code and abducted one Jahangir Sattar S/o Lt. Abdus Sattar, Ex-Labour Minister, West Bengal and assaulted him with deadly weapon at Rajimna village, P. S. Pandua.

(7) On 24-12-1970 at 12.30 hrs. you along with your associates gheraoed the arresting police party after forming an unlawful assembly at Bhunpur P. S. Pandua during the time of arrest pelted brick, brickbats towards them causing damage to the vehicle and also assaulted some of the police personnel causing injuries on their persons."

4. Mr. Naranarayan Gooptu, Counsel (with Messrs Indrajit Sen and B. Malkhandi, Advocates) appearing on behalf of the applicant has challenged the order of detention on a three-fold ground. Mr. Gooptu contended in the first instance that the grounds are vague and indefinite, preventing the applicant from making an effective representation to the authorities denying him thereby the right guaranteed under Article 22 (5) of the Constitution of India. The next contention of Mr. Gooptu is that there is malice in law vitiating the order of detention inasmuch as amongst others, specific cases were pending over the same subject-matter, constituting also the grounds of detention. The third and last contention of Mr. Gooptu is that the grounds of detention are neither proximate nor relevant, there being no dir-

ect or causal connection or nexus with the purpose of detention under the West Bengal (Prevention of Violent Activities) Act, 1970. In support of his submissions Mr. Gooptu referred to several cases which will be considered in their proper context. Mr. Priti Bhushan Burman, advocate (With Mr. Bhaskar Sen, Counsel) appearing on behalf of the respondent joined issue. He contended that the objection on the ground of vagueness is quite unfounded as will be borne out by the grounds themselves and the detainee was not handicapped in any manner to make an effective representation to the authorities against the order. Mr. Burman next contended that there is no malice in law and that there is no bar to an order of detention merely because a criminal case is pending over the same subject-matter on which the order of detention is passed. Mr. Burman lastly contended that the grounds of detention are not in any manner irrelevant as alleged or at all and that there is a proximate connection or nexus with the purpose of detention under the Act. An Affidavit-in-opposition affirmed on 6-3-71 by the respondent No. 3, the District Magistrate, Hooghly was filed.

5. Before we proceed to consider the grounds of detention it will be pertinent to consider the provisions of the President's Act No. 19 of 1970. The West Bengal (Prevention of Violent Activities) Act, 1970 (President's Act No. 19 of 1970) is a new enactment, highlighted by a notable departure from the earlier piece of legislation on the subject viz., the Preventive Detention Act IV of 1950 and for a proper appreciation, the said provisions should be considered in the light of the principles of Preventive Detention. The law of Preventive Detention is not an emergency law but an extraordinary enactment. Preventive Detention is a palpable exception to the basic canon of Western Jurisprudence that a man is innocent until proved guilty. In such Acts, as has been observed by David H. Bayley in his book on "Preventive Detention in India", "the requirements of stability warred with the benefits of permissiveness". The concept of preventive detention though a chequered one is as old as the hills. Flickering glimpses thereof as found in the East India Company Act, 1780 were focussed more prominently in the East India Company Act, 1784; forged thereafter strongly in the Bengal Regulation of 1812; reinforced in the Bengal State Prisoners' Regulations, 1818 and the State Prisoners' Regulations of Madras and Bombay as also the State Prisoners' Act, 1850; given a clearer shape in the Defence of India Act, 1915; vested with a distinct form in the Defence of India

Act, 1939; specifically incorporated in Article 22 (3) of the Constitution of India; culminating in the Preventive Detention Act, 1950 (Act IV of 1950); and ultimately resurrected in the West Bengal (Prevention of Violent Activities) Act, 1970 (President's Act No. 19 of 1970).

6. The object of the President's Act No. 19 of 1970 is a specific one viz., "to provide for detention with a view to preventing violent activities and for matters connected therewith." Section 3 (2) of the said Act is a significant addition, constituting a distinct departure from the Preventive Detention Act IV of 1950 and while attempting to define the expression "acting in any manner prejudicial to the security of the State or the maintenance of public order" it gives only a qualified definition thereof, excepting in Section 3 (2) (a) (ii) and 3 (2) (c). The definition however has been made exhaustive by the use of the word "means". The expression "mean" has been defined in the Shorter Oxford English Dictionary, revised and edited by C. T. Onions, as "to intend to have a particular reference" or "to intend to indicate or to convey." According to the Rules of Interpretation of Statute the word "mean" has a specific connotation. A reference may be made to the observations of Lord Esher, Master of the Rolls, in the case of *Gough v. Gough*, (1891) 2 QB 665. When a statute incorporates the phrase "mean" and not "include", in relation to certain things or acts, "the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put out in the definition." Roland Burrows in his "Words and Phrases Judicially defined" has referred to the definition of the word "mean" by Mr. Justice Stringer; it is "Explanatory and restrictive in contradistinction to the use of the word 'includes', which is extensive." Accordingly, in the periphery of the President's Act No. 19 of 1970, the meaning of the expression "acting in any manner prejudicial to the security of the State or the maintenance of public order" is not as wide as in the Preventive Detention Act, 1950, having been circumscribed within the ambit of Section 3 (2) (a) to (e). To put it in a short compass, the sine qua non of the provisions incorporated in Section 3 of the West Bengal (Prevention of Violent Activities) Act, 1970 are "(a) acting in any manner prejudicial to the security of the state or the maintenance of public order; (b) such acts must be within the bounds of Section 3 (2) (a) to (e); (c) the same must take place against the backdrop of violent activities, to prevent which the Act came into force; and (d) the overriding consideration of

the State Government for such detention being preventive and not punitive. Anything short of this would be long off the mark.

7. It is against the background of the aforesaid provisions and in the light of the affidavits affirmed as also the submissions made by the learned counsel appearing on behalf of the respective parties that we will now proceed to consider the grounds of detention. The grounds of detention, which are seven in number, are spread over a period of one year and nineteen days. The first ground refers to some acts taking place on 5-12-1969 when the Preventive Detention Act, 1950 was in force and the next ground is separated therefrom by over six months. We will take up in the first instance ground No. 1 for consideration. The first ground set forth above relates to the forcible harvesting by the detainee and his associates of some paddy from the lands of Shri Bejoy Keshab Kumar and Shri Charan Tulsi Bhattacharya of Baidyapur, P. S. Kalna depriving them thereby of their legal ownership of the crop. Mr. Gooptu appearing on behalf of the detainee has contended that the first ground is not tenable and does not justify the order of detention. The steps of his reasoning are that (a) it is vague (b) it does not affect the maintenance of public order (c) that there is malice in law because a criminal case is pending over the same subject-matter and (d) that it is neither proximate nor relevant, there being no direct or causal connection with the purpose of detention under the West Bengal (Prevention of Violent Activities) Act, 1970 and being outside the bounds of Section 3 (2) (d) or even (e) thereof, as urged on behalf of the respondent, it is de hors the statute and constitutes no nexus. Mr. Burman joined issue on each of these steps of reasoning.

8. As regards the first prong of attack on ground No. 1 on account of vagueness, a reference to ground No. 1 would make it abundantly clear that it is not so. It has been stated that on the date and time mentioned the detainee along with his associates formed an unlawful assembly and forcibly harvested the paddy crops from the lands of two specific persons of a particular village as named therein. It is difficult to find any vagueness therein and apprehend that it would stand in the way of making an effective representation on the part of the detainee. In paragraph 3 of the petition it has been stated that the said allegations are false to the knowledge of the detaining authority and that the detainee being a school teacher, he had nothing to do with the harvesting of paddy. It was further stated that

in any event it is in the nature of a private dispute outside the ambit of the Act. The District Magistrate, Hooghly in his affidavit-in-opposition affirmed on the 6th March, 1971, in reply thereto, has denied in paragraph 6 the allegations in general and in particular that the grounds of detention are neither false nor untrue nor mala fide as alleged or at all. He further stated that in making the order of detention in question he satisfied himself that the grounds of detention were in existence and that those were individually and collectively connected with the purpose for which detention order was made. He also specifically denied the allegation of vagueness and averred that the activities mentioned therein related to the maintenance of public order. As to the cases on the point of vagueness we need not multiply the number. The test is now well-settled. In the case of Dr. Ram Krishna Bharadwaj v. State of Delhi, AIR 1953 SC 318 at p. 319, the test is laid down as "whether the ground mentioned is so vague as to render it difficult, if not impossible, for the petitioner to make an adequate representation to the appropriate authorities." In the case of Rameswar Shaw v. District Magistrate Burdwan, AIR 1964 SC 334 it has again been observed that "if some of the grounds supplied to the detainee are so vague that they would virtually deprive the detainee of a statutory right of making a representation, that again may introduce a serious infirmity in the order of his detention." In a Calcutta case viz., the case of Kamakshya Mukherjee v. The State of West Bengal, AIR 1968 Cal 596 it has been held by the Division Bench (R. N. Dutta and N. C. Talukdar JJ.) that "the proper yard-stick according to us to find out vagueness is whether the said grounds as served on the detainee enable him to make an effective representation to the authority concerned. Anything short of that will be long off the mark and prejudice the detainee." The Supreme Court also observed in the case of Moti Lal Jain v. State of Bihar, AIR 1968 SC 1509 at p. 1513 that "the grounds must not be vague or indefinite and must afford real opportunity to make a representation against the detention." We respectfully agree with the said observations and applying the said test to ground No. 1 we find no vagueness. The contention of Mr. Burman in this context that the ground is not vague in any manner, as alleged or at all, accordingly succeeds and the submissions made by Mr. Gooptu in this behalf fail.

9. The second prong of attack of Mr. Gooptu on ground No. 1 that it does not constitute any activity wherefrom it can be deduced that the detainee was

acting in any manner prejudicial to the maintenance of public order, as alleged or at all, is also not tenable on ultimate analysis. The best as to what constitutes a disturbance of public order is now settled and without multiplying the number of cases, we would refer to the observations of Chief Justice Hidayatullah made in the case of Arun Ghosh v. State of West Bengal, AIR 1970 SC 1228 at p. 1229 that "public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order." Turning now to ground No. 1 we agree with Mr. Burman that the same may constitute an act which is prejudicial to the maintenance of public order. The detenu and his associates formed an unlawful assembly on the date in question and harvested paddy from the lands of the two persons mentioned therein applying force and the avowed intention on their part was to deprive the owners of their legal ownership. As the Chief Justice of India observed in the above mentioned case "An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different." We respectfully agree with the said observations and applying the said yard-stick to the acts stated in ground No. 1 we hold that same does affect prejudicially the maintenance of public order. The order of detention accordingly is not bad on this count, if not otherwise so, and the contentions of Mr. Burman on the point succeed.

10. The third branch of attack on ground No. 1 is that it is vitiated by malice in law because of the pendency of a criminal case on the self-same ground. In paragraph 3 of the petition, whereupon the Rule was issued, it has been stated that the said allegations form the subject-matter of a criminal prosecution, being case No. G. R. 490 of 1970 under Sections 147/379 Indian Penal Code pending before the Sub-divisional Judicial Magistrate, 1st Class, Chinsurah. It has further been stated that the said allegations are false and the detention of the applicant on the basis of the said allegations is mala fide, illegal and wrong. The District Magistrate in paragraph 6 of the Affidavit-in-opposition affirmed on the 6th March, 1971 denied the allegations that the grounds of detention are false, untrue or mala fide and further stated that he was satisfied that the activities mentioned

in the said ground and also in the other grounds related to the maintenance of public order upon a personal consideration of the materials. The law on the point is also well-settled and it is not necessary to cite all the cases excepting a few bearing on the point. In the case of M. B. Malyali v. Commr. of Police, AIR 1950 Bom 202 at p. 205 Chief Justice Chagla delivering the judgment of the Court observed that "the powers of detaining authority are very wide under the law as it exists today. The Government may detain a person even though the grounds clearly disclose that he could have been prosecuted under the ordinary criminal law with regard to those very grounds. The detaining authority may, as I pointed out earlier, detain a person although a criminal court has acquitted him in respect of the same charge for which he is being detained under the Security Act." A reference may also be made to the case of Ramanlal Rathi v. Commr. of Police Calcutta, AIR 1952 Cal 26 wherein Mr. Justice P. B. Mukharji (As His Lordship then was) delivering the judgment of the Court observed that "the satisfaction is of the appropriate government and not of the Courts. Such satisfaction as laid down in Section 3 of the Preventive Detention Act is not limited to be based on the existing laws of the land. Fundamentally therefore operation of the existing laws of the land or the determination of the offences by courts under such laws and the result arising therefrom whether of acquittal or discharge or even of conviction cannot be allowed to operate as a restriction on the powers of the government to detain under Section 3 of the Preventive Detention Act." Mr. Justice Guha Roy and Mr. Justice Sen held in the case of Shanichari Deb v. State of West Bengal, (1955) 59 Cal WN 545 that "there is nothing to prevent the authorities from proceeding under the Preventive Detention Act even when there are specific proceedings under the ordinary criminal law against a particular person." The same view was taken again in the case of Priyatosh Mazumdar v. The State of West Bengal, AIR 1963 Cal 589 wherein Mr. Justice Debabrata Mukherjee and Mr. Justice D. N. Dasgupta held that "the fact that there are parallel proceedings in existence one in court and the other by way of detention, does not by itself vitiate the order of detention." In a more recent decision of the Calcutta High Court viz., in the case of Sk. Sanwar Ali v. The State of West Bengal, (1968) 72 Cal WN 627 the Division Bench (R. N. Dutt and N. C. Talukdar JJ.) held that "a consideration of the court and the consideration of the Government are in

these contexts different and do not belong to the same realm of scrutiny." Mr. Gooptu also referred to the case of Sudhir Kumar Saha v. Commr. of Police Calcutta, AIR 1970 SC 814 at page 815. But the facts there are distinguishable and do not establish the extreme proposition put forward by Mr. Gooptu. Mr. Gooptu ultimately relied on two unreported decisions of the Supreme Court in support of his contention viz., the case of Ram Singh v. Commr. of Police, Calcutta, Writ Petition No. 398 of 1969 D/-18-12-1969 (SC) and the case of Deep Chand Sharma v. State of West Bengal, Writ Petitions Nos. 403 and 470 of 1969 D/- 18-12-1969 (SC) wherein Mr. Justice Hegde delivered the judgments of the Court in both the cases. The facts are again quite distinguishable and ultimately the said cases do not warrant the contention of Mr. Gooptu. In the case of Ram Singh Their Lordships proceeded on the footing that "quite clearly the authorities have not borne in mind the distinction between maintenance of 'law and order' and maintenance of 'public order'". In the case of Deep Chand Sharma again Their Lordships found that two of the criminal cases were withdrawn and the other two cases were likely to be withdrawn and that it was submitted that those cases were being withdrawn for want of evidence. Their Lordships considered the explanation offered on behalf of the respondents to be wholly unacceptable because in any event the officer who conducted the searches and the witnesses who were present at the time should have been available in support of the prosecution case. It is on this ground substantially that Their Lordships proceeded and held that the impugned order was made for collateral ground. The facts in the present case are, however, quite different and applying the principles referred to above we uphold the submissions made by Mr. Burman that ground No. 1 does not disclose any malice in law and the contentions of Mr. Gooptu in this behalf accordingly fail.

11. The fourth and last prong of Mr. Gooptu's attack on ground No. 1 is the absence of proximity or nexus. In this context, Mr. Gooptu's contentions are two-fold viz., (a) that the acts complained of having taken place on 5-12-1969 when the Preventive Detention Act, 1950 was in force but was not taken into consideration for an order of detention under the said Act, cannot constitute a relevant ground for detention under the West Bengal (Prevention of Violent Activities) Act, 1970 on 25-12-1970 and (b) that in any event the said acts are outside the ambit of Section 3 (2) (a) to (e) of the President's Act No. 19

of 1970. Mr. Priti Bhushan Burman, on behalf of the respondents contended that both these branches of submissions made by Mr. Gooptu are unwarranted and untenable inasmuch as in the first instance there is no bar in law to such a consideration by the detaining authorities merely because the impugned acts had taken place under the earlier Act but were not taken into consideration under the said Act; and secondly that the said Acts dovetail indeed into the definitions given in Section 3 (2) (d) and (e) of the President's Act No. 19 of 1970. A reference to the said ground would make it clear that the Act referred to had taken place on the 5th December, 1969 and on that date the Preventive Detention Act, 1950 was in force. The point at issue therefore is whether by itself it will establish the absence of any proximate connection with the purpose of detention and render the said ground to be irrelevant. The act complained of apparently was not taken into consideration for the purpose of detention under Act IV of 1950 while it was in force. It does not also appear in the first blush to have any direct or causal connection with the purpose of detention of the person concerned under the President's Act No. 19 of 1970. The gap of a little over one year between the first ground and the order of detention would not ipso facto make the ground irrelevant but we cannot overlook the material fact that the act complained of had taken place while the earlier Act was in force but was not taken into consideration for the purpose of an order of detention passed under the said Act. It is further to be considered that no less than six other grounds referring to acts taking place after the expiry of Act IV of 1950, have been catalogued in the grounds of detention under the President's Act No. 19 of 1970. We accordingly uphold the contentions of Mr. Gooptu that the said ground No. 1, referring to acts taking place on 5-12-1969 when Act IV of 1950 was in force, has no direct or causal connection with the object of detention under the President Act on 25-12-1970. The second branch of Mr. Gooptu's submission in this context has also much force behind the same viz., that the act complained of in ground No. 1 does not come within the ambit of either Section 3 (2) (d) or (e) of the President's Act No. 19 of 1970, and is accordingly de hors the statute and irrelevant. Mr. Burman's contentions in this context are not sustainable. The acts complained of in ground No. 1 do not come within the bounds of clause (d) to Section 3 (2) of the said Act inasmuch as the same does not make out an offence punishable with imprisonment for life or im-

prisonment for a term extending to seven years or more or any offence under the Arms Act, 1959 or the Explosive Substances Act, likely to disturb public order. The said acts again do not come within the ambit of clause (e) to Section 3 (2) of the said Act, because the same does not relate to a person referred to in clauses (a) to (f) to Section 110 of the Code of Criminal Procedure committing any offence punishable with imprisonment where the commission of such offence disturbs or is likely to disturb public order. It is therefore abundantly clear that the acts referred to in ground No. 1 dated 5-12-1969 do not come within the bounds of either clause (d) or (e) to Section 3 (2) of the President's Act, No. 19 of 1970 and are as such *de hors* the statute and irrelevant. The second branch of Mr. Goopu's submissions relating to the fourth prong of his attack on ground No. 1 accordingly succeeds.

12. Mr. Burman thereafter made a further submission that in any event, in order to detain the person concerned, there need not be any such past activity as stated in the definition given in any one of the clauses (a) to (e) to Section 3 (2) of the West Bengal (Prevention of Violent Activities) Act, 1970 but that the detaining authorities may proceed even on an apprehension that the detenu may commit such acts, affecting thereby the security of the State or public order and accordingly to prevent him from committing the same, he may be detained. Mr. Burman has tried to interpret the provisions of Section 3 (2) (a) to (e) in general and of Section 3 (2) (d) and (e) in particular, in a manner not intended by the lawmaking authority. The ratio of his arguments are not sustainable and are far-fetched viz., that the acts catalogued in the aforesaid provisions need not be actually committed but merely on an apprehension that those are likely to be committed, the person concerned can be detained to prevent the likelihood of such a commission in future. Such an interpretation only gives an unduly extended connotation to the said provisions, encroaching upon the liberty of the subject. There cannot be an order of detention merely on the apprehended ground that detenu is likely to commit such acts like those stated in the aforesaid provisions unless and until in the past the said detenu has committed any such acts giving rise to such an apprehension. Bereft of such previous activity, the apprehension would be merely anticipatory and not preventive. It is pertinent in this context to understand what is meant by the expression "Preventive." As was observed by Mr. Jus-

tice B. K. Mukherjee (as His Lordship then was) in the case of *Gopalan v. State of Madras*, AIR 1950 SC 27 at page 91 that "there is no authoritative definition of the term 'preventive detention' in the Indian Law. The expression has its origin in the language used by judges or the Law Lords in England while explaining the nature of detention under Regulation 14 (b) Defence of Realm Consolidated Act, 1914 passed at the outbreak of the first world war, and the same language was repeated in connection with the emergency regulations made during the last world war. The word 'preventive' is used in contradistinction to the word "punitive". Mr. Justice Mukherjee proceeded to quote the words of Lord Finlay in the case of *Rex v. Halliday*, 1917 AC 260 at p. 269 that "It is not the punitive but the precautionary measure" and laid down that "the object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it." It means that restraint whose object is to prevent probable or possible activity which is apprehended from a would be detenu on grounds of his past activities. It is pertinent also to refer to the observations of Lord Macmillan in the case of *Liversidge v. Anderson*, 1942 AC 206 at page 254 that "the question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence". The interpretation of the word 'Preventive' as given above viz; to prevent probable or possible activity which is apprehended from a would-be detenu on grounds of his past activities does not justify this further submission of Mr. Burman seeking to give an extended definition to the said word.

13. This branch of Mr. Burman's contention would be a dangerous proposition encroaching on the liberty of the subject. For example, a citizen merely shining a knife, in the instance given by Mr. Burman, cannot ipso facto be deemed to be acting in any manner prejudicial to the security of the State or the maintenance of public order within the bounds of Section 3 (2) (d) and (e) of the Act as it would be only far-fetched to assume that with the said knife, he may or is likely to commit any such acts as described in the said clauses. A citizen, against whom there is no previous allegation, shining his knife may not do so for the proverbial pound of flesh but for the less dramatic purpose of peeling some vegetables. The physical appearance again of a person or any defect in his character may not be appealing but that does not constitute a ground for an apprehension on

the part of the detaining authority that he is likely to commit any of the acts catalogued within the bounds of Section 3 (2) (a) to (e) of the President's Act No. 19 of 1970 and as such should be prevented from committing the same by being detained. This will be an extreme proposition unsustainable on merits and encroaching dangerously on the liberty of the subject. A lean and hungry looking Cassius may be dangerous in the estimate of Julius Caesar — "Yond Cassius has a lean and hungry look: he thinks too much. Such men are dangerous". Again a man who has no music in him may not be considered to be persona grata in the Merchant of Venice — "A man that hath no music in himself, nor is not moved with concord of sweet sounds, is fit for treasons, stratagems and spoils". But what is good enough for a Shakespearean character is not sufficient for the requirements of the President's Act No. 19 of 1970. To give effect to Mr. Burman's submissions would be to legislate and as Francis Beacon observed, in his "Essay on Counsels, Civil and Moral: of Judicature," "Judges ought to remember that their office is *Jus dicere*, and not *jus dare*; to interpret law and not to make law or give law". It would be inexpedient to read more into the Act than the law-making authority did ever intend and he thinks that have been left open for the protection of the liberty of the citizen, should not be allowed to be walled upon such circumscribed interpretation of law, not even intended by the law-making authority.

14. The method of construction, in such cases, encroaching on the liberty of the subject, must be a strict one and cannot be so expansive as Mr. Burman submitted. It would otherwise result in girdling the earth. In the case of *Barnard v. Gorman*, 1941 AC 378 Lord Wright cited with approval at page 393 the well-known dictum of Pollock, C. B. in *Bowditch v. Balchin*, (1850) 5 Ex. 378 that "In a case in which liberty of the subject is concerned, we cannot go beyond the natural construction of the statute". Lord Atkin also elaborated the same in the well-known case of 1942 AC 206 at page 244 that "Amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace". Lord Atkin further referred to Alice in Wonderland and underlined the observations of Humpty Dumpty that "when I use a word, it means just what I choose it to mean neither more nor less". It is also pertinent to refer to his further observations "that the words have only one meaning" and that "I protest, even if I

do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister." A reference in this context may also be made to the case of AIR 1970 SC 814 Mr. Justice Hegde observed at page 815 that "the freedom of the individual is of utmost importance in any civilized society. It is a human right. In our Constitution it is a guaranteed right". The said observations are material and it is held that this being the cornerstone of our liberty, such freedom can only be deprived of by due process of law and it is further held that in the instant case there has been an encroachment on the said freedom and as such the order of detention should be set aside. Justice is in accordance with law and the law, in this case, is as incorporated in the President's Act No. 19 of 1970. Grounds which are de hors the said Act are irrelevant and repugnant and entitle the detinue to be set at liberty. Lord Wright aptly observed in connection with the duty of the Home Secretary in the case of 1942 AC 206 referred to above that "It is the duty which he must discharge on his own responsibility to the utmost of his ability, weighing on the one hand the suspects' right to personal liberty and on the other hand the safety of the state". The courts have their duty no less than the same and the suspects' rights to personal liberty and the security of the state or the interest of public order should equally be weighed to the utmost ability. This delicate equipoise should always be borne in mind and if the same is tilted it would result in the tilting of the apple-cart. "Fiat Justitia Ruat coelum — let justice be done though heavens may fall". The second branch of Mr. Burman's submission on the fourth prong of Mr. Gooptu's attack on ground No. 1 accordingly fails and Mr. Gooptu's contentions in this behalf accordingly succeed.

15. Mr. Burman thereafter made an ancillary submission that the absence of nexus or relevancy of one ground only, out of the several ones mentioned, would not be sufficient to render the order of detention invalid. He contended that the proper test in such matters is to take the total effect of all the grounds together for deciding whether a particular ground is relevant or vague and that in any event the ground purported to be irrelevant or vague must be a vital one. Mr. Gooptu joined issue and both the learned counsel cited several cases in support of their respective submissions. We will now, proceed to consider the said cases. Mr. Burman referred in the first instance to the

case of *Dwarka Das Bhatia v. The State of Jammu and Kashmir*, AIR 1957 SC 164 wherein Mr. Justice Jagannadhadas delivering the judgment of the court observed at page 168 that "In applying these principles, however, the court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid". Mr. Burman overlooked the further observations made in this context by the Supreme Court viz., that "where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant the very exercise of that power is bad". Their Lordships further observed that "That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based". The next case cited by Mr. Burman is the case of *Saberuddin Shaikh v. State of West Bengal*, AIR 1964 Cal 231 wherein Mr. Justice Debabrata Mookerjee delivering the judgment of the court observed at page 233 that "We think that the detention order was made on the totality of the facts contained in the particulars attached to the ground and it would not be right to take a particular and study it in isolation from the rest". Apart from the facts of the said case being distinguishable from those in the present one, the extreme view taken therein has not been supported by several Supreme Court decisions which will be referred to and considered presently. The next case cited by Mr. Burman is another Calcutta case viz., the case *Md. Pearoo v. The State*, AIR 1969 Cal 157 wherein Mr. Justice R. N. Dutt delivering the judgment of the court observed at page 158 that "But when we take into consideration the other grounds it appears that the detenu was said to have been indulging in similar activities till 1967 and that gives ground No. (1) proximate connection with the detention order or, in other words, with the purpose for which the detenu is being detained, namely, maintenance of public order. Ground No. 1 in the said case recited an incident taking place on August 31, 1966 and it was submitted on behalf of the detenu that the same had no proximate connection with the

order of detention made on February 5, 1968. Their Lordships ultimately held that this gap of time by itself would not be sufficient and the factum of the detenu indulging in similar activities will invest ground No. 1 with proximity. Ground No. 1 in the present case is not being impugned only on the ground of gap of time but also on the further ground of apparent irrelevancy because of the provisions of the new Act whereunder the detenu has been detained. The Supreme Court also considered these principles in a different manner and the same would be referred to presently. Mr. Burman ultimately referred to the case of *Kalyanmal Agarwalla v. District Magistrate, Midnapore*, AIR 1970 Cal 12 wherein Mr. Justice R. N. Dutt and Mr. Justice T. P. Mukerji considered ground No. (a) in that case in the context of grounds (b) and (c) therein and held that ground (a) should be held to have proximate connection with the purpose for which the detenu was being detained viz., maintenance of supplies essential to the community. In the facts of the said case Their Lordships observed that the allegations in ground (a) related to similar acts prejudicial to the maintenance of supplies essential to the community. In any event we will have to consider the principles laid down in this context by the Supreme Court inasmuch as the law declared by the Supreme Court shall be binding on all the courts under Article 141 of the Constitution of India. Mr. Gooptu cited several cases and we will proceed to consider those as bearing on the point at issue. He referred to the case of AIR 1953 SC 318 wherein Chief Justice Patanjali Sastri delivering the judgment of the court observed at page 320 that "We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of Article 22. That not having been done in regard to the ground mentioned in sub-paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Article 21". The next case cited in this context is the case of *Shibban Lal Saksena v. State of Uttar Pradesh*, AIR 1954 SC 179 wherein Mr. Justice B. K. Mukherjee (As His Lordship then was) delivering the judgment of the court observed at page 181 that "In such cases, we think, the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole". The next case on the point

cited by Mr. Gooptu is the case of AIR 1964 SC 334 wherein Mr. Justice P. B. Gajendragadkar (as his Lordship then was) delivering the judgment of the court observed at page 337 that "There is also no doubt that if any of the grounds furnished to the detenu are found to be irrelevant while considering the application of clauses (i) to (iii) of Section 3 (1) (a) and in that sense are foreign to the Act, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed". The next case is the well-known case of Ram Manohar Lohia v. The State of Bihar, AIR 1966 SC 740 wherein Mr. Justice A. K. Sarkar (as his Lordship then was) delivering the judgment of the court containing of the majority view observed at page 747 and 748 that "The result then is that the detention order mentions two grounds one of which is in terms of the rule while the other is not. What then is the effect of that?

..... This question is clearly settled by authorities. In AIR 1954 SC 179, it was held that such an order would be a bad order, the reason being that it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind of the authority concerned and contributed to the creation of his subjective satisfaction which formed the basis of the order. Mr. Gooptu finally cited a more recent decision of the Supreme Court viz., the case of Puskar Mukherjee v. The State of West Bengal, AIR 1970 SC 852. Mr. Justice Ramaswami delivering the judgment of the Court observed at page 859 that "But it is well established that the constitutional requirement that the grounds must not be vague must be satisfied with regard to each of the grounds communicated to the person detained subject to the claim of privilege under clause (6) of Article 22 of the Constitution and therefore even though one ground is vague and the other grounds are not vague, the detention is not in accordance with procedure established by law and is therefore illegal. We respectfully agree with the said observations of the Supreme Court and held that the irrelevancy of one or some grounds would be sufficient for rendering the order of detention as a whole to be invalid. As regards the other branch of Mr. Burman's contention that ground No. 1 being not a vital or essential one should be left out of consideration; it may be pointed out that this purported insignificant ground dating back to the 5th December, 1969 was taken into consideration for the purpose of detention on 25-12-1970. In paragraph 3 (ii) of the affidavit-in-op-

position by the respondent No. 3 the District Magistrate, Hooghly, it has been averred that "I satisfied myself that the grounds and each of them were in existence and I concluded that the grounds for detention collectively and each of them separately were with the purpose for which the detention order in question was made". In paragraph 6 again it was stated that with regard to the first ground along with the others that "In making the order of detention in question, I satisfied myself that the grounds of detention were in existence and that these were individually and collectively connected with the purpose for which detention order was made". In view of the said statements, the wind is taken out of the sails of Mr. Burman's argument, that the said ground is not a relevant one for constituting the satisfaction of the detaining authority. The contention of Mr. Gooptu is accordingly upheld, viz. that the ground No. 1 in the order of detention is neither proximate nor relevant, there being no direct or causal connection or nexus with the purpose of detention under the West Bengal (Prevention of Violent Activities) Act, 1970 and accordingly the order of detention as a whole is not in accordance with law.

In view of the finding above that the order of detention as a whole is bad inasmuch as the acts referred to therein are neither proximate nor relevant, being without any direct or causal connection or nexus with the purpose of detention under the West Bengal (Prevention of Violent Activities) Act, 1970, it is not necessary to enter into the merits of the other grounds of detention. We would only place on record our appreciation of the able assistance rendered to this court by the learned counsel appearing on behalf of the respective parties.

In the result, the Rule is made absolute; We hold that the impugned order of detention is illegal and invalid; and we direct that the detenu may be released forthwith.

Let the order go down at once.

AJAY K. BASU, J.:— 16. I agree with the order that the detenu should be released forthwith.

Rule made absolute.

AIR 1972 CALCUTTA 45 (V 59 C 7)**RAMENDRA MOHAN DATTA, J.**

International Coal Corporation,
Plaintiff v. Pure Sitalpur Coal Concern
Ltd. Defendant.

Suit No. 165 of 1970, D/- 21-6-1971.

(A) Arbitration Act (1940), Section 21 — Arbitration of suit disputes — Share-holders can object intervening in third party's suit against company when a director, becoming Special Officer under consent order in company's another suit wherein restraint order against directors also had been passed, files an agreement for arbitration of that third party's suit to gain control over the company. (X-Ref:— Partnership Act (1932), Section 19 (c)) — (Companies Act (1956), Sec. 402 (e)). (Paras 17, 23 and 25)

Appointment of special officer cannot be by consent of parties but it is a power of the court to be sparingly used only when specially necessary. He is an officer of the court and his powers and functions which will vary according to the facts of the case however must be only such that he can run the company in the best interest of the organisation and its members under the court's supervision. He cannot have unlimited powers unless specifically empowered and must take directions from the court periodically. His powers cannot also be to enable him to achieve his own end or of his group.

(Paras 16 and 19)

When in view of that restraint order no directors are functioning and the special officer, an interested party having been a director, has managed to get so appointed and by that arbitration agreement he will be able to get full control of the company it is necessary that he should have taken directions from the court before trying to so settle that suit which might affect the interests of a group of the directors or share-holders. The shareholders therefore can interfere and object to the filing of that agreement showing how their interests are affected.

(Paras 17 and 19)

Even if that agreement has been signed by only one partner of the plaintiff-firm, they cannot however question the authority of that partner relying on Section 19 (c) Partnership Act as that clause being concerned only with the extent of implied power of a partner is inapplicable and such an objection can be raised only by the partners or parties to the suit. They are parties neither to the suit nor to that agreement. A partner is also not prohibited from agreeing on behalf of the firm for arbitration of a dispute.

(Para 23)

(B) Arbitration Act (1940), Section 21 — Calcutta High Court Rules under — Agreement to refer suit disputes to arbitration cannot be accepted if it is simply put in — Compliance with those rules is necessary. (Para 25)

Cases Referred: Chronological Paras (1967) Suit No. 2029-A of 1967.

D/- 4-9-1967 (Cal), Keshavlal

Ojha v. Gunwantra Ojha 5, 7, 8

Mitter and S. C. Sen, for Plaintiff; Deb, for Defendant.

ORDER:— A terms of settlement is sought to be put in whereby all disputes in respect of the above suit have been agreed to be referred to arbitration as per agreement dated July 31, 1971. The said agreement has been made an annexure to the said terms of settlement.

2. By an interlocutory order made in this suit, Ghose, J., by an order dated 22nd May, 1970 appointed two joint receivers being the respective representatives of the plaintiff and the defendant herein and directed them to run the colliery belonging to Messrs. Pure Sitalpur Coal Concern Limited (hereinafter called the said company). By the said order the plaintiff, in this suit, inter alia, agreed to advance a sum of Rupees two lakhs and the said joint receivers were directed to invest the same in the said company for the purpose of running the said colliery. The joint receivers were also directed to pay up the sum by stated instalments. It was further directed that the said joint-receivers would stand discharged from further acting as joint-receivers subject to their filing of accounts, when the dues of the plaintiff firm would be fully paid off by them, and in that event they would make over possession of the said colliery to the defendant company.

3. The admitted position is that the plaintiff firm in pursuance of that order advanced a sum to the extent of Rs. 36,000/- only and the balance sum had not been advanced by them. The claim in the suit herein is for a sum of Rs. 1,91,616.15 paise.

4. By clause 3 of the said arbitration agreement, which is annexed to the said Terms of Settlement, it is agreed that all interim orders made in this suit including the order for the appointment of joint receivers would stand vacated. By clause 4 it is also agreed that after such discharge the joint receivers would hand over possession of assets, books, papers and documents of the company to the company "represented by Kashavlal Ojha a Special Officer appointed in suit No. 2029-A of 1967 by an order dated 18th May, 1971". The

said Special Officer appointed in Suit No. 2029-A of 1967 by the order dated 18th May, 1971 signed both the arbitration agreement as also the Terms of Settlement on 31st May, 1971. For and on behalf of the plaintiff one of the partners, one Ashok Kumar H. Mehta signed both the arbitration agreement as also the Terms of Settlement describing himself as a partner on 31st May, 1971. One B. B. Sinha has also signed the Terms of Settlement as late as on 3rd June, 1971 for and on behalf of Pure Sitalpur Coal Concern Limited but without indicating in which capacity he has so signed. The above is the actual position with regard to the arbitration agreement annexed to the Terms of Settlement proposed to be put in.

5. Mr. Deb appearing on behalf of some of the shareholders of the defendant company has raised several objections. The locus standi of Mr. Deb's clients for interfering with the putting in of the Terms of Settlement being challenged, Mr. Deb argues that the company at present has no directors. All the directors have ceased to exist because the company has not held any annual general meeting for the last about 7-8 years. He refers to an Order of A. N. Sen, J. made on 4th September, 1967 in Suit No. 2029 A of 1967 (Cal) (Keshavlal Ojha v. Gunwantrai Ojha) which ran as follows:

"Mr. B. B. Sinha is directed to keep a separate account in respect of transactions, other parties are restrained from acting as directors. Interim order to continue."

6. By virtue of that order and under authority from the said B. B. Sinha, one Promoderai Amritlal Ojha, one of the shareholders in the group for whom Mr. Deb is appearing, was acting as the Liaison Officer of the defendant company. Mr. Deb contends, that the company is being run properly and its position has improved to a great extent since the appointment of the said joint-receivers; now the whole group of Keshavlal Ojha is in collusion and in conspiracy with Gunwantrai Ojha and a few others and have now been trying to oust the said joint receivers and the said Promoderai Ojha from the management of the colliery business of the said company. The said Keshavlal Ojha thereby now intends to have full control over the said defendant company by adopting this round-about process. Mr. Deb contends that prior to the order dated 4th September, 1967 the said Promoderai Amritlal Ojha and a few other members of the Ojha family in that group were acting as directors of the said company but now by adopting this

method Keshavlal Ojha's group will have complete control over the defendant company to the complete ouster of the said Promoderai Amritlal Ojha and the group to which he belongs. Mr. Deb contends that B. B. Sinha who was previously a director has since automatically ceased to be a director by retirement by rotation because the company has not called any annual general meeting for the last about 7-8 years. Accordingly, it is contended that since there are no directors of the defendant company the shareholders have become vitally interested in the affairs of the company.

7. To show how and in what manner Keshavlal Ojha became the Special Officer and how he is seeking to have complete control over the said company, Mr. Deb contends that by the Consent Order dated 18th May, 1971, Keshavlal Ojha got himself appointed as a Special Officer at a monthly remuneration of Rs. 1,500/- to manage the affairs of the company till the disposal of the said suit No. 2029 A of 1967 (Cal). The said Keshavlal Ojha was to maintain accounts of the dealings and finance of the company till the disposal of the said suit. By that order the said B. B. Sinha was discharged from the obligation of keeping separate accounts in terms of the ad-interim order dated 4th September, 1967 and the filing of accounts by him pursuant to the said order was dispensed with. The said consent Order also provided that all the directors of the defendant company were restrained from acting as directors of the company till the disposal of the said suit being Suit No. 2029 A of 1967.

8. After the said Consent Order was passed Mr. Deb's clients came to know about it and filed a suit for setting aside the said Consent Order on the ground of fraud and collusion. On the 2nd June, 1971 on an ex parte application of Mr. Deb's clients made in their said suit, this court made an ad-interim order of injunction restraining the defendants i.e., the parties to the Suit No. 2029A of 1967 (Cal) including the said Company, their agents and servants from giving effect to or acting upon the compromise and/or the Consent Order dated May 18, 1971 passed in suit No. 2029 A of 1967. The said application was made returnable by 7th June when the said Interim Order was varied; the relevant portion thereof provides:

"I appoint Mr. B. B. Sinha and Mr. Keshavlal Amritlal Ojha as the joint Special Officers without security to carry on the business of M/s. Pure Sitalpur Coal Concern Limited until the disposal of this application."

9. After providing for some other directions the said order also provided: "save as aforesaid the ad-interim Order passed herein is varied to this extent."

10. It is argued that the net position has been that the Consent Order dated 18th May, 1971 remains stayed but the said B. B. Sinha and the said Keshavlal Ojha were appointed as joint Special Officers of the company in the Suit filed by Mr. Deb's clients to carry on the business of M/s. Pure Sitalpur Coal Concern Limited.

11. For all these reasons as stated above Mr. Deb contends that his clients are to a great extent interested in resisting the filing of the terms of Settlement inasmuch as apparently the terms might appear to be quite innocent but, if put into action, this will have far-reaching consequences and will adversely go to affect the interest of the company as well as of Mr. Deb's clients. That being the position Mr. Deb prays for leave to intervene and to object to the terms being filed on its merits also.

12. Mr. Mitter on the other hand argues that Mr. Deb's clients have admitted the position in their petition before the Appeal Court that B. B. Sinha was acting as the director of the said Company and on that basis the said Promodrai Amritlal Ojha was so long holding the power of Attorney from the said B. B. Sinha and as such was looking after the business of the said company.

13. Mr. Sen on behalf of the plaintiff firm contends that just as the shareholders have no say in the matter of the internal management of the company, when the company is managed by the board of directors, except in certain special circumstances as provided by the Statute, similarly, the shareholders cannot also have any say in a matter where the Special Officer is acting on behalf of the company. It is argued that Mr. Deb's clients have no locus standi to interfere into the putting in of the Terms of Settlement in this suit and the court should not grant them leave to intervene in this matter.

14. It is necessary here to determine the position and the powers of the Special Officers and in what manner they should function after their appointments.

15. The position and the powers of a Special Officer have not been provided in the Companies Act, 1956. It is settled law that to run the affairs of the company such as this, a receiver should not be appointed. In order to remove a deadlock in a company this Court often had to resort to the ap-

pointment of a Special Officer of the company so that the affairs of the company could be run most beneficially by way of interim measure through the said Special Officer under the supervision of the Court in the pending matter. It is admitted by and on behalf of all the parties herein that since quite some time past a practice has grown up in this court to make such appointments, in a suitable case if the court so thinks fit and proper solely with a view that there might not be any deadlock in the company and so that the affairs of the company might be conducted in a suitable manner through such Special Officer. As to what would be the powers and functions of such Special Officers have not been laid down in any of the decided cases of this court.

16. In my opinion, the powers and functions of a Special Officer must vary in accordance with the facts of each case but such powers and functions must be such so as to enable him to run the affairs of the company in the best interest of the company and its members and under the supervision of the Court. Accordingly, it is always desirable and, I should say, incumbent upon the Special Officer to take directions from time to time from the Court appointing him as such Special Officer so that the interest of the company might be, protected in the best possible manner. In any event, his powers and functions should not be, and indeed, cannot be, such so that he would be in a position to achieve his own end or that of his group by sacrificing the existing interests of the other group of shareholders without an order from Court to that effect. Being the sole Special Officer he cannot have that unlimited power in respect of the Company unless the Court specifically clothes him with such powers. Being an Officer of the Court if he would do that, that would be a misuse of his powers. He must not, without an order of the Court do such things that the interest of the company would suffer in his hands and his acts would, in any way, be prejudicial to the interest of the shareholders or creditors or contributories of the company. In my opinion, for the purpose of deciding this case it is not necessary for this court to say anything more about the powers and functions of the Special Officer. Suffice it to say, that in exercising powers as such Special Officer and in functioning in that position such Officer shall always look to the interest of the company and whenever any step has to be taken by him which would be likely to be of controversial nature, the said Officer is bound to take directions of the court and to act in accordance with such directions,

As a sole Special Officer his position and powers are much lesser than that of the board of directors which runs the business of the company in accordance with the powers entrusted to it by the Memorandum and the Articles of the Company and by the Statute. A Special Officer being an Officer of the Court remains answerable to the Court for his acts and conduct and as such must obtain the necessary directions from the Court appointing him to clothe himself with special powers. In that respect his position and powers are different from that of a director or of a board of directors. He cannot have the full powers of a director unless the court vests him with such powers.

17. In respect of this company, namely, Pure Sitalpur Coal Concern Limited by the order of A. N. Sen, J., dated 4th September, 1967 all the directors have ceased to act as directors. Only B. B. Sinha was directed to keep accounts of the company in respect of the transactions of the company. In the present suit two joint-receivers were appointed as such receivers in order to look after the business of the colliery. By the Consent Order dated 18th May, 1971 all these are sought to be given a go-by. Keshavlal Ojha, the Special Officer is himself an interested party but he seeks to come into the picture by means of the Consent Order where the court did not have the opportunity to go into the question after hearing the parties but on the basis of such consent had passed the said order dated 18th May, 1971. By virtue of these powers derived by the Special Officer from the said Consent Order the next step he took was to settle this Suit with the plaintiff firm so that he could take full control over the company by obtaining the discharge of the said two joint-receivers and of the said Liaison Officer who was acting under the authority of the said B. B. Sinha under the said Power of Attorney. According to Mr. Deb, the Special Officer by means of such consent order in a suit which has been kept pending for the purpose of allowing the Special Officer to function and which cannot remain pending after the dispute with Gunwantrao Ojha is settled, now seeks to clothe himself with all the powers to have full control over the company and to run its affairs without any sanction of this Court. He has created himself the Special Officer in a Suit in which he was one of the plaintiffs-directors with the help of some of the other directors but now in this suit which is a suit between the said company and an outsider, by consent he seeks to oust the joint-receivers and to have full con-

trol over the colliery. If the directors have been restrained from functioning as directors and if the company's affairs are sought to be managed in this manner, I see no reason why the shareholders cannot come in to intervene and bring it to the notice of the Court in what manner their interests are being sacrificed by obtaining and utilising the various orders of this Court obtained by the consent of the parties in the pending suit.

18. Accordingly, in my opinion under such circumstances, the shareholders have certainly a say in the matter and can legitimately come up before the court and ask for leave to intervene to bring it to the notice of the Court in what manner the Court's Officer has been behaving in respect of a particular company and whether he should be allowed to file the Terms of Settlement or not. In my opinion, Mr. Deb's contentions are acceptable and sound. I hold that it is a fit case where I should and, accordingly, I give his clients leave to intervene in this matter.

19. In my opinion, the parties by consent cannot appoint a special Officer of a company. That is a power which a Court can exercise, and indeed very sparingly, if the Court thinks fit under special circumstances by taking into consideration the interest of the company its shareholders, contributories and its creditors. The parties by their acts by means of a Consent Order cannot jeopardise the interest of the shareholders of the company or of the directors or creditors of the company by making an appointment of a Special Officer over a company.

20. While deciding this matter I will not seek to lay down the circumstances under which a Special Officer should be appointed by Court or what should be their powers, rights or liabilities but all that I need observe here, in this case, is that if a practice of this nature has grown up let it grow up as a healthy one and not as a corrupt one. Let it not be utilised to seek one's own gain by sacrificing the interests of the general body of the shareholders or of the company. Accordingly, in a case where the Special Officer is allowed to function and the entire body of the directors are restrained from functioning as such directors, and more so, when the Special Officer appointed happens to be an interested party, in the sense that he was previously acting as a director of the company and there are groups of directors who are fighting amongst each other, the Special Officer appointed by Court, in all fairness and in the interest of the company and of all persons concerned in the company ought to

take directions from the Court before settling any pending matter which would go to affect the interest of a particular group of directors or shareholders of the company. In this case not only that Keshavlal Ojha was not at present in the management of the company but one of Mr. Deb's clients Promodrai was now acting as the Liaison Officer under the authority of the said B. B. Sinha whom the Court authorised to keep accounts and to run the company and the colliery is being run by the joint receivers under certain directions of the Court. It is quite obvious that by the Consent Order dated 18th May, 1971 not only Keshavlal is trying to get control over the company but at the same time Promodrai and the joint receivers who are actually managing the affairs of the colliery and as such the main business of the said company, are sought to be removed without obtaining the prior sanction of this Court. It is contended that the said Suit No. 2029A of 1967 (Cal) (Keshavlal Ojha v. Gunwantrao Ojha) is purposely being kept alive and the said consent order has been sought to be obtained by way of an interlocutory order even though, it is apparent that nothing remained in the said Suit. The purpose is to allow Keshavlal to act as the Special Officer of this Court as long as possible by ousting the other persons as indicated above.

21. Mr. Deb contends that the Terms of Settlement ought not to be allowed to be put in because the same has not been properly signed by the parties to it. Mr. Deb contends that the terms, sought to be put in, should have been signed by the Joint Special Officers describing themselves, as such Joint Special Officers appointed in the Suit to Mr. Deb's clients being Suit No. 246 of 1971 (Cal) (Mukundrai Ravishankar Trivedi v. Keshavlal Amritlal). As stated above the terms have been sought to be signed by Keshavlal as Special Officer in Suit No. 2029A of 1967. Mr. Mitter on the other hand, contends that at the relevant point of time when the said signature was put in, the said Special Officer was appointed as such and accordingly, that was his correct designation on that date and consequently there is no irregularity in his signature. On this point, I have already expressed my views as stated above.

22. It is argued by Mr. Deb that under the provision of Section 19 (2) clause (c) of the Partnership Act, 1932 one partner has got the implied authority, and the implied authority of such a partner does not empower him, to compromise and to reduce any claim or portion of a claim by the firm. Ac-

cordingly Mr. Deb argues that the Terms of Settlement have not been duly signed by both the partners and hence should not be allowed to be filed. Mr. Mitter on behalf of the defendant and Mr. S. C. Sen appearing on behalf of the plaintiff at that time asked the Court's permission so that the other partner who was also present in the court, if necessary, could put his signature on the Terms of Settlement.

23. Both Mr. Mitter and Mr. S. C. Sen also argue that in any event, the provision of Section 19 of the Partnership Act has no application in the facts and circumstances of the case in as much as the said provision only relates to the extent of the implied powers of the partners to act on behalf of the firm. There is no provision anywhere to the effect that one partner cannot sign on behalf of the firm in referring a dispute to arbitration. Moreover, it is only the partners or those who are parties to the Suit who can agitate the point relating to the authority of one partner to bind the other in referring a dispute to arbitration. In any event, they contend that Mr. Deb's clients cannot take up the said point because they are neither parties to the Suit nor parties to the settlement nor of the said arbitration agreement. Accordingly, in so far as the signatures of the partner of the plaintiff firm on the terms of settlement as also on the arbitration agreement are concerned, the same do not suffer from any defect. I think that that is the correct way of reading the provision of Sec. 19 and accordingly, the contention of Mr. Deb on this point must be rejected.

24. Mr. Deb next argues that clause 4 of the said arbitration agreement, which has been made a part of the Terms of Settlement, if allowed to be given effect to, would be in conflict with the latest order that has been passed by this Court whereby both Keshavlal Ojha and B. B. Sinha have jointly been appointed the Special Officers in the suit filed by Mr. Deb's clients. The said clause 4 of the said arbitration agreement provides that the said joint receivers will hand over possession of the assets, books, papers and documents belonging to the defendant company "represented by Keshavlal Ojha Spl. Officer appointed in Suit No. 2029A of 1967 by order dated 18th May, 1971." It is true that clause 4 of the arbitration agreement relates to the time when the said Terms and the arbitration agreement were signed, namely, on 31st May 1971 but, in any event, the said agreement, if allowed to be put in will be in conflict with the later orders passed by this Court

whereby the said consent order dated 18th May, 1971 has been stayed and the Joint Special Officers have been directed to act jointly and not singly and as such must necessarily, be entitled to the possession of such books etc. in terms of their order of appointment. I uphold the contentions of Mr. Deb on this point.

25. But the most vital objection which has been raised by Mr. Deb is that there is no petition before this court whereby the matters in suit could be referred to arbitration. If the provisions of Section 21 of the Arbitration Act, 1940 has to be taken recourse to, then there must be an application in writing before this Court. Arbitration rules have been framed in respect of the said section by this Court whereby the application must be, by way of petition. The rules framed by this Court even though they are procedural in nature are meant to be followed and in the absence of compliance of such rules under S. 21 of the Arbitration Act the Court cannot be said to have been properly moved and the court's jurisdiction to determine the Suit cannot be taken away except under the said provision.

26. Mr. Mitter realised the defect in putting in the Terms of Settlement and as such after the point was taken and in the midst of the arguments he came prepared with a petition. He now seeks to present the petition before this Court in order to entitle his clients to put in the Terms of Settlement whereby all disputes in respect of Suit No. 165 of 1970 are agreed to be referred to arbitration. The matter has been argued at great length on the basis of the Terms of Settlement which is sought to be put in by Mr. Mitter and I feel, I should not allow Mr. Mitter to present the petition at this stage in this proceeding. I hold that this Terms of Settlement cannot be filed without complying with the rules provided by this Court. This petition is accordingly not entertained and is returned.

27. On the question of the signature of B. B. Sinha Mr. Deb argues that he has not indicated in which capacity he has put his signature there. B. B. Sinha has signed the same for and on behalf of Pure Sitalpur Coal Concern Limited. Mr. Deb has also brought to my notice the date when the said B. B. Sinha has put his signature, namely, 3rd June, 1971. According to Mr. Deb, in any event, only one director cannot sign the Terms for and on behalf of the company. It must be signed by Board's resolution and in a case where there is no such Board it must have the approval of the general body of the shareholders and in a case

where a Special Officer has been appointed he should sign on behalf of the company after obtaining the prior directions to that effect from the court. Mr. Deb has referred to several English decisions and also of this Court but it is not necessary to discuss them because both Mr. Mitter and Mr. S. C. Sen have admitted the principles laid down therein.

28. The last point of Mr. Deb is that the plaintiff is also in collusion and in conspiracy with Keshavlal and his group; the plaintiff in pursuance of the order dated 22nd May, 1970 made by Ghose, J., was to advance a sum of Rs. 2 lakh to the defendant company; the plaintiff failed to comply with the said order but only put in a sum of Rs. 36,000/-. Accordingly, the plaintiff has an interest to compromise the suit by appointing their own arbitrators and getting an award in their favour without complying with the order of Ghose, J., with the help of Keshavlal. It is alleged that the arbitrators are near relations of the partners of the plaintiff firm.

29. By considering all these points, in my opinion, Mr. Deb's arguments have great force behind them and as indicated above, I have no hesitation to accept them. In my opinion, the Special Officers appointed herein being Officers of the Court must obtain prior directions from the appropriate Court before they are advised to refer to arbitration the subject-matter of the dispute in a pending suit in which the company is involved and more so, when none of the directors of the company are functioning as such directors. I am further of the opinion that neither the arbitration agreement nor the Terms of Settlement have been properly signed except as indicated above and in any event the matter cannot be agreed to arbitration without a petition. Accordingly, I reject the same. There will be no order as to cost.

Order accordingly.

AIR 1972 CALCUTTA 50 (V 59 C 8)

GHOSE, J.

In the Matter of Asiatic Oxygen Ltd.,
Applicant.

Company Application No. 267 of
1970, D/-16-6-1971.

Companies Act (1956), Section 113
(1) — Obligation of the Company — Sub-section (1) does not provide for delivery of Certificates of shares or debentures or debenture stocks, but only enjoins upon the Company to have them ready for delivery. The sub-section does

HO/IO/D886/71/MNT/G

not impose an obligation upon the Company to deliver the shares etc. Thus it does not authorise a person applying for their delivery to have an order for delivery of the said shares under this section. AIR 1952 SC 156 Rel. on.

(Para 8)

Cases Referred: Chronological Paras (1952) AIR 1952 SC 156 (V 39)

= 1952 Cri LJ 836, W. H. King

v. Republic of India

8

ORDER:— This application has been made by Raigarh Trading Co. Ltd. against Asiatic Oxygen Ltd. & ors., for, inter alia, delivery of 28,500 equity shares of Rs. 10/- each in the respondent Asiatic Oxygen Ltd. (hereinafter referred to as the Company) belonging to the petitioner; in the alternative for issue of duplicate certificates for the aforesaid 28,500 equity shares of Rupees 10/- each and delivery thereof to the applicant. This application has been made on a Judge's Summons dated 8th October, 1969 under Section 113 of the Companies Act, 1956.

2. In this application Surajmal Nagarmal, a partnership firm was given liberty to intervene. The said firm has also filed Affidavit. There is no dispute before me that Raigarh Trading Co. Ltd., the applicant is the registered holder of the said 28,500 equity shares of Rupees 10/- each in the Company. The only dispute before me is as to whether the Company delivered the said shares to the Petitioner. The Company alleges that the Company duly delivered the said shares to one Dinesh Chandra Sarkar representing the applicant, who in his turn delivered the said shares to M/s. Surajmal Nagarmal through Biswanath Deora as and by way of pledge for the due repayment of loans granted by Surajmal Nagarmal to the Petitioner. On the nature of affidavit evidence it is difficult to come to any conclusion as to whether the company delivered the said shares to the applicant represented by the said Dinesh Chandra Sarkar who in its turn pledged the same with Surajmal Nagarmal. For deciding the said fact this application has to be tried in evidence.

3. But, in my opinion, it is not necessary for me to try this application on evidence inasmuch as I am of the opinion that an application for delivery of shares under Section 113 of the Companies Act, 1956 does not lie. For that the Companies Act, 1956 provides for no special remedy. A suit has to be filed for that.

Section 113 of the Companies Act reads as follows:—

"(1) Every company shall, within three months after the allotment of any of its shares, debentures or debenture

stock, and within two months after the application for the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificate, of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

The expression 'transfer' for the purpose of this sub-section, means a transfer duly stamped and otherwise valid, and does not include any transfer which the company is for any reason entitled to refuse to register and does not register.

(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

(3) If any company on which a notice has been served requiring it to make good any default in complying with the provisions of sub-section (1), fails to make good the default within ten days after the service of the notice, the Court may, on the application of the person entitled to have the certificate or the debentures delivered to him, make an order directing the company and any officer of the company to make good the default within such time as may be specified in the order; and any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company responsible for the default."

4. Sub-section (1) of the said Section imposes an obligation upon the company to have ready for delivery the certificates of all shares etc. within three months after the allotment of such shares or debentures or debenture stock or within two months after application for the registration of transfer of any such shares, debentures or debenture stock in the absence of any conditions of issue of the shares, debentures or debenture stock to the contrary. Sub-section (2) of the said Section provides for levy of fine up to the limit of Rupees 500/- per day for the period during which the company fails to comply with the provisions of sub-section (1) upon the company and every officer of the company. Sub-section (3) of the said Section authorises "the person entitled to have the certificates or the debentures delivered to him to apply to Court on the failure of the Company to make good the default mentioned in sub-section (1) within 10 days after the service

of a notice upon the company requiring the company to comply with the provisions of sub-section (1) of the said Section and make good the default in regard thereto. Upon such application the Court under sub-section (3) is empowered to make an order directing the company or any officer of the company to make good the default within the time mentioned in the order.

5. Section 113 of the Companies Act, 1956 is in identical terms as Section 80 of the English Companies Act of 1948. Rule 7 of the Rules of the Supreme Court (Companies) (No. 2) 1948 of England enumerates the applications which shall be made by motion. Rule 8 of the said Rules enumerates the applications which have to be made by summons. Sub-rule (i) of Rule 8 of the said Rules enumerates applications in regard to delivery of certificates or debentures under Section 80 (3) of the Act. Rule 11 (a) of our Companies (Court) Rules, 1959 sets out the applications which shall be made by petition. Rule 11 (b) of our Rules provides that all other applications under the Act or under the said Rules have to be made by a Judge's summons in the manner provided in the Rules.

6. Form of the summons for such applications under the English Rules was cited and relied upon by Mr. S. B. Mukherjee. The said forms appear in pages 1093 and 1094 of Palmer's Company Precedents, Vol. I, 17th Edition. Mr. Mukherjee contends that the words "in regard to delivery" as appearing in Rule 8 of the English Rules as well as in the form of the summons mentioned above show that sub-section (3) of Section 80 of the English Act and Section 113 of our Act really authorises a person entitled to the delivery of shares or debentures to apply for delivery of the same.

7. I am unable to accept the said contention of Mr. Mukherjee. The words "in regard to delivery" in my view mean 'for the purpose of delivery'. Sub-section (1) to Section 113 imposes an obligation upon the company to complete and to have ready for delivery the certificates of shares, debentures or debenture-stocks allotted or transferred in the circumstances and within the time mentioned above. The failure to do so, as we have noted earlier, entails, visiting with imposition of fine under sub-section (2) upon the company or any of the officer of the company who is liable for such default. Sub-section (3) of the said Section empowers the Court to make an order upon the company or any officer of the company only to make good the default in complying with the provi-

sions of sub-section (1) to the said Section.

8. The failure to comply with the requirements of sub-section (1) to the said Section thus shall be visited with penal consequences. In that view of the matter, in my opinion, the said sub-section has to be construed strictly (See AIR 1952 SC 156; See also Maxwell on Interpretation of Statutes 11th Edition pages 254-55). The said sub-section nowhere provides for delivery of the certificates of share or debentures or debenture-stocks but only enjoins upon the company to have the same ready for delivery. The said words in the sub-section, in my opinion, should not be construed in such a way as to give an extended meaning to the words "to have them ready for delivery." The sub-s. (1) does not impose an obligation upon the Company to deliver the said shares etc. Thus, in my opinion, sub-section (3) to the said Section does not authorise a person to have an order for delivery of the said shares. In that view of the matter, in my opinion, this application is misconceived and must fail.

9. In the premises, this application is dismissed. In the facts and circumstances of this case, I do not, however, make any order as to costs.

10. Certified for Counsel as against respective clients. All interim orders shall stand vacated. Operation of the order is stayed for four weeks.

Application dismissed.

AIR 1972 CALCUTTA 52 (V 59 C 9)

SALIL KUMAR DATTA, J.

Biswanath Chatterjee, Appellant v. Ajit Kumar Sarkar, Respondent.

A. F. A. D. No. 359 of 1970; D/-7-6-1971.

(A) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 13 (1) (e) — Nuisance or annoyance to neighbours including landlord — Though systematic obstruction by tenant to inspection of pump room and water reservoir would amount to nuisance, a single instance of such obstruction does not amount to acts of nuisance or annoyance. (Para 8)

(B) Civil Procedure Code (1908), Section 100 — Second Appeal — Issue not involving question of fact — An issue which does not involve any question of fact can be raised in second appeal where a change of law has taken effect after the decision in first appeal and has been given retrospective effect. AIR 1966 SC 1024, Ref. (Para 11)

HO/IO/E161/71/SNV

(C) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 17 (1), (2) — Application under, sub-section (1), when can be treated as one under sub-section (2). Where, against the landlord's case that the tenant was a defaulter, the tenant in his application under Section 17 (1) made a positive statement that all rent from the time of alleged default had been duly deposited with the Rent Controller and also made an omnibus prayer for further orders, the application though purported to be under sub-section (1), it would be an application under sub-section (2) as there was dispute implicit in the application and the tenant by his omnibus prayer would be deemed to have impliedly prayed for determination of rent. (Case law discussed). (Para 13)

Cases Referred: Chronological Paras

- (1971) 75 Cal WN 372 = 1971
Ren CR 449, Gunwantrao v.
Satyanarayan 10, 13
(1967) C. R. No. 3340 of 1966, D/-
20-2-1967 (Cal), Smt. Parmeswari
Debi v. Nandalal 13
(1966) AIR 1966 SC 1024 (V 53)
= 1966-2 SCR 925, Krishnapa-
suba Rao v. Dattatraya Krishnaji 10
(1960) 64 Cal WN 157 = ILR
(1958) 2 Cal 247, G. P. Press v.
Naraindas 10
(1958) 62 Cal WN 830, Taraknath
v. Karuna Kumar Chatterjee 10

Tapash Chandra Roy, for Appellant;
N. C. Chakraborty, Asoke Guha, Prama-
tha Chandra Roy, Sitaram Bhattacharjee,
Binoy Bhushan Choudhury, for Respon-
dent.

JUDGMENT:— This is defendant-tenant's appeal against a concurrent judgment, decreeing plaintiff's suit for recovery of possession. The plaintiff's case is that he is the owner of premises No. 11-D, Monoharpukur Road and the defendant had been a tenant under him in respect of Suit No. 1 in the ground floor thereof at a rental of Rs. 75/- per month and pump charge of Rs. 5/- per month, the tenancy being according to English Calendar month. The defendant became defaulter in payment of rent from November 1966 as alleged deposits with the Rent Controller were invalid. It was alleged, that, the defendant was guilty of conduct which was a nuisance or annoyance to neighbours including the landlord as he forcibly prevented landlord's men from using a passage leading to the pump room and inspecting the reservoir of water which supplied water to seven flats of the said premises and if the pump and motor were damaged supply of water to tenants would be curtailed. It was alleged that the tenancy was duly determined by

a notice to quit but as the defendant failed to vacate, the suit was instituted praying a decree for recovery of possession on eviction of the defendant therefrom on the aforesaid grounds.

2. The suit was contested by the defendant, who filed written statement denying all material allegations in the plaint. It was stated that he was not a defaulter in payment of rent as rent for November, 1966 was deposited with the Rent Controller as the landlord refused to accept rent and rent thereafter was duly deposited with the Rent Controller. As to the passage leading to the pump room, it was stated that the said passage was within his tenancy and it was also denied that he was guilty of any conduct which would amount to nuisance or annoyance as alleged. An additional written statement was filed by the defendant and it was stated that rent was tendered every month to the landlord and on his refusal it was being deposited with the Rent Controller and as such he was not a defaulter. In those circumstances it was submitted that the suit should be dismissed.

3. The suit was tried in evidence before the learned Munsif, who held that the notice determining the tenancy was valid and legal and was duly served. It was further held that the passage leading to the pump room was not a part of the defendant's tenancy and it was unthinkable that it could be used only on permission of the defendant as claimed. It was found that the defendant was guilty of causing nuisance or annoyance to the landlord and inmates of the house. The learned Munsif further found that there was no evidence to indicate that the landlord refused any Money Order in respect of rent remitted to him. The rent for October, 1966 was sent by Money Order which was duly accepted but as far as rent for November, 1966 the story of tender by the tenant was a myth. Accordingly it was held that the tenant was a defaulter from November, 1966. In those circumstances the suit was decreed for recovery of possession as also for mesne profits from Nov., 1968 to be ascertained in a proper proceeding under Order 20, Rule 12 of the Code of Civil Procedure.

4. An appeal was preferred against the said decision by the tenant and it was held by the appellate court, in concurrence with the trial court, that the plaintiff was never unwilling to receive rent as would also appear from Ext. 7 and other letters. The defendant's story of tender was thus a "simple falsehood" and the deposits with the Rent Controller were invalid. The defendant accordingly was held to be a defaulter. As

to the other grounds of eviction it was held that the passage was not included within the tenancy of the defendant and the defendant often obstructed the work of inspecting the reservoir through the said passage. P. W. 1 the plaintiff's engineer, who inspected the reservoir, stated that if the water level fell and the pump was operated then the entire machinery would be burnt out. The appellate court held that the defendant was prone to give obstruction and such systematic obstruction amounted to nuisance or annoyance. In that view the appeal was dismissed and the trial court's order was affirmed. The present appeal is against the said decision.

5. Mr. Tapash Chandra Roy, the learned Advocate appearing for the defendant, challenged the findings of the Courts below as to the acts of nuisance and annoyance by the tenant-defendant. He referred to the evidence of P. W. 1 according to whom the obstruction to the inspection of the pump room and reservoir was done in October, 1966 and it is to be remembered that the suit was instituted on 7th November, 1968. There is no oral evidence that there was such obstruction on earlier occasions and according to Mr. Roy there was no material for the appellate court for its findings that there was systematic obstruction by the tenant which was accepted as causing annoyance and nuisance. Mr. Chakraborty the learned Advocate for the respondent referred me to the correspondence wherein the landlord has referred to systematic obstruction to inspection of pump room and reservoir. Mr. Chakraborty contended that the findings are based on materials on record and being finding of fact cannot be challenged in second appeal.

6. Clause (e) of sub-section (1) of Section 13 of the West Bengal Premises Tenancy Act, 1956 sets out the conduct of the tenant or person residing in the premises which is a nuisance or annoyance to neighbours including the landlord is a ground for eviction of tenant from the premises under his tenancy. Annoyance or nuisance has not been defined in the Act and accordingly it has to be understood in the normal connotation according to plain and sober notions of living. According to judicial decisions, nuisance is anything which interferes with the normal comforts of human life or endangers the health and safety of the neighbour while annoyance is wider and covers anything which reasonably troubles or disturbs the mind or pleasure not of a fanciful or skilled person but of an ordinary sensible person, though it may not amount to physical detriment or discomfort. It is not possible to lay down any rule of law

applicable to every case as it will be at all times a question of fact with reference to the surrounding circumstances.

7. Undoubtedly in the facts of the present case, systematic obstruction by the tenant to inspection of pump room and reservoir, would amount both to nuisance and annoyance. On the one hand it will interfere with the normal comforts of neighbours by way of suspension or diminution of water supply, endangering even their health and comfort. On the other hand it will disturb the mind of the landlord and other inmates of the premises, with the prospect of their discomfort and possible damage or loss that may thereby be caused. This position has not been denied, as he could not, by Mr. Roy.

8. The real question for determination is whether there has been such systematic obstruction to the inspection of the pump room and reservoir by the tenant. The landlord admittedly did not accompany his engineer in such inspection and the engineer, who is P. W. 1, had complained that there had been the instance of such obstruction in October, 1968 and prior to that he inspected the pump room and reservoir. The same fact was deposed to by P. W. 3 and apart from this instance of obstruction, there is no evidence of any other obstruction, except what is contained in Ext. 7 (h), a letter which, in absence of evidence in support by the persons who usually carried the inspection, cannot be accepted as proving the systematic obstructions. A single instance of such obstruction in October, 1968, in absence of evidence of any prior obstruction, cannot, in my opinion, be accepted for holding the tenant guilty of acts of annoyance or nuisance to neighbours including the landlord. The landlord is not accordingly entitled to a decree on this ground. It may be mentioned that the finding about the passage to the pump room as not appertaining to the defendant's tenancy are findings of fact and cannot be challenged and in fact has not been challenged by Mr. Roy.

9. The next question to be considered is whether the defendant is a defaulter from November, 1966. This is undoubtedly a finding of fact and cannot be assailed in second appeal. But Mr. Roy has taken some additional grounds in view of the change of law that has taken place in the meantime. Sec. 17 (4) as it was at the time of the institution of suit is to the following effect:—

"If a tenant makes deposit or payment as required by sub-section (1), or sub-section (2) no decree or order for delivery of possession of the premises to

the landlord on the ground of default in payment of rent by the tenant shall be made by the Court but the Court may allow such costs as it may deem fit to the landlord:

Provided that a tenant shall not be entitled to any relief under this sub-section if he has made default in payment of rent for four months within a period of twelve months."

10. By the West Bengal Premises Tenancy (Amendment) Act, 1969 published in Calcutta Gazette of 31st October, 1969, which was deemed to have come into force on August 26, 1968 (Act 4 of 1968), a new proviso as set out hereunder was substituted in place of the above proviso—

"Provided that a tenant shall not be entitled to any relief under this sub-section, if, having obtained such relief once in respect of the premises, he has again made default in the payment of rent for four months within a period of twelve months."

Further in sub-section (4), in place of words "sub-section (2) or sub-section (2-A)" were substituted. After the amendment, a default for four months or more would thus be curable on compliance of the provisions of sub-sections (1), (2) and (2-A) of Section 17 of the Act as the said amendments were made applicable to pending suits including appeals. Mr. Roy drew my attention to an application filed on December 9, 1968 by the defendant in the suit within the time prescribed in which it was stated that the defendant had deposited rent upto November, 1968 and the rent was "now" payable from December 1968 together with the pump charges. In these circumstances it was prayed that the court would be pleased to pass an order for permission to deposit the monthly rent from December 1968 onwards in this Court and there was further prayer to the effect that the Court may "pass such other or further order or orders as your honour may deem fit and proper." This application was disposed of ex parte and such permission was given and the amount equivalent to rent from December 1968 onwards was being deposited in the suit. Mr. Roy contended that the said application though filed under Section 17 (1) of the Act as stated in its title should have been treated as one under Section 17 (2) of the Act and disposed of in accordance with law. In support of this contention reliance was placed on the decision in Gunwantrao v. Satyanarayan, (1971) 75 Cal WN 372 in which this Court considered the tests by which an application though purported to have been made under Section 17 (1), could be treated as one under Sec-

tion 17 (2). According to Mr. Roy the tests laid down in the said decision were satisfied in this instant case. It was accordingly contended that if the application is treated as one under Section 17 (2), the trial court would have determined the amount of rent to be deposited in court or paid to the landlord fixing the time within which the amount should be deposited or paid, so that the defaults if any, could be cured and the tenant could be entitled to relief against a decree for possession. Mr. Chakraborty has disputed the above contention firstly because according to him there was nowhere in the four corners of the petition any dispute as to the amount of rent payable, which was a sine qua non of an application under Section 17 (2) and the same view was taken in the decision stated above. Mr. Chakraborty further contended that the dispute to be raised must be a bona fide dispute while in the present case even in the additional written statement the tenant made a statement that he tendered rent every month prior to deposit with the Rent Controller. This case of tender was found by the courts below to be a myth and there was really no bona fide dispute in this respect. Reliance was placed in the decision of Tarak Nath v. Lt. Col. Karuna Kumar Chatterjee, (1958) 62 Cal WN 830 at p. 836, where it was held that only bona fide dispute come under Section 17 (2) and mere raising a dispute will not attract the provisions of the section. Reliance was also placed in G. P. Press v. Naraindas, (1960) 64 Cal WN 157 at p. 161 in support. Mr. Chakraborty further contended that issue now raised would be a mixed question of law and fact, and not taken in the courts below, and cannot be taken for the first time in this court and he referred me to the decision in Krishnapasuba v. Dattatraya Krishnaji, AIR 1966 SC 1024 which supported the above contention.

11. In view of the change of law which has taken effect after the decision of the lower appellate Court and has been given retrospective effect, an issue when it does not involve any question of fact, may in any event be taken even for the first time in this Court. The point for my consideration is whether the application filed on December 9, 1968 could be taken as an application under Section 17 (2). Mr. Chakraborty contended that there was no dispute involved or raised in the application and such dispute, as I have already stated, even if it was there, was not according to the plaintiff, bona fide. As to the bona fides of the dispute, it appears from written statement that the defendant claimed that he was not a defaulter as alleg-

ed in the plaint in view of the deposits of rent made by him with the Rent Controller which according to the plaintiff were illegal deposits. There can thus be no doubt that the defendant by his denial in the said application that he was not a defaulter raised a dispute on the question of default. It appears also that such dispute was bona fide as in view of the deposits made with the Rent Controller of which there is no dispute, the defendant's case was that he was not a defaulter while according to the plaintiff such deposits were invalid in law. The defendant tried to validate the deposits by a story of prior tender which was disbelieved by the Courts. But that story related to the question of validity of deposit and not to the deposits themselves which according to the defendant would disprove the plaintiff's case of default and would also require consideration in determining the amount to be deposited in court or paid to the plaintiff by the defendant.

12. As to the point whether the petition should be treated as one under Section 17 (2), it is necessary to refer to some rulings of this Court.

13. In *Smt. Parameswari Debi v. Nandalal*, C. R. 3340 of 1966, D/-20-2-67 (Cal), it was held that though the petition in the said proceedings was stated to be one under Section 17 (1) asking for permission to deposit at the rate of rent paid, it was in substance one under Section 17 (2). Further even though in the petition it was not stated that there was any dispute, as a matter of fact there was a dispute, as according to the defendant the deposits were to be made at the rate of Rupees 250/- per month, while according to the plaintiff the rate was Rs. 550/- per month. Further there was the omnibus prayer of the nature referred to in the case of *Gunwantral* (1971) 75 Cal WN 372. The Court held that the application was intended to be one under Section 17 (2) and the petition contained prayer for a direction from court regarding the amount payable and the trial court should have treated it as such. In *Gunwantral's* case, the court did not accept the application as being in substance one under Section 17 (2), as the said application was merely one for deposit and there was no omnibus prayer to the court for passing such other or further orders as would be deemed fit and proper. In the present case against the background of the plaint case that the defendant was a defaulter, there was a positive statement that all rent from November, 1966 had been duly deposited with the Rent Controller. There was thus a dispute implicit in the said application which was raised by the defendant and by the om-

nibus prayer the defendant impliedly prayed for determining the amount of rent payable as was pointed out in the said decision. The trial court accordingly erred in not passing appropriate orders on the said application before passing a decree on ground of default and the appellate court also erred in confirming the said decree which thus cannot be sustained.

14. In the result, this appeal succeeds and is allowed without any order as to costs in this Court. The judgments and decrees of the courts below are set aside. The case is now sent back to the trial court for disposal of the suit in accordance with law, taking into consideration the ground of default now available to the plaintiff, in view of my decision that on the other ground relating to nuisance and annoyance the plaintiff is entitled to no relief. The trial court will first take up the application filed by the defendant on Dec. 9, 1968 treating it as one under sub-section (2) of Section 17 of the Act and will dispose of the said application as also the suit in accordance with the provisions of sub-sections (3) and (4) of Section 17 of the Act.

15. Let the matter be disposed of as expeditiously as possible and let the records be sent down at once.

Appeal allowed.

AIR 1972 CALCUTTA 56 (V 59 C 10)

S. C. GHOSE, J.

Rajputana Trading Co. Pvt. Ltd.,
Appellant v. Iswarsingh Kripalsingh
and another, Respondents.

Suit No. 674 of 1969, D/- 21-5-1971.

(A) Houses and Rents— West Bengal Premises Tenancy Act (12 of 1956), Section 17 (1) — Period of limitation for deposit under Section 17 (1) will not be extended by operation either of Section 21 or Section 22. (X-Ref:— Section 21) (X-Ref:— Section 22).

(Para 7)

(B) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 17 (1) — Expression "payment" means actual delivery of or parting with money physically and the principle of tender as contemplated by law of contract is not applicable to and included in the word "payment".

(Para 8)

Cases Referred:— Chronological Paras
(1966) 70 Cal WN 864, Gopal
Banerjee v. Manindra Nath Dey 6
(1966) 70 Cal WN 1086, Dinanath
Mondal v. Fatik Chand Seal 7

- (1965) AIR 1965 SC 1909 (V 52) =
 1965-3 SCR 34, Kaluram v. Baldyanath 7
 (1964) AIR 1964 Cal 105 (V 51) =
 68 Cal WN 30 (SB), Siddheswar Paul v. Prokash Chandra Dutt 7
 (1913) 18 Ind Cas 442 = 18 Cal WN 84, Sati Prasad Garga v. Manmatha Nathkar 6
 (1907) 5 Cal LJ 270 = ILR 34 Cal 305, Jagat Tarini Das v. Nabagopal Chaki 5. 6
 (1900) 7 Cal WN 720, Rangit Singha v. Bhagabuttay Charan 5
 (1900) ILR 29 Cal 854 = 7 Cal WN 82, Buta v. Municipal Committee of Lahore 5
 (1878) 9 Otto (U.S.) 560 = 25 L Ed 484, Colby v. Reed 5
 (1877) 6 Otto (U.S.) 580 = 24 L Ed 678, Bissell v. Heyward 5
 (1848) 5 CB 365 = 75 RR 747, Dixon v. Clark 5
 (1839) 13 Peters (U.S.) 136 = 10 L Ed 95, Wallace v. McConnell 5
 (1726) 2 P. Wms. 378, Gyles v. Hall 5

ORDER:— This is an application, inter alia, for, reconsideration of an order passed by me on August 26, 1970 under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956, hereinafter referred to as the Act directing the striking out of the defence of the petitioner so far as delivery of the possession of the premises in suit was concerned. The said order was passed by me under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956 on the ground that the defendant had failed to pay the landlord or deposit either in Court or with the Rent Controller an amount equivalent to the rent in respect of the six tenancies mentioned in the plaint for the month of May 1969, that is, a period after the institution of the suit.

2. On March 6, 1969, the suit was filed by the plaintiff against the defendants for recovery of possession of the premises in suit which were the subject-matter of six different tenancies. The Writ of Summons was served on the defendants on April 7, 1969. The defendants entered appearance and filed written statement on or about May 5, 1969. On February 28, 1969 an application was made by the plaintiff in this suit, inter alia, for striking out the defence of the defendants so far as the recovery of possession was concerned on grounds of various defaults made in payment or deposit of rent mentioned in the petition filed in the said proceeding. After hearing the said application I held that the defendant No. 2 had defaulted in paying or depositing an amount equivalent to rent in respect of the tenancies

which are the subject-matter of the suit for the month of May 1969. In that view of the matter, I directed the defence so far as recovery of possession was concerned in the suit to be struck out as mentioned earlier. This application, is made in the inherent jurisdiction of this Court to reconsider and recall the said order and rehear the said application on merit.

3. The defendant No. 2 who is the petitioner in the instant application alleges that in fact there was no default in payment or deposit of rent in accordance with the provisions of the statute in respect of the said tenancies for the month of May, 1969. The petitioner has stated that the petitioner through one Govindlal Das on or about June 10, 1969 tendered to the landlord through one of its Directors, Durga Prosad More a total sum of Rs. 537.28 p. In respect of the six tenancies of the defendant at premises No. 97, Vivekananda Road, Calcutta "on account of rent and/or amount calculated at the rate of rent for the month of May 1969". Durga Prosad More refused to accept the said sum tendered to him in cash, as stated in sub-paragraph (i) of paragraph 13 of the petition in the instant application. In sub-paragraph (ii) of the said paragraph it is stated "upon such refusal to accept the rent so tendered" Mr. Das went to the Beadon Street Post Office and remitted the said total sum of Rs. 537.28 p. by Money Order to the landlord.

4. The post office obviously as the agent of the petitioner duly tendered the said sums to the landlord. On June 12, 1969 the landlord refused to accept the said sums so tendered. The petitioner received back the Money Order in respect of the said six tenancies on June 16 and 17, 1969. On June 20, 1969, the said sum of Rs. 537.28 P. in respect of the said six tenancies were duly deposited with the Rent Controller in accordance with the provisions of the West Bengal Premises Tenancy Act, 1956. Mr. Bhabra submitted that the said sum of Rs. 537.28 P. was tendered to Durga Prosad More as the Director of the landlord and was wrongfully refused to be accepted by the said Durga Prosad More as such landlord. Thus there was payment of the said sum to the landlord as contemplated by Section 17 (1) of the West Bengal Premises Tenancy Act, 1956. Secondly, Mr. Bhabra submitted that even if the said tender be deemed not to be payment to the landlord as contemplated by Section 17 (1) of said Act, the said sums were deposited within the time mentioned in proviso to Section 22 (1) of the said Act. According to Mr. Bhabra, the

petitioner had 15 days under proviso to sub-section (1) of Section 22 of the said Act to deposit the money with the Rent Controller from the respective dates when he had received back the Money Order remitted by him.

5. It is to be noticed that Section 17 (1) of the Act contemplates payment to the landlord or deposit in Court or with the Rent Controller; it does not mention the word "tender". Section 38 of the Indian Contract Act enunciates the law of tender in India. Section 38 of the Indian Contract Act is set out hereunder:—

"38. Where a promisor has made an offer or performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:

(1) It must be unconditional.

(2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then, to do the whole of what he is bound by his promise to do.

(3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them."

It is clear, therefore, from the said section that it discharges a promisor from performing his promise and keeps intact his rights under the contract where the promisor offers to perform unconditionally the promise to the promisee and is prevented by him from doing so. According to Mr. Bhabra as soon as the tenant tendered the rent to the landlord as stated in paragraph 13 (i) of the petition herein and such rent was refused to be accepted by the landlord, the tenant was absolved from all liabilities or obligations under Section 17 (1) of the said Act. Mr. Bhabra relied on the case of Jagat Tarini Dasi v. Nabagopal Chaki, (1907) 5 Cal LJ 270, wherein it was held as follows:—

"Now it is well settled, that while a tender does not extinguish the indebtedness, a valid tender which is kept good stops the running of interest after the tender; see Gyles v. Hall, (1726-2 P. Wms. 378); Wallace v. McConnell, 1839-13 Peters (US) 136 and Bissel v. Heyward, (1877-8 Otto (US) 580). "It

was argued, however, that this rule is not applicable to cases under the Bengal Tenancy Act, and that in order to stop interest, a tenant must prove, that after improper refusal of a tender validly made, he deposited the amount due in Court under the provisions of Section 61 of the Bengal Tenancy Act.

In support of this position, reliance was placed upon the decision of this Court in Rangit Singha v. Bhagabutti Charan, (1900-7 Cal WN 720). It may be conceded, that there are observations in that judgment which lend some apparent support to the contention of the respondent; but upon closer examination of the facts of the case, which we have ascertained from the records, it appears to be clearly distinguishable. There it was alleged that rent had been tendered and improperly refused, and upon this basis alone, it was contended that interest would cease to accrue from the date of the tender. There was not the remotest suggestion, nor any proof whatever, that the tender had been kept good. Under these circumstances, the learned Judges held that the tenant could not successfully claim to be relieved of his liability to pay interest, unless he proved a deposit under Section 61 of the Bengal Tenancy Act. The learned Judges did not lay down, that even if it was established, that not only had a valid tender been made, but also that it had been kept good, the tenant would continue to be liable for interest until such time as he could make a deposit under Section 61 of the Act. In the first place, such a view would be totally opposed to the well established principle, that a valid tender which is kept good stops the running of interest. (See the judgment of Wilde, C. J. in Dixon v. Clark, (1848-5 CB 365). The principle of the plea of tender is, to use the language of Mr. Justice Clifford in Colby v. Reed, (1878-9 Otto (US) 560) that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able, by tendering the requisite money, the plaintiff himself having prevented a complete performance by his refusal to accept the tender (See also Bullen and Leake on Precedents of Pleadings, 3rd Ed. p. 693). That principle is substantially embodied in Section 38 of the Indian Contract Act, and was recognised by the Judicial Committee in Buta v. Municipal Committee of Lahore, (1900 ILR 29 Cal 854)."

6. Mr. Bhabra also cited (1913) 18 Ind Cas 442 (Cal) which follows the aforesaid decision in (1907) 5 Cal LJ 270. Mr. Bhabra then cited the case of Gopal Banerjee v. Manindra Nath Dey, (1966) 70 Cal. WN 864 and contended that the

penal consequence visiting upon a default in payment or deposit of rent or money equivalent to rent in terms of Section 17 (1) of the said Act should be construed strictly and where there is any doubt as to whether the default has taken place or not the section should be construed in favour of the tenant for whose benefit the said West Bengal Premises Tenancy Act was enacted. Thus in the instant case a liberal construction should be given to the word 'pay' in Section 17 (1) and where there has been a valid tender by the tenant the same should be held to have satisfied the requirements of payment contemplated by the said section.

7. Mr. Kapoor on the other hand contended that tender of rent to be effective and binding must be followed by deposit either in Court or with the Rent Controller in strict compliance with the provision of Section 17 (1) of the Act to enable the tenant to get the benefit of Section 17 (4) of the said Act. Mr. Kapoor relied on the case of Dinanath Mondal v. Fatik Chand Seal, (1966) 70 Cal WN 1086. Mr. Kapoor further contended that Sections 21 and 22 of the said Act are not applicable to cases of deposit with the Rent Controller under Section 17 (1) of the said Act and thus rent or amount equivalent to rent if deposited with the Rent Controller has to be deposited within 15th of the month following that for which rent was deposited in accordance with the provision of Section 17 (1) of the said Act. Mr. Kapoor relied on the Special Bench case of Siddheshwar v. Prokash, 68 Cal WN 30 = (AIR 1964 Cal 105) (SB). In order to appreciate the contentions of Mr. Kapoor on this point the relevant portions of Sections 21 and 22 of the said Act are set out hereunder:—

"21. Deposit of rent by the tenant.—

(1) Where the landlord does not accept any rent tendered by the tenant within the time referred to in Section 4 or where there is a bona fide doubt as to the person or persons to whom the rent is payable, the tenant may deposit such rent with the Controller in the prescribed manner.

(Provided that where any rent is remitted by the tenant to the landlord by postal money order, the date of issue of the postal money order shall for the purposes of this sub-section, be deemed to be the date of tender of such rent by the tenant to the landlord.)

(2) The deposit shall be accompanied by an application supported by an affidavit by the tenant stating—

(a) the premises for which the rent is deposited with the description sufficient for identifying the premises;

(b) the period for which the rent is deposited;

(c) the name and address of the landlord, or the person or persons claiming to be entitled to such rent;

(d) the reasons and circumstances for the application for deposit of the rent;

Provided that in the case of deposits of rent for successive months during any continuous period, no affidavit in support of application shall be required after the first deposit if the reasons and circumstances which led the tenant to make the first deposit remain the same.

22. Time-limit for making deposit and consequence of incorrect particulars in application for deposit—

(1) No rent deposited under Section 21 shall be considered to have been validly deposited under that section for purposes of clause (i) of sub-section (1) of Section 13, unless deposited within fifteen days of the time fixed by the contract in writing for payment of the rent or, in the absence of such contract in writing, unless deposited within the last day of the month following that for which the rent was payable.

Provided that where any rent remitted to the landlord by postal money order within the time referred to in Section 4 is returned to the tenant by the postal authorities as undelivered either on account of the landlord having refused to accept payment thereof or for any other cause such rent may also be validly deposited for the purposes of the said clause within 15 days from the date on which it is so returned to the tenant.

(2) No such deposit shall be considered to have been validly made for the purposes of the said clause if the tenant wilfully or negligently makes any false statement in his application for depositing the rent, unless the landlord has withdrawn the amount deposited before the date of institution of a suit or proceeding for recovery of possession of the premises from the tenant.

(3) If the rent is deposited within the time mentioned in sub-section (1), and does not cease to be a valid deposit for the reason mentioned in sub-section (2), the deposit shall constitute payment of rent to the landlord as if the amount deposited has been valid legal tender of rent if tendered to the landlord on the date fixed by the contract, or, in the absence of any contract, on the fifteenth day of the month next following that for which rent is payable."

In the said case of 68 Cal WN 30 = (AIR 1964 Cal 105) (SB) Sidheswar v.

Prokash it was held that deposit of rent in terms of Section 21 of the said Act which is deemed to constitute payment of rent to landlord under sub-section (3) of Section 22 of the said Act is not equivalent to payment of rent contemplated in Section 17 (1) of the said Act. Section 17 (1) of the said Act is set out hereunder:—

"17 (1). On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 13, the tenant (shall, subject to the provisions of sub-section (2), within one month) of the service of the writ of summons of him (or where he appears in the suit or proceeding without the writ of summons being served on him, within one month of his appearance) (deposit in Court or with the Controller or pay to the landlord) an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent. per annum from the date when any such amount was payable upto the date of deposit, and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month, a sum equivalent to the rent at that rate."

Sections 21 and 22 appear under Chapter IV of the said Act which is headed "deposit of rent". Section 17 on the other hand does not contemplate payment or deposit of rent but of a sum or amount equivalent to rent. Thus the character of the money that is paid or deposited under Section 17 (1) is undefined whereas the character of money deposited under Section 21 of the Act is defined and fixed as rent. Section 21 contemplates deposit of rent for the purposes of Section 13 (1) of the Act. In the case of *Kaluram v. Baidyanath*, AIR 1965 SC 1909, Sections 17, 21 and 22 of the said Act were considered. It was held that the scheme of Section 17 (1) is a complete scheme by itself; the Legislature intended that in suits or proceedings to which Section 17 (1) applied payment of rent by the tenant to the landlord must be made as prescribed by Section 17 (1). Section 17 (1) was enacted for the purpose of controlling the relationship between the landlord and the tenant in the manner prescribed by the said Section after a suit or proceeding for ejectment was instituted and the other provisions of the said Act namely Sections 21 or 22 could not control or gov-

ern the provisions of Section 17 (1). I am of the opinion therefore that deposit of rent even with the Rent Controller as introduced by amendment in Section 17 (1) after the decision of the said case of AIR 1965 SC 1909 by the Supreme Court and the said case of 68 Cal WN 30 = (AIR 1964 Cal 105) (SB) by the Special Bench of this Court has, not altered the position in any respect. The deposit in terms of Section 17 (1) with the Rent Controller must be made within the time mentioned in the said sub-section. The time will not be extended by operation of other sections like 21 or 22 of the said Act. In that view of the matter, I am of the opinion that although the fact of tender of rent and refusal of the landlord to accept the same in respect of month of May 1969 was not expressly brought to my notice, at the time of hearing of the previous application, the same even if brought to my notice, could not have changed my decision in the said application.

8. Section 17 of the Act has been enacted not only for the benefit or protection of the tenant but in my opinion for the benefit and protection of the landlord as well. Although a default in payment or deposit of an amount equivalent to rent in accordance with the provisions of the sub-section (1) of Section 17 shall be visited with striking out of the defence of the tenant so far as recovery of possession of the premises is concerned, that will not entitle the Court to put a liberal construction on the word 'payment' used in the said sub-section. The principle of tender which in my opinion is a principle of the law of contract between parties cannot be made applicable to and included in the word 'payment' in Section 17 (1) of the said Act. The obligation to pay an amount equivalent to rent or deposit the same within the time mentioned in the said sub-section is a statutory obligation and cannot be governed or modified by applying thereto the contractual principles of tender. In my opinion, literary meaning must be given to the word 'pay' in the said sub-section which will mean that the payment must be actual delivery of or parting with money physically.

9. In any event in my opinion, however, construction of the word 'pay' in Section 17 (1) is not of any importance for deciding the instant application.

10. As noted earlier although in paragraph 13 (i), the petitioner said that the petitioners through Mr. Das tendered to Durga Prosad More the said total sum of Rs. 587.38 P. as "rent and or amount equivalent to rent," in sub-paragraph (ii) of the said paragraph,

the petitioner himself has stated that what he tendered through Mr. Das was rent which was refused to be accepted by the landlord. On the basis of affidavit evidence, it is clear therefore that the petitioner intended to tender and in fact tendered rent to the landlord. The landlord certainly was not obliged to accept any rent after institution of the suit and service of the notice to quit. That being so, it was not a valid tender. In my opinion, the landlord was justified in refusing to accept the same. For the aforesaid reasons, the application must fail. In my opinion, there is no new reason for which I should recall the order passed by me and reconsider my decision.

11. In the premises, this application is dismissed with costs.

12. The operation of this order shall remain stayed for eight weeks.

Application dismissed.

AIR 1972 CALCUTTA 61 (V 59 C 11)

ANIL KUMAR SEN, J.

Gostha Behari Ghose, Petitioner v. University of Calcutta, Respondent.

C. R. No. 1746 (w) of 1969; D/- 6-8-1971.

(A) Calcutta University Act (2 of 1966), Section 58 — First Statutes under (1968), Statute 100 (1), Proviso — Where a trust managing a college is registered after the commencement of the Statutes, the trust would be deemed to have been 'created' after such commencement notwithstanding execution of the trust prior to such commencement and the terms and conditions of such trust will require the approval of the Syndicate of the University. Consequently, in absence of such approval, the terms and conditions of the trust relating to constitution of the governing body of the College will not be operative and the governing body will have to be reconstituted in terms of Statute 93.

(Paras 11, 12)

(B) Registration Act (1908), Section 17 — Registration of trust, requirement as to: — Where immovable properties worth more than hundred rupees are transferred in favour of named trustees, the trust will not be operative unless it is registered. AIR 1936 Cal 556, Followed. (Para 13)

(C) Constitution of India, Article 226 — Complicated question of fact — They will not be decided in the summary proceedings under Article 226.

(Para 14)

(D) Constitution of India, Art. 226 — Other remedy open — Where a right or liability is created by a statute which gives a special remedy for its enforcement, the remedy provided by the statute only must be availed of. (Case law discussed). (Para 17)

Cases Referred: Chronological Paras

- (1952) AIR 1952 SC 64 (V 39) — 17
- 1952 SCR 218, N. P. Ponnuswami v. Returning Officer Namakkal 17
- (1948) 52 Cal WN 343, Hurdutraf v. Official Assignee of Calcutta 17
- (1936) AIR 1936 Cal 556 (V 23) — 17
- 40 Cal WN 1320, Bhupati Nath v. Basantakumari Devi 13
- (1935) 1935 AC 532 = 104 LJ PC 82, Attorney General for Trinidad and Tobago v. Gordon Grant and Co. 17
- (1919) 1919 AC 368 = 88 LJ KB 282, Neville v. London Express News Paper Ltd. 17
- (1859) 6 CB (NS) 336 = 141 ER 486, Wolverhampton New Water Works Co. v. Hawkesford 17

N. C. Chakravarti, Santinath Mukherji, and Satyajit Banerji, for Petitioner; G. P. Kar and B. K. Dutta (for Nos. 1 to 4); A. D. Mukherji, and M. M. Mullick (for Nos. 5, 6, 7, 10, 12, 13 and 14), for Respondents.

ORDER:— This Rule was issued on a Writ petition. The dispute involved is one over reconstitution of the governing body of Nandalal Ghose B. T. College on the enforcement of the Calcutta University First Statutes, 1966 (SC) (hereinafter referred to as the First Statutes).

2. The first two petitioners are the shebaitis of Sri Sri Lakhi Janardan Thakur. By a deed dated May 17, 1968 they conveyed certain lands and a two storied building to petitioners 3 to 5 and respondents 5 and 9 as trustees for setting up a B. T. College to be named after late Nandalal Ghose, the father and grandfather of the petitioners 1 and 2 respectively. Under the said deed the settlees were constituted members of a provisional committee who would establish the college contemplated by the trust. But the deed further provided that after such establishment the committee or the governing body of the college would be formed according to law, rules and regulations of the University of Calcutta for the management of the said college. In such committee, however, a settlor or one of their successors will be a life member and further a settlor or settlors' successors will nominate one local member.

3. The settlees established a college. On March 26, 1968 they applied

to the University authorities for affiliation of the said college from the academic session 1968-69. On a report submitted after enquiries by Sri K. K. Mukherjee and Sri A. C. Banerjee the Calcutta University Syndicate by a resolution dated July 5, 1968 granted affiliation subject however to the implementation of certain conditions set out in the enquiry report. On such affiliation the college was run from the beginning of the academic year 1968-69.

4. By an appropriate notification issued under Section 58 (4) of the Calcutta University Act, 1966 (hereinafter referred to as the said Act) the State Government brought into force the First Statutes, the First Ordinances and the First Regulations framed by the Vice Chancellor under Section 58 (2) of the said Act with effect from September 18, 1968. Chapter 7 of the First Statutes provides for constitution, powers and functions of the governing bodies of colleges and the tenure of its members. Two Statutes 93 and 100 are relevant for our present purpose and they are set out hereunder:—

93. (1) Save as otherwise provided in Statute 100 the Governing Body of a college shall consist of the following members, namely:—

(a) the Principal of the college, who shall be the Secretary of the Governing Body, ex-officio;

(b) two members to be elected from amongst themselves by the whole-time teachers of the college at a meeting to be convened for the purpose by the Principal of the college and presided over by him;

(c) in the case of a college receiving recurring financial aid from the State Government, one member to be nominated by the State Government;

(d) three members to be nominated by the Syndicate of whom at least one shall be a woman in the case of a Women's College or a co-educational college;

(e) besides the members, if any, required to be included in the Governing Body of the college under the terms and conditions of any donation to the college, such other members, being representatives of the donors of the college to whose donations no such condition is attached, as may be chosen in the following manner, that is to say,—

(i) where the number of such donors exceeds five, two members, and

(ii) where the number of such donors does not exceed five, one member, to be elected by such donors by postal ballot:

Provided that after the commencement of these Statutes, no condi-

tion shall be attached to any donation to a college requiring representation in the Governing Body of the college, and

Provided further that no teacher or salaried employee of the college who is a donor shall be entitled to be so elected.

(2) The members of a Governing Body as stated under paragraph (1) shall, at their first meeting, elect a person as the President of the Governing Body and such President may or may not be elected from amongst such members.

(3) The names of all persons elected or nominated as members or the President of every Governing Body shall be reported by the Principal of the college to the University.

(4) All disputes about the election or nomination of the members or the President of every Governing Body shall be referred to the Syndicate and its decision thereon shall be final.

100. (1) In the case of a college managed by any Trust or Registered Society or under a scheme laid down by a competent court, the constitution of the Governing Body shall in so far as the terms and conditions of such Trust, Articles and Memorandum of Association of such registered Society or such scheme, as the case may be, so require, continue as such:

Provided that, after the commencement of these Statutes, the terms and conditions of any such Trust, the Articles and Memorandum of Association of any such Society or any such scheme shall require the approval of the Syndicate before such Trust is created, such Society is registered or such scheme is submitted to the court.

(2) The provisions of Statutes 94 to 99 shall apply to a college referred to in paragraph (1), in so far as such provisions are not inconsistent, as the case may be, with the terms and conditions of the Trust, the Articles and Memorandum of Association of the Registered Society or the scheme concerned.

5. On October 31, 1968 Sri A. C. Banerjee, the Inspector of Colleges issued a circular to all heads of affiliated colleges including the petitioners' college requesting the college authorities to reconstitute their respective governing bodies in accordance with First Statutes and report the same to the University for approval on or before December 31, 1968. According to the petitioners there having been material mistakes in the original trust deed dated May 17, 1968 and the trustees having met with difficulties in acting upon the same, it was decided to amend the trust deed dated May 17, 1968

(hereinafter referred to as the earlier deed). Further according to the petitioners in furtherance of the said decision by a deed of modification dated September 5, 1968 (hereinafter referred to as the later deed) the earlier trust was amended. It is not in dispute that such amendment was in material particulars including exclusion of certain plots originally conveyed and inclusion of some new plots. That apart, there was material alteration regarding the provision as to the constitution of the governing body. While the earlier deed provided that such governing body should be constituted according to rules and regulations of the University of Calcutta subject only to there being two representatives of the settlors, the later deed provided for a Trust Board which would control, manage and administer the college. Such Board shall consist of ten members, five of whom would be permanent. The permanent members would be two shebait, the settlors or their successors and three others nominated in the deed itself to be succeeded on their death or relinquishment of office by person or persons to be nominated by the senior shebait. The five non-permanent members are the principal, two representatives of the teachers, two persons interested in education selected by the permanent members. The deed further provided that the permanent members shall have power to co-opt two other members in the interest of the college. This later deed though alleged to have been executed on September 5, 1968 was not registered until December 31, 1968 and there is a serious dispute between the parties on its bona fides and the actual date of its execution. According to the respondents this later deed was executed long after September 18, 1968 when the First Statutes came into effect and was antedated only to defeat the provisions of Statute 93 thereof.

6. On December 31, 1968 the petitioner No. 4 wrote a letter to the University informing it about the amendment of the trust and therewith forwarded a copy of the later deed. On February 25, 1969 Sri A. C. Banerjee, Inspector of Colleges wrote a letter to the college authorities informing them that the later deed was placed before the college committee of the University on January 14, 1969 for consideration when the said committee adopted the following resolution:

1. Resolved that the committee regrets that the trust deed cannot be approved as it was registered on 31-12-1968.

2. That the Secretary be requested to reconstitute the governing body of the college in accordance with First Statute 93 framed under the Calcutta University Act, 1966 without further delay."

The petitioners now before this court however claim that they had no knowledge about this letter which was suppressed by the Principal, respondent No. 5 until the last week of April, 1969.

7. On the basis of the aforesaid letter dated February 25, 1969 of the University the governing body was reconstituted all between the Principal and the President of the existing governing body, respondents 5 and 10 respectively. It was so reconstituted with respondent No. 5, the Principal, respondents 6 and 7 as teachers' representatives and the petitioner No. 2 as the donors' representative. Respondent No. 10 by two letters dated April 25 and May 6, 1969 forwarded the names of the members of the reconstituted governing body to the University and the University on its part on May 13, 1969 nominated respondents 12, 13, and 14 as the University's nominees to the governing body. The governing body so reconstituted was approved by the University on May 26, 1969 and it is claimed that on May 25, 1969 at the first sitting the newly constituted managing committee elected respondent No. 10 to be the President of the committee. The petitioners to this court disown all knowledge of these facts about reconstitution at all material times except a notice to the petitioner No. 2 of the first sitting of the reconstituted managing committee on receipt whereof he lodged a strong protest with the University authorities and then moved this court on May 28, 1969 and obtained the above Rule.

8. On the Writ petition as it now stands on the amendment allowed by this court, the present petitioners are disputing the reconstitution of the governing body effected in the manner set out hereinbefore under the First Statutes on twofold grounds. In the first place, the petitioners claim that they come within the purview of Statute 100 and as such the Trust Board as provided in the later deed should be the governing body and reconstitution of the governing body under Statute 93 is unauthorised. Secondly, it is claimed by them in the alternative that the reconstitution was not made in accordance with Statute 93 but was made irregularly really by the respondent No. 5 to suit his own interest by suppressing material facts from the existing governing body and particularly

the petitioners to this court. Strong reliance is placed on a letter dated May 16, 1969 of the respondent No. 10 to the Inspector of Colleges. In this letter the respondent No. 10 clearly acknowledged that the reconstitution was not constitutionally effected by the existing governing body and that his earlier letter dated May 6, 1969 was initiated in an irregular manner. On the claim as aforesaid the petitioners have prayed for an appropriate mandate upon the respondents directing them not to give effect to the disapproval of the trust dated 5-9-1968 as conveyed by the Inspector of Colleges by his memo dated February 25, 1969, not to give effect to the reconstitution dated May 26, 1969 and to accept the deed dated September 5, 1968. There is also a prayer for an appropriate mandate directing the members of the reconstituted governing body to forbear from acting as such.

9. Two sets of the respondents are contesting this Rule. The first set consists of the University, The Vice Chancellor, The Inspector of Colleges and the Deputy Inspector of Colleges being respondents 1 to 4. Two affidavits have been filed on their behalf respectively on September 23, 1970 and April 7, 1971. According to them as already indicated hereinbefore the later deed is not a bona fide one. It was an antedated deed created only for the purpose of avoiding Statute 93 of the First Statutes and as such the University had lawfully rejected the same. They further claim that the University being informed of the reconstitution by the President of the existing governing body under the material clauses of Statute 93 the University forwarded its own nominees to the governing body and the governing body so reconstituted was constituted in accordance with law. In this view the said respondents are strongly contesting the claim of the petitioners.

10. This Rule is being contested by respondents 5, 6, 7, 10, 12 and 13. An affidavit has been filed on their behalf but in substance it reads as an affidavit of respondent No. 5. It has been sworn by the said respondent No. 5 on November 14, 1970. There is a further affidavit by the said respondent no. 5 filed on March 30, 1971. In these affidavits, it is also claimed that the later deed is not a bona fide one. That the reconstitution under Statute 93 was lawfully made. It is, however, not disputed by these respondents that such reconstitution was effected between the Principal and the President, respondents 5 and 10 and not by the existing governing body. Although it is

claimed that it was so done to the knowledge of all the petitioners to this Court, it is however clear that such reconstitution was not sponsored by the existing governing body or its Secretary nor was it approved by such a governing body. On these allegations these respondents too are contesting the claim of the petitioners.

11. Mr. Chakraborty appearing in support of this Rule has first contended that the University authorities misconceived the legal position in not approving the deed of modification dated September 5, 1968 on the ground that it was registered on December 31, 1968. It is only on such misconception the said authorities proceeded to consider that Statute 100 has got no application and that the governing body is to be reconstituted under Statute 93. According to Mr. Chakraborty the University authorities lost sight of the provisions of Section 47 of the Registration Act by virtue of the provisions whereof notwithstanding registration on a later date the said deed is to take effect from the date of its execution viz., September 5, 1968 and thus bring it within the purview of Statute 100. In my view, however, there are two impediments to the acceptance of this contention of Mr. Chakraborty notwithstanding the provisions of Section 47 of the Registration Act.

12. In the first place, under the proviso to Statute 100, if a trust within the meaning of Statute 100 (1) is to be created after commencement of these statutes, the terms and conditions of such trust shall require a prior approval of the Syndicate. Otherwise such a trust does not have the benefit of the said Statute. On the facts of the present case therefore the question that arises for consideration is as to when was the trust created. Even if by virtue of Section 47 of the Registration Act the deed is given a retrospective effect from the date of execution still can it be said to have been created on a retrospective date. In my view Mr. Mukherjee is right in his contention that when both execution and registration are necessary ingredients to the creation of the trust, the trust is not created until both the requirements are fulfilled. The term 'create' in this proviso bears the meaning of bringing into legal existence. For so doing registration is an essential requirement. Therefore, when one registers such a deed and thus completes the creation on a date subsequent to the commencement of these statutes the proviso comes into play and a prior approval of the Syn-

dicade becomes a legal necessity. Section 47 of the Registration Act might give a retrospective effect to the trust but that does not derogate from the position that the trust itself was created on the date it is registered.

13. Incidentally, Mr. Saktinath Mukherjee who followed Mr. Chakraborty to give replies contended with reference to the provisions of the Sections 1 and 5 of the Indian Trusts Act that the endowment being a charitable one no registration whatsoever is at all necessary in the present case. But in my view, this contention is not well founded. It is quite clear on the settlement itself that the settlors transferred immovable properties of the value of more than hundred rupees in favour of named trustees who are to hold it for a specific purpose of charity. An endowment so created attracts 17 of the Registration Act and the deed does not become operative unless it is registered. This view appears to follow by implication from the decision of this court in the case of Bhupati Nath v. Basanta, 40 Cal WN 1320 = (AIR 1936 Cal 556).

14. The next difficulty for Mr. Chakraborty lies in the fact that on the pleadings the true date of execution of the deed of modification is seriously disputed. While according to the petitioners it was executed on September 5, 1968, according to the respondents it was not executed till after September 18, 1968 but was antedated in order to defeat the provisions of Statute 93. In my view, such a dispute cannot appropriately be decided in a summary proceeding like the present one and on the materials now before me. While to support their own case the petitioners rely on the document and an affidavit in support thereof, the respondents on the other hand, refer to certain circumstances including some intrinsic to the document itself which may raise a strong suspicion that the document was not executed on the date it bears. My attention has been drawn to the fact that this deed of modification was executed on a stamped paper purchased by one Tara-pada Sur on February 6, 1968 i. e. on a date even prior to the original deed. Next my attention has been drawn to the admitted position that notwithstanding the circular of the University dated October 31, 1968 this deed of modification was not brought to the notice of the University authorities on any date prior to December 31, 1968. Inordinate and unexplained delay in the matter of registration had also been a matter of adverse comments by the learned Advocates for the respondents. Petitioners'

claim that later deed was duly acted upon by the parties since September 1968 has strongly been denied by the respondents and there is no evidence of its corroboration; as pointed out earlier such deed was not disclosed to the University or its authorities before 31-12-1968 and there is no evidence that the University ever accepted such a deed or acted upon its terms. No doubt my attention has been drawn by Mr. Chakraborty to two resolutions dated July, 6, 1968 and September 15, 1968 made annexures 'A' and 'B' to the affidavit-in-reply filed on February 18, 1971 but I am unable to place any reliance upon those two documents as, in my view, on the importance of these documents they ought to have been disclosed in the original petition and not in the affidavit-in-reply. On this evidence only and in view of the complicated nature of dispute raised on facts it is not possible for me in this summary proceeding to find out what is the true date of execution of this deed of modification. As Mr. Chakraborty's contention rests entirely on an assumption that this deed was executed on a date prior to September 18, 1968 but registered on later date and when on my findings made hereinbefore there is no solid foundation for such an assumption, Mr. Chakraborty cannot succeed in this contention of his even on the provisions of Section 47 of the Registration Act. On these conclusions I must overrule the first contention raised by Mr. Chakraborty in support of this Rule.

15. The next contention of Mr. Chakraborty is to the effect that assuming that Statute 93 applies even then the reconstitution is not in accordance with the said Statute. According to Mr. Chakraborty the reconstitution should not have been effected by respondent No. 5 alone in collaboration with respondent No. 10 without the knowledge and concurrence of the existing governing body or the Secretary thereof. He has further submitted with reference to the statements set out in paragraph 24-A of the petition that there was no proper or bona fide election of teachers' representatives or donors' representative and that there had been no government nominee to the governing body. Much of the facts set out in the petition to support the aforesaid alleged irregularities in the reconstitution have been seriously disputed by respondent No. 5 in his affidavit. Strangely however the respondent, No. 10 had not filed any affidavit to deny an admission of his own in the letter dated May 16, 1969 made annexure 'G' to the petition to the effect

that the reconstitution was not effected in a regular manner. This letter dated May, 16, 1969 which is not denied or controverted by the author thereof was described by the Registrar of the University in his affidavit as "manufactured for the purpose of creating false evidence." Such is also the claim of respondent No. 5. I, however, agree with Mr. Chakraborty that such a statement on the part of a responsible officer of the University is highly irresponsible when it is clearly admitted by the learned Counsel for the University that the original of the said document was found in the relevant file from the custody of the University itself in course of inspection of documents. Furthermore, upon the admitted facts of the present case there had been clear infringement of Statute 93 (1) (e) when the member required to be included in the governing body under the terms and conditions of even the first donation of the earlier deed had not been brought into the governing body.

16. But notwithstanding these facts I must uphold the contention of Mr. Kar who is appearing on behalf of the University that any dispute of the present nature should not be gone into in this proceeding at this stage in view of the provisions of Statute 93 (4) of the First Statutes referred to hereinbefore. According to Mr. Kar the dispute raised by Mr. Chakraborty in this regard is a dispute about the election or nomination of members to the governing body which should first be referred to the Syndicate for adjudication, and should not be taken up by this Court in this jurisdiction. Statute 93 (4) on its terms well supports this contention of Mr. Kar. But Mr. Chakraborty strongly contends that a statutory regulation like Statute 93 (4) cannot take away or abridge the jurisdiction conferred on this Court by Article 226 of the Constitution so that notwithstanding the aforesaid provision relied on by Mr. Kar this court can go into and adjudicate in a Writ proceeding as to whether an election or nomination of members to a governing body had lawfully been made in accordance with the Statute or the regulations made thereunder.

17. In my view, there may not be any dispute on the principle that no statute can impose any restriction or abridge the jurisdiction conferred on this court by the constitution. But a statute without excluding such a jurisdiction can provide for regulation for the enforcement of rights or obligations created by such statute. It is well settled that where a right or lia-

bility is created by a statute which gives a special remedy for its enforcement the remedy provided by the statute only must be availed of. This Rule which was originally laid down by Willes J. in *Wolverhampton New Water Works Co. v. Hawkesford* (1859) 6 C. B. (N. S.) 336 and was approved by the House of Lords in *Neville v. London Express News Paper Ltd.*, (1919) AC 368, by the Privy Council in *Attorney General of Trinidad and Tabago v. Gordon Grant and Co.*, (1935) AC 532 and by the Supreme Court in *N. P. Poonnuswami v. Returning Officer, Namakkal*, AIR 1952 SC 64. It is no doubt true that in the case of *N. P. Poonnuswami* the Supreme Court on the provisions of Article 329 (b) held that the jurisdiction of the High Court was excluded but the decision did not rest entirely on the exclusion of the jurisdiction itself. On the other hand, the Supreme Court approved an earlier decision of this court in the case of *Hurdutrai v. Official Assignee of Calcutta*, 52 Cal WN 343. In that case the question which arose for consideration was as to whether Sections 55 and 56 of the Presidency Town Insolvency Act excluded the jurisdiction of the Ordinary Civil Court or not and whether matters coming within the purview of the said provisions should be left to the Insolvency Court or not. In considering the said issue Mukherjee J. observed, "we are inclined to hold that Ordinary Civil Courts have concurrent jurisdiction in matters coming under Sections 55 and 56 of the Presidency Town Insolvency Act though they can decline to exercise such jurisdiction on grounds of expediency and refer the assignee to the Insolvency Court." Therefore, the pertinent question is not one as to whether the jurisdiction of this court is excluded or not but whether on the ground of expediency the parties should be made to seek remedy provided by the Statute or the statutory regulation the rights and obligations whereunder are sought to be enforced. Now in the present case the rights and obligations relate to election to a governing body of an educational institution affiliated to the University itself. The University itself would be expected to be better conversant with the affairs of institution under its administrative control. So also the requirements of the regulations with reference to the facts relating to each institution. The regulation itself provides that all disputes relating to such election should properly be adjudicated by the Syndicate. That being the position, in my view, there can be no doubt that the most expedi-

ent manner in which such disputes are to be adjudicated is by availing the remedy provided by the regulation and not by substituting a proceeding under Article 226 of the Constitution for the remedy so provided. That also appears to be the intention of the regulation itself on my reading. In this view I find ample support for the contention of Mr. Kar that in view of the provisions of Statute 93 (4) this court should not go into a dispute as raised by Mr. Chakraborty but should on the other hand, relegate the parties to seek appropriate remedy from the Syndicate itself. On the conclusions as above I must overrule the second contention raised by Mr. Chakraborty.

18. As both the contentions raised in support of this Rule fail the application fails and the Rule is discharged.

19. There will be no order for costs.

20. As the Rule is discharged, all interim orders are vacated.
Rule discharged.

AIR 1972 CALCUTTA 67 (V 59 C 12)

SALIL K. ROY CHOWDHURY, J.

Gopal, Petitioner v. The State of Uttar Pradesh, Respondent.

Award Matter No. 79 of 1971, D/-15-6-1971.

(A) Arbitration Act (1940). Sections 8 and 9 Expl. — Where the arbitrator named in the arbitration clause in spite of repeated requests by a party to the arbitration agreement gave no response and in spite of service of notice of application under Section 8 with leave of Court did not appear he must be deemed to have refused and neglected to act within Section 9 Expl. 1947-2 Mad LJ 520, Rel. on; AIR 1954 Cal 245, Distinguished.

(Paras 7, 11, 12, 15)

(B) Arbitration Act (1940), Section 8 — Where the arbitration clause provided that the dispute between the parties will be referred to the Secretary, U. P. Government, Industries Deptt. for arbitration and his decision will be final and binding on the parties, the arbitrator is the incumbent in the office of the Secretary at the time of reference and not a persona designata and the parties cannot be said to have intended not to supply the vacancy if the arbitrator refused or neglected to act. (Para 9)

(C) Arbitration Act (1940), Section 8 — Where in reply to an application under Section 8 the point that under

the arbitration clause the arbitrator was appointed as persona designata and the parties intended not to supply the vacancy if the arbitrator refused or neglected to act was not specifically taken even in the affidavit in opposition it cannot be taken from the Bar as it is a question of fact which the applicant had no opportunity to deal with. (Para 9)

Cases Referred: Chronological Paras

(1962) 1962-1 Lloyd's Rep 267,	
Burkett Sharp & Co. v. Eastcheap Dried Fruit Co. & Perera	6
(1954) AIR 1954 Cal 245 (V 41) = 93 Cal LJ 92, Nandram Hanutram v. Raghunath & Sons Ltd.	6
(1947) 1947-2 Mad LJ 520, K. G. S. Venkatanarayanayya v. K. G. S. V. R. Lakshmiddevamma	10
(1911) 38 Ind App 181 = ILR 33 All 743 (PC), Sadik Husain v. Kaniz Zohra Begam	10
(1848) 2 De. G. & Sm. 33 = 64 ER 15, In re Hawley & North Staffordshire Rly.	6

Sankar Ghosh with Bhaskar Gupta, for Petitioner; Salil Hazra, for Respondent.

ORDER:— This is an application for removal of the named Arbitrator and appointment of an Arbitrator in terms of an arbitration agreement between the parties dated the 27 of Jan., 1967. The application is made under Section 8 (b) read with Explanation to Section 9 and Section 11 of the Arbitration Act.

2. The relevant facts are that by a contract in writing dated the 27th of January, 1967 between the parties the petitioner was appointed as clearing/handling and transport agents of the respondents in respect of a complete 1200 tons a day capacity cement making plant including its spares, tools and tackles as also for such other consignments as may be desired by the Director, Government Cement Factory on behalf of the Government of Uttar Pradesh being supplied by Messrs. Fives Lille Cail of Paris, France or by any suppliers at Calcutta Port or Dum Dum Airport on the terms and conditions contained in the said agreement.

3. The said agreement dated the 27th of January, 1967 in clause 28 contained an arbitration clause as follows:

"In case of any disputes, differences or questions arising between the parties herein touching or arising out of this agreement or the subject-matter thereof, the same will be referred to the Secretary, Government of Uttar Pradesh, Industries Department for arbitration and his decision shall be final and binding on the parties. The

Arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award."

4. It is alleged by the petitioner that various works were done under the said contracts and bills were submitted by the petitioner to the respondent out of which a sum of Rupees 502786.75 still remains due and payable by the respondent to the petitioner. The respondent is alleged to have been raising various disputes in regard to the payment of the said bills of the petitioner and have not paid the same. It is alleged by the petitioner that demands were made both orally and in writing from the respondent to pay the said sums but the respondent has failed and neglected to do so and in consequence the petitioner by a cable dated the 11th of November, 1968 regretted that no payment has been received by them in respect of their outstanding bills and asked for remittance of Rs. 75,000/- on account and requested them to intimate when the matter between them can be finalised. The respondent by their telegram dated the 11th of December, 1968 intimated that as per their account no amount was payable to the petitioner and also asked for sending the Accountant of the petitioner for scrutiny of the bills. The petitioner by their telegram and letter dated the 19th February, 1969 to the Director, Uttar Pradesh Government Cement Factory, Dalla Project, Mirzapur pointed out that the allegations of the respondent were incorrect and inter alia requested to send the due amounts and if the said sum is not paid petitioner gave notice that they will take necessary steps for safeguarding their interests. Thereafter various correspondences and telegrams ensued between the parties and ultimately on the 17th/20th of July, 1970, the petitioner regretted that no payments were received by them in respect of their outstanding bills amounting to Rs. 5,02,786.75 and pointed out that under clause 17 of the contract between the parties payments of the bills should have been made within 30 days upon presentation and although more than one year has elapsed after the presentation of the bills no payment has been received by the petitioner and they finally invoked the arbitration clause of the contract and called upon the respondent to nominate and appoint the arbitrator in terms of the arbitration clause within 15 days thereof otherwise the petitioner gave notice that they will appoint a person as the sole arbitrator to proceed with the matter. Copy of the said letter was also

sent to the Secretary Government of Uttar Pradesh, Industries Department, the nominated arbitrator under the agreement with a request to enter upon the reference. As no reply was received by the petitioner to their said notice dated the 17th/20th of July, 1970 the petitioner again wrote a letter to the Director, Uttar Pradesh Government Cement Factory, Dalla Project dated the 22nd of August, 1970 with a copy to the Secretary, Government of Uttar Pradesh Industries Department, Lucknow stating that as one month has elapsed after the appointed arbitrator was requested to enter upon the reference in terms of the arbitration agreement for adjudicating the disputes and differences between the parties, the petitioner gave notice that they have no alternative but to move the Court for appointment of an arbitrator without any further reference to the respondent. Thereafter the petitioner by a letter dated the 12th of September, 1970 addressed to the Secretary Government of Uttar Pradesh, Industries Department, Lucknow with a copy to the Director, Uttar Pradesh Government Cement Factory, Dalla Project, again gave a notice as the dispute between the parties has not been referred to the arbitrator in terms of the arbitration clause in the agreement and requested the appointed arbitrator, that is, the Secretary to enter upon reference forthwith on receipt of the said letter and fixing the date of the meeting of the arbitrators for preliminary directions etc. As there was no response either from the appointed arbitrator or the Director of Uttar Pradesh Government Cement Factory, Dalla Project, the petitioner finally by a letter dated the 7th of January, 1971 to the Director Uttar Pradesh Government Cement Factory, Dalla Project gave a notice under Section 8 of the Arbitration Act that they have appointed Dr. Tapas Banerjee, Barrister-at-Law as a sole Arbitrator to adjudicate the disputes that have arisen between the parties and the respondent to call upon to concur in such appointment within 15 days after the service of the said notice and if they failed to concur, the petitioner would apply to appropriate Court for appointment of Dr. Banerjee as the sole Arbitrator with directions to enter upon reference and make an award. It is only after the said notice under the Arbitration Act being served on the respondent, the Director, Uttar Pradesh Government Cement Factory, Dalla Project replied by a letter dated the 29th of January, 1971 and contended that it is only the Secretary to the Govern-

ment of Uttar Pradesh, Industries Department who can be appointed as sole Arbitrator for adjudication of disputes between the parties and the points of dispute have already been referred to by the petitioner to the Secy., Govt. of Uttar Pradesh, the Arbitrator whose decision is awaited. It was also contended that the agreement does not provide for appointment of any other person as the Arbitrator. By a letter dated the 6th of Feb., 1971 the respondent intimated the petitioner that as the petitioner by their letter dated the 7th of Jan., 1971 has referred to the Government for orders the Government is examining the same with reference to the arbitration proceeding desired by the respondent and in the meantime the Deputy Director, Uttar Pradesh Government Cement Factory, Dalla Project by the said letter alleged that six bills of the petitioner have not been received by them and asked for copies of the same to enable them to examine the said bills. There were certain internal correspondences of the respondent which have been annexed to the affidavit-in-opposition of Sukhamay Ghosh affirmed on the 26th of May, 1961 referring to the views taken by the respondent's Departments including Law Department, according to which there was no dispute to be referred to the arbitration and as such there cannot be any question of appointment of an arbitrator and neglect or refusal on the part of the arbitrator to act and appointment of sole Arbitrator under Section 8 of the Arbitration Act. Finally, the respondent by a lengthy letter dated the 15th of April, 1971 addressed to the petitioner *inter alia* contended that as there is no dispute between the parties and the matter is pending investigation by the respondent and after their investigation if any dispute arises then the disputed matter can be referred to adjudication of the Secretary, Government of Uttar Pradesh, Industries Department in terms of the arbitration clause and as there was no dispute Section 8 of the Arbitration Act has no application. Thereafter on the 20th of April, 1971 the petitioner made this application for removal of the appointed arbitrator under the agreement and appointment of Dr. Tapas Banerjee, Barrister-at-Law or such other person as the Court deemed fit and proper as Arbitrator to adjudicate the dispute between the parties.

5. Mr. Sankar Ghosh with Bhaskar Gupta appearing for the petitioner submitted that the disputes between the parties arising out of the contract are covered under the arbitration clause and in spite of the notice under Sec-

tion 8 of the Arbitration Act, the respondent has failed to appoint any Arbitrator and order should be made as prayed for. Mr. Ghosh submitted that from the facts it is quite clear that the Arbitrator named in the arbitration agreement, that is, the Secretary Government of Uttar Pradesh, Industries Department, has neglected or refused to act in spite of repeated requests by the petitioner by their letters dated 17th/20th of July, 1970 and final letter dated the 7th of January, 1971 as the said appointed Arbitrator did not comply with within one month from the requests made by the petitioner to enter on and proceed with the reference within the meaning of the explanation to Section 9 of the Arbitration Act. In these circumstances, there has been positive failure, neglect and refusal on the part of the appointed Arbitrator. As such he is liable to be removed under Section 11 (1) of the Arbitration Act and the sole Arbitrator Dr. Tapas Banerjee should be appointed to adjudicate the disputes as notice under Section 8 (1) (c) of the Arbitration Act has been duly served on the respondent and the respondent having failed to comply with the notice the petitioner is entitled to the order asked for.

6. Mr. Salil Hazra appearing for the respondent was fair enough to concede that he cannot sustain the stand taken by his Client that there is no dispute between the parties. As such there cannot be any reference to arbitration in terms of the arbitration agreement. He contested the application mainly on the ground that there is no wilful or deliberate failure or neglect on the part of the named arbitrator that is the Secretary, Government of Uttar Pradesh, Industries Department to enter upon or proceed with the reference as he was labouring under a misapprehension or misconception as to the legal position of existence of a dispute at this stage. He submitted that in order to invoke Section 8 there must be neglect or failure or refusal to act on the part of the arbitrator which must be deliberate and wilful. Mr. Hazra referred to passage of Russell on Arbitration, 18th Edition page 99 wherein two English cases have been referred. — *Re Hawley and North Staffordshire Rly.*, (1848) 2 De G. & Sm. 33, and *Burkett Sharp and Co. v. Eastcheap Dried Fruit Co.* and *Perera*, (1962) 1 Lloyd's Rep. 267 in which Court held that in the facts and circumstances of those cases there were no refusals to act on the part of the arbitrators. He also referred to the decision *Nandaram Hanutram v. Raghu-*

nath & Sons Ltd., 93 Cal LJ 92 = (AIR 1954 Cal 245) where Bachawat, J., held that the existence of dispute or difference is a condition precedent to the exercise of the jurisdiction by the arbitrator under the arbitration clause and a dispute implies an assertion of a right by one party and a repudiation thereof by another. But the repudiation by the other party may be either express or implied and may be by words or by conduct. But as Mr. Hazra has already conceded and rightly, that he cannot now contend that no dispute has arisen between the parties as such the decision of Bachawat, J., is no longer relevant for the purpose of deciding the present application. Mr. Hazra further contended that the parties should be bound by their agreement and the disputes must be referred to the named arbitrator under the agreement where in the facts and circumstances as are disclosed by the correspondence between the parties including the internal correspondence of the respondent that there was a misconception in the mind of the arbitrator as to the correct legal position and as such he cannot be said to have refused to act or there is any failure or neglect on the part of an arbitrator under the agreement. As such the parties should refer the disputes to the named arbitrator and Mr. Hazra submitted that the Secretary, Government of Uttar Pradesh, Industries Department should be appointed as Arbitrator to adjudicate the disputes between the parties and the matter to be referred to him.

7. I may note here that the notice of the application with the leave of the Court has been duly served on the arbitrator, that is, the Secretary, Government of Uttar Pradesh, Industries Department but he has not chosen to appear to make any representation to this Court or explain the circumstances which are now alleged by the respondent, as to why he did not enter upon and proceed with the reference after the dispute was specifically referred to him by the petitioner and he was asked to enter on the reference. It is significant that, the named arbitrator never replied to the petitioner in spite of the fact he had been served with the letters dated 17th/20th July, 1970, 12th September, 1970 and 7th January, 1971 by the petitioner. It is sought to be contended by Mr. Hazra that the arbitrator communicated with the respondent and as such the respondent came to know that the arbitrator was taking the same view as the respondent and their Law Department took on the subject-matter,

that is, as there no dispute has arisen between the parties, the appointment of the arbitrator is premature. I may quote here a relevant statement contained in a letter from S. N. Acharya, Sanyukt Sachiv to the Director, Government Cement Factory, Dalla dated the 31st of March, 1971 which is as follows:—

"Here the dispute is yet to be referred to the Secretary (Industries) and recourse to Section 8 will be had only when he neglects or refuses to act. The Factory can send its reply to the notice of the above lines."

8. The notice referred to in the said statement in the letter dated the 31st of March 1971 is the notice of motion of this application served by the petitioner on the respondent.

9. Mr. Hazra has also referred me to all the correspondence between the parties and the internal correspondence of the respondent and submitted that in the circumstances when the arbitrator is labouring under a misconception of legal position he cannot be said to have refused to act or failed or neglected to act and the application for appointment of an Arbitrator by Court under Section 8 or removal of the arbitrator under Section 11 of the Arbitration Act do not arise. He further contended that the Arbitrator has not accepted the appointment as there is no evidence before the Court that the arbitrator signified his assent either to the petitioner or to the respondent accepting the office of the arbitrator in terms of the arbitration agreement. Mr. Hazra further contended that in the arbitration agreement the sentence "his decision shall be final and binding on the parties" signifies that the arbitrator was a *persona designata* and the parties intended not to supply the vacancy in case he refuses or neglects to act in terms of the arbitration agreement. It may be noted that this point has not been taken in the affidavits but it is now being argued from the Bar. Moreover, in my view, the contentions of Mr. Hazra are untenable as the arbitration clause itself is quite clear and the arbitrator is the incumbent in the office of the Secretary, Government of Uttar Pradesh at the time of reference of dispute to arbitration and can never be construed as an arbitration by a *persona designata*. Further the point not being specifically taken in the opposition it cannot be allowed to be taken from the Bar as that is a question of fact which the petitioner had no opportunity to deal with and assuming respondent can take that point as I have already held

that by interpretation of the arbitration clause it cannot be said that there was any intention as appearing in the said agreement that the vacancy of the arbitrator created by his neglect or refusal to act was not intended to be supplied. I cannot accept the contentions of Mr. Hazra for obvious reasons. Position as disclosed in the correspondence between the parties and the internal correspondence is that the arbitrator is completely under the control and spell of the respondent and lacks in the fundamental conception as to the powers and duties of an arbitrator and as such is incapable of acting as an arbitrator in the disputes between the parties and discharge his judicial function impartially without being influenced by the views and orders of the respondent. In my view, if he is allowed to be the arbitrator to adjudicate the dispute between the parties whole purpose and object of the arbitration would be frustrated. The conduct of the respondent and the appointed arbitrator being the present Secretary to the Government of Uttar Pradesh, Industries Department raises no doubt in my mind that it would be injustice and against all principles of equity and good conscience to refer the matter to the appointed arbitrator in the facts and circumstances of this case.

10. Mr. Bhaskar Gupta cited a Division Bench decision of the Madras High Court in *K. G. S. Venkatanarayana v. K. G. S. V. R. Lakshmidheva-amma*, (1947) 2 Mad LJ 520 wherein a dispute between the members of a Hindu Joint family was referred by an agreement in writing to an appointed arbitrator after a criminal proceeding was instituted in the Bombay Magistrate's Court by a party. In fact, there were alternative arbitrators that is, in case of failure of one other will act as an arbitrator. After the said agreement to arbitration the criminal proceeding was withdrawn from Bombay Court but each of the two named arbitrators refused to act. Thereafter an Advocate's notice was sent to each of the named arbitrators requesting them to reconsider the matter and consent to act as arbitrator. One of the arbitrators replied immediately and declined to act as an arbitrator. The other arbitrator neither acknowledged the receipt of the Advocate's notice nor replied to it. Thereafter a fresh criminal proceeding was started in Bombay Presidency Magistrate's Court, about two and half months after the notice of the Advocate was received by one of the arbitrators who did not reply to the said notice, suddenly gave

notice to the parties that he will hold the reference of the arbitration at his residence. It was contended that the said arbitrator not having acknowledged the receipt of the Advocate's letter clearly indicated that he had no intention to act as an arbitrator in the matter and as such the criminal proceeding in Bombay Presidency Magistrate's Court was started. It was also contended that the opposite party had approached the arbitrator and caused the arbitrator to enter into the reference under pressure. As such there will be no impartial justice before the arbitrator. In spite of such notice the arbitrator proceeded ex parte and made an award. The award was challenged and was set aside on the ground that there was no valid appointment of arbitrator as the arbitrator having refused to act cannot subsequently without a fresh submission by the parties enter into reference and the award was invalid. In that decision *Gentle. C. J.* at pages 521-22 has held:

"When asked by the respondent. In the letter of July 15, to reconsider his refusal and to act as arbitrator. Mr. Venkata Seshayya did not even acknowledge the letter. The Explanation to Section 9 of the Arbitration Act provides that the fact that an arbitrator, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request, may constitute a neglect or refusal to act within the meaning of Section 8. Assuming the respondent's letter of July 15, addressed to Mr. Venkata Seshayya, was a request within the contemplation of the section, in the light of his earlier refusal and since he did not comply with the request contained in the letter within one month, his conduct must constitute further refusal to act.

In the thirteenth edition of Russell on "Arbitration", it is stated at page 335 as follows:

"Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment. It has been so decided in the case of an umpire, and it would seem to be only reasonable that an appointment should not be considered to be effective until the person appointed has agreed either expressly or tacitly to exercise the functions of the office."

In *Sadik Husain v. Kaniz Zohra Begam*, (1911) 38 Ind App 181 (PC) it was observed by the Board at page 751:

"It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomi-

nation as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment."

The notice dated October 1, sent by Mr. Venkata Seshayya, by which he purported to make directions in the arbitration by fixing the date for the inquiry, was given after he had expressly refused to act; and, assuming the respondent's advocate's letter of July 15 (which Mr. Venkata Seshayya ignored) was notice contemplated by the Explanation to Section 9, after his omission to comply with the notice within one month, which omission was further refusal to act, as contemplated by the Explanation. Even if the respondent's letter of the 15th July was not such a notice, his refusal to act had been expressed five months before he purported to give directions as arbitrator and had not been withdrawn. In either event, Mr. Venkata Seshayya had done nothing regarding his appointment as arbitrator by the agreement of April 28, before he sent his communication of October 1, save to express and to indicate refusal to act.

In my view, when he wrote the communication of October 1, the time had passed within which he could have accepted the appointment and that that communication itself was not such acceptance. Before he wrote it, he did not take up the appointment by signifying his assent to it and he had divested himself of the character of an arbitrator. Further, there was no fresh submission by the parties to the arbitration".

11. In my view, although the facts in the Madras Case are somewhat different from the present one, but the principle, when an arbitrator should be held to have refused to act within the meaning of Explanation to Section 9 has been stated and I have no hesitation in applying the principle to the facts of this case where as I have already held that the arbitrator has refused to act after being called upon by the petitioner to enter on and proceed with the reference within the meaning of Explanation to Section 9 of the Arbitration Act.

12. I will once again briefly analyse the fact which appears from the admitted correspondence. The contract was entered into on the 27th of January, 1967 and it appears that the work under the contract was completed before November, 1968. The petitioners by their telegram dated the 11th of November, 1968 sent to the

respondent recorded with regret that after discussions no payments of their outstanding bills have been received. There was no response to the said telegram and the petitioner again by another telegram dated 23rd of November, 1968 requested the respondent to remit payment of the outstanding bills and also referred to the telephonic talk in the meantime. Thereafter, for the first time, the respondent responded by a telegram completely denying any liability to the petitioner as in the respondent's account nothing was found payable to the petitioner. Thereafter it appears that various letters were exchanged between the parties and also a telegram dated the 6th of July, 1970 sent by the petitioner to the respondent on the subject but nothing happened. Ultimately, by the notice dated 17th/20th of July, 1970 sent to the respondent and copy to the named arbitrator the petitioner invoked the arbitration clause in the contract and called upon the respondent to nominate and/or appoint the said arbitrator within 15 days and also requested the named arbitrator to enter into the reference. There was no response from the respondent or the arbitrator. The named arbitrator had not the ordinary courtesy to acknowledge the receipt of the letter to the petitioner although the said letter was a formal notice under the Arbitration Act on the face of it. Thereafter the petitioner by a series of letters addressed to the respondent and the said arbitrator being letters dated 22nd August, 1970, 12th September, 1970 and 7th January, 1971 requested formally the arbitrator to enter on and proceed with the reference and asked the respondent to take steps in the matter of the reference but no reply or response was received by the petitioner either from the respondent or the arbitrator. It was only for the first time by the letter dated the 29th of January, 1971, the respondent through the Director, Uttar Pradesh Government Cement Factory, Dalla, replied to the statutory notice under Section 8 of the Arbitration Act dated the 7th of January, 1971 served by the petitioner on the respondent which is set out hereunder:—

"BY REGISTERED POST WITH A/D

No. D-7 (XXIVL) 67-68-1424

From:—

The Director, Government Cement Factory, Dalla Mirzapur.
Recd. on 29-1-71.

To

M/s. Gopal & Kumar, 14, Netaji Subhas Road, Calcutta-1.

Dated Dalla Jan. 20, 1971.

Sub.:— Notice for arbitration Proceedings.

Dear Sirs,

Please refer to your letter No. RK/U-3/71/36. dated 7-1-71 purporting to be a notice under Section 8 of the Arbitration Act, 1940, for appointment of Sri Tapesb Banerjee as Sole arbitrator for adjudicating in the dispute between you and the Factory administration.

Section 28 of the agreement entered with you only provides for appointment of Secretary to Government of Uttar Pradesh Industries Department, as sole arbitrator for adjudicating in the dispute between you and the factory administration arising out of the contract for clearance of consignments from Calcutta Port and their handling at the Port as well as at the destination point entered with you. The points in dispute have already been referred by you to the Secretary to Government of Uttar Pradesh, Industries Department and his decision in the matter is awaited. The agreement does not provide for appointment of any other person as arbitrator and, as such, we totally disagree with contents of your letter under reference.

Yours faithfully,

Sd/-

(S. P. Bhatnagar)

Director.

(contd. on col. 2)

Sl. No.	Bill No.
1.	22
2.	203
3.	255
4.	256
5.	257
6.	104

Date.	Amount.
24.4.67	Rs. 6,682.50
18.10.67	Rs. 55.00
4.11.67	Rs. 65,000
4.11.67	Rs. 245.00
5.11.67	Rs. 50.00
2-3-67	Rs. 15,000.00
	<u>Rs. 22,097.50</u>

Please send copies of the same with a certificate of non-payment to enable us to examine it and take necessary action.

Yours faithfully,

Sd/- Ashok Chandra

Deputy Director.

For Director.

14. In the circumstances the petitioner naturally had no other alternative but to make this application under the Arbitration Act for removal of the named arbitrator and appointment of arbitrator by the Court and took out a notice of motion on the 1st of April, 1971 of this application and served the same on the respondent. The respondent after receiving the notice of the application through the Director, Government Cement Factory, Dalla, by a long letter dated 15th of April, 1971, inter alia, contended that there was no dispute between the parties as the Gov-

13. After the said letter the respondent sent another letter dated the 6th of February 1971 to the petitioner in continuation of the said letter dated the 29th of January, 1971 which is as follows:—

No. D-7-1485/

Dated, Dalla, February 6, 1971.

From:

The Director, Government Cement Factory, Dalla (Mirzapur)

To

M/s. Gopal & Kumar, 14, Netaji Subhas Road, Calcutta-1.

Dear Sirs,

In continuation of this office letter No. D-7 (XXIVL)/67-68-1424 dated January 29, 1971, I am to say that your letter of January 7, 1971 has been referred to Government for orders and they are examining it with reference to the arbitration proceedings desired by you. We shall revert on the subject as soon as Government's orders in the matter are received. In the meanwhile I am to say that your undermentioned six bills included in the list of outstanding bills sent with your letter of RK/V-3/70, dt-17-7-1970 do not appear to have been received by us.

ernment was examining the alleged claim of the petitioner and after examination, the Government will know the position and after that if any dispute remained that may be referred to arbitration. In substance they alleged that there is no ground for petitioner's present application and the same being premature. It is clear from the conduct of the respondent that their whole idea is to delay the settlement or adjudication of the dispute between the parties which has arisen in 1968 under the contract as long as possible under various pleas. It also appears that the arbitrator is completely under the control and influence of the respondent and in fact Mr. Hazra has clearly admitted before me that the arbitrator did not think it necessary to make any communication to the petitioner but he intimidated the respondent that he was holding the same view with

the respondent that there is no dispute existing between the parties, as such the question of invoking the arbitration clause has not arisen, being premature. The matter being under consideration of the respondent and until an order is made by the Government on the subject no dispute can arise. The whole attitude of the respondent and the arbitrator seems to me against all principle of natural justice, common sense and complete denial of ordinary rights of a citizen. The respondent and the arbitrator seem to have taken the law in their own hand and acted in a high-handed manner denying the legal rights of the petitioner under the said contract and it is only after services of the statutory notices under Section 8 of the Arbitration Act and the notice of motion of this application they are setting up all sorts of frivolous and untenable pleas which cannot be entertained or accepted in a Court of law. The submission of Mr. Hazra on behalf of the respondent that as the arbitrator was labouring under a misapprehension as to the basis of his jurisdiction, being the existence of dispute under the contract, and there was no dispute yet as the respondent is still considering the alleged claim of the petitioner, that is why, the arbitrator thought it fit not to show the ordinary courtesy of replying to the series of the requests made by the formal notices to him to enter upon and to proceed with the reference. In the circumstances it is clear from the conducts of the respondent and the arbitrator that the named arbitrator i.e., the present Secretary, Government of Uttar Pradesh, Industries Department is an unfit and incapable person to act as an arbitrator in terms of the arbitration agreement between the parties.

15. As I have already held that the arbitrator has neglected and refused to act within the meaning of the Explanation to Section 9 of the Arbitration Act he is liable to be removed under Section 11 (1) of the Arbitration Act and the petitioners are entitled to an order in this application.

16. In the result, I make an order appointing Dr. Tapas Banerjee Barrister-at-Law, of No. 1/1B, Deodar Street, Calcutta-19 as an arbitrator to adjudicate the dispute which has arisen between the parties in respect of the agreement dated the 27th of January, 1967 and he is to enter upon the reference on a signed copy of the minute of this order and he is to make his award within four months from the date of his entering reference. I am appointing Dr. Tapas Banerjee not

as the appointed arbitrator of the petitioner but as an arbitrator whom I think a fit and proper person to adjudicate the disputes between the parties. The respondent to pay the costs of this application. The arbitrator and all parties to act on a signed copy of the minutes and the petitioner to complete the order.

Order accordingly.

AIR 1972 CALCUTTA 74 (V 59 C 13)
SALIL KUMAR DATTA, J.

Mofazzel Mondal and another, Defendants-Appellants v. Anachhaddin Sardar and others, Plaintiffs-Respondents.

A. F. A. D. No. 78 of 1961. D/-7-6-1971.

Debt Laws — Bengal Agricultural Debtors' Act (7 of 1936), Section 37-A — Effect of setting aside sale — The effect of setting aside execution sale in a decree for debt on an application of one of joint debtors is to revive the title of all the joint debtors but the applicant joint debtor alone is entitled to retain possession till the extinguishment of debt. Non-applicant joint debtors are free to alienate their shares and the alienee becomes entitled to declaration of title and joint possession. AIR 1949 Cal 125 and AIR 1948 Cal 31, Rel. on; AIR 1953 Cal 323, Dist.

(Paras 8, 9, 10)

Cases Referred: Chronological Paras
(1953) AIR 1953 Cal 323 (V 40) =
88 Cal LJ 180. Lankeswar Hal- 6
dar v. Ram Gopal
(1949) AIR 1949 Cal 625 (V 36), 6
Sudarshan v. Karunasindhu
(1948) AIR 1948 Cal 31 (V 35) =
51 Cal WN 859, Gopi Ballav v. 6
Aswini Kumar

Syama Charan Mitter, for Appellants; Mukunda Behari Mullick, Mahendra Kumar Ghosh and Bishnu Ranjan Samajpati, for Respondents.

JUDGMENT:— This is the defendants' appeal against the judgment of concurrence decreeing the plaintiffs' suit for declaration of title and joint possession. The plaint case is as follows:

The suit property is comprised in Dag No. 1973 in Khatian No. 46 measuring 60 acres in P. S. Hanskhali in District Nadia. The suit land was settled by the landlord in 1926 by registered pattah to Moala Bux and Mahiruddi Mondal. The defendants are the heirs and legal representatives of Mahiruddi. After the death of Moala Bux his brother Jalil Mondal and

on his death Fakir Chand inherited the property and had been in joint possession. Fakir sold the suit property to the plaintiffs by a kobala dated August 13, 1956, but as the plaintiffs went to take possession, they were prevented from taking possession by the defendants. Accordingly, the suit was filed on August 20, 1956 by the plaintiffs for a declaration of their 8 annas title and joint possession with the defendants.

2. The suit was contested by the defendants Nos. 1 and 2 who filed their joint written statement stating that the settlement was, in fact, taken by Mohiruddi and Moala Bux had no title to it. This jama was sold in auction for arrears of rent and Mohiruddi instituted proceedings under Section 37-A of the Bengal Agricultural Debtors' Act before the Special Debt Settlement Board, Ranaghat and obtained return of the jama on the basis of the decree under the award and the decretal dues had been paid off. Moala Bux having no title. Jalil and thereafter Fakir obtained no interest in the property and never had any possession. The suit was, accordingly, misconceived, not maintainable in law and barred by limitation.

The suit was tried on evidence before the learned Munsif who came to the finding that the settlement was taken both by Moala Bux and Mohiruddi, and, exclusive possession of Mohiruddi was not established. It was further held that the plaintiffs acquired 8 annas interest in the suit property and they were entitled to the reliefs prayed for in the suit. The suit was, accordingly, decreed.

3. An appeal was preferred by the defendant and the appellate court affirmed the findings of the trial court. A new point was taken in respect of the proceedings under Section 37-A of the said Act. Mohiruddi got back the property under the provisions of the award passed in the said proceedings and duly paid the amount under the award. According to the appellate court the title of Moala Bux was not thereby affected though possession was given to Mohiruddi by the Board. There was also no case of ouster or assertion of any hostile title by the defendants. Accordingly, the plaintiffs were entitled to the declaration and joint possession prayed for in the suit. The present appeal is against the said decision by the appellants.

4. Mr. S. C. Mitter, the learned Advocate appearing for the appellants, has contended that on an interpretation of the relevant provisions of the Section 37-A of the Act. it would ap-

pear that the sale in the execution of the decree extinguished the title of the judgment-debtors in the jama. When one of the debtors applied for setting aside the sale, and on the basis of the award passed in his favour the sale is set aside and the land was restored to him, such act amounts to a negation of the title of the other co-sharers. The other co-sharers accordingly could claim no interest or title in the property and there was no provision for reverting title to them.

5. Mr. Mukunda Behari Mullick, the learned Advocate for the plaintiffs-respondents contended that the award, which set aside the sale that extinguished the title of all co-sharers, revived the title of all co-sharers. He referred to Section 9 (3) of the Act which provided that in case of payment of the debt by a debtor applicant pursuant to an order of the Board, the other persons so liable for the debt, would be liable to contribute to the debtor applicant in respect of the sum paid by him under the said order. This Section 9 provides for settlement of ancestral or joint debts and not of debts which culminated in a decree and an auction sale of the holding. According to Mr. Mullick the same principle should be extended to the cases covered by Section 37-A of the Act.

6. There is no dispute that the application under Section 37-A can be made by any of the debtors as provided in sub-clause (III) of clause (b) of sub-section (1) of Section 37-A, reserving such right to "such person" which may be liable for the debts jointly with others. This was so held in *Sudarshan v. Karunasindhu*, AIR 1949 Cal 625, and it was also held that for relief under Section 37-A, it is not necessary that all the debtors should join the application, following the decision in *Gopi Ballav v. Aswini Kumar*, 51 Cal WN 859 = (AIR 1948 Cal 31).

7. In *Gopi Ballav's* case, it was noted that though the sale was set aside, nothing was said about title and it was observed by Chakravarti, J.: (as his Lordship then was) speaking for the Court as follows:

"If such an order (setting aside the sale under sub-section (8) is made, the position which results is that since the section says nothing about this, title apparently reverts to all the original owners, although the application might have been made by some of them, but possession is restored only to the applicant or applicants." (P. 862) (of Cal WN) = (at p. 33 of AIR).

The Court also noted that possession is to be given to the applicants who

are to be deemed as the debtors and the non-applicants, if the title reverted to them, may alienate their shares, but neither they nor their transferees can obtain possession so long as the debt is not paid off, for which period the property must remain in possession of the applicants under the terms of the section. The real question was posed in the above case in the following terms:—

"When the debt is paid off, a question may well arise, as to whether the applicants will be entitled any longer to retain their exclusive possession. It will then have to be decided whether the section really revives the title of even the non-applicants and, in effect, makes a gift of them of their shares, although gift of a deferred character, or whether title really vests in the applicants alone, although it is not expressly so said."

The question was not finally answered as it was not necessary in the facts of the case before the Court. Mr. Mitter also referred to a decision in *Lankeswar Halder v. Ram Gopal*, 88 Cal LJ 180 = (AIR 1953 Cal 323) where it was held that to give the joint debtors the right of the benefit of the provisions of Section 37-A, it was necessary for them to make application within the period of limitation. The Court was concerned, in this case, with the question as to whether the application by other co-sharers was barred by limitation, and the case really was not concerned with the question of title in the property the sale of which was set aside.

8. Section 37-A provides an elaborate scheme for setting aside sales of immoveable property in execution of the decrees and restoration of possession thereof. In fact the object of the Amending Act II of 1942 which was inserted as Section 37-A was for the protection of the holdings of the debtors who lost them by hurried decrees and sales effected by the landlords and creditors. In short, the material provision in sub-section (1) is that the application for relief can be made by anyone of the joint debtors when the property is sold in execution of a decree relating to a debt. Under sub-section (2) the application has to be made to the Board. Sub-section (4) gives the power to the Board to make an estimate of the average annual gross receipts derivable from the property sold during 1934 to 1938. Under sub-section (5), after the estimate is made, an award shall be made by the Board directing the applicant to pay annually in cash to the decree-holder half of the value of annual gross receipts un-

til debt is extinguished or until 20 years have expired from the award and also annual rent, with further direction to pay in cash half of the cash receipts toward bona fide mortgage subject to which the property was sold. Under sub-section (7), after the award is made, the applicant shall be deemed to be the debtor. In sub-section (8) it is provided that on presentation of the copy of the award to the Civil Court, at whose order the property was sold, such Civil Court shall direct that the sale be set aside and the debtor, meaning the applicant, with his under raiyat, if any, shall be restored to possession of the property. By sub-section (9) the debtor so restored to possession under sub-section (8), shall not, during the period the debt remains unsatisfied or until expiration of 20 years, alienate by sale, lease, gift or other form of transfer or create any charge thereon and any alienation or charge so made shall be void.

9. These sub-sections do not make any provision about title in respect of the property, and, it appears to me that no provision was necessary in the circumstances. If the sale is set aside, the legal effect would be that there was no sale at all, the further effect whereof would be that the title of the original holders in the property was never disturbed but remained in them all through and we have seen that protection of holdings sold in execution of a decree for debt is the purpose of the Act including the amending Acts. Though the title of the original holder thus remains with them in spite of the sale since set aside, the applicant who moves for the award is put in possession of the property, for enabling him to pay of the instalments under the award from the usufructs of the property so long as the debts or subsisting mortgage are not paid off. This is an indirect mode of obtaining contribution from the co-sharers which, in case of other debts, is provided in Section 9 (3). For securing the due payment under the award, the debtor in possession has been denied the right to alienate the property or create any charge thereon during the period the award remains unpaid or until expiration of twenty years from the award. The other co-sharers are not under any restriction as to transfer but their transferees will not be entitled to possession of the property till the debt is paid off or the expiration of twenty years from the award when the debt is to be deemed to have been satisfied. On such satisfaction of the debt, the right of the co-sharers to possession springs into force, while

their title to the immoveable property remains unaffected on account of the sale being set aside on the filing of the award.

10. Accordingly. I am unable to accept the contention of Mr. Mitter that only the applicant for the award which in due course sets aside the sale would be entitled to the property. Further, the preservation of the title will not mean a gift of the property to the non-applicant debtors, as the payments for satisfaction of the debts under the award will be made from the usufructs of the property. This interpretation is, thus, consistent with the notions of equity and if legislature thought otherwise, we would find express provisions conferring title of the property to the applicant debtor, which in view of the manner, as provided, in which the debt is to be satisfied, could mean an unfair advantage to the applicant debtor at the cost of his co-sharers who failed to join or apply for some reason or other, thereby frustrating the objects for which the Act and its amendments have been enacted. Accordingly the transferee from a co-sharer would be entitled as in the present case to a declaration of title and possession jointly with the defendant as prayed for in view of the satisfaction of the debt under the award.

11. As the contentions raised on behalf of the appellants fail, this appeal is dismissed, without, however, any order as to costs in this Court.

Leave under Clause 15 of the Letters Patent is prayed for and is granted.

Appeal dismissed.

AIR 1972 CALCUTTA 77 (V 59 C 14)

RAMENDRA MOHAN DATTA, J.

Himangsu Sekhar Paul, Plaintiff v. Kishori Lal Paul and others. Defendants.

Suit No. 69 of 1963, D/- 16-2-1971.

High Court Rules and Orders — Calcutta High Court Original Side Rules, Chapter 26, Rule 51 — Chamber Summons — Application relating to conduct of a reference pending before Special Referee filed by a party whose request to that Referee to make a special report was declined has to be moved by way of Chamber Summons and not by way of a notice of Motion. (X-Ref:— Chapter 20, R. 3). (X-Ref:— Civil Procedure Code (1908), Section 151). Rulings of Chitty and Chaudhury JJ. D/-15-5-1917 and 17-5-1917 (Cal), (1844) 12

IO/JO/E373/71/JRM/AKJ

M & W 685 and Suit No. 2020 of 1947, D/- 13-9-1961 (Cal), Followed.

(Paras 10, 11 and 18)

When the order on that application has held the Referee to have wrongly allowed an oral plea without an opportunity to the other party, such order also comes under the Rule.

(Para 12)

With the express provision in the Rule governing such application neither Chapter 20, Rule 3 nor Section 151, Civil Procedure Code can apply.

(Para 13)

When the question whether the application should have been moved by way of Chamber Summons or by Notice of Motion has not been raised before the Court, it should be decided unless otherwise ordered at the taxation stage.

(Para 14)

In view of the rulings of Chitty and Chaudhury, JJ. D/- 15-5-1917 and 17-5-1917 — They have become the law of the court having been followed from the year of their pronouncement — That application must be taxed as for Chamber Summons and not as for a Notice of Motion

(Paras 16 & 18)

Cases Referred: Chronological Paras

(1961) Suit No. 2020 of 1947 D/- 13-9-1961 (Cal), Hanutmul Boid

v. Federation Bank of India

17

(1844) 12 M & W 685 = 152 ER

1374, Scales v. Cheese

16

ORDER:—This matter has come up before me for review of taxation of the Bill of Cost No. 272 of 1967 and for an order, Inter alia for varying and/or setting aside the findings of the Taxing Officer given on 12th August, 1970. The matter in question arises out of an application made before A. N. Sen J by one of the parties herein claiming the following reliefs:—

(a) Time to file the report by the Special Referee be extended by two months from date of the order to be made hereon;

(b) The Special Referee be directed to proceed with the reference in terms of the consent decree and orders dated 8th March, 1965 and 26th August, 1965;

(c) That the Special Referee be directed to follow the procedure laid down by the reference rules of this Court and in the Code of Civil Procedure;

(d) The Special Referee do proceed with reference in respect of matters and/or issues which arise under the consent decree and not to bring in matters which are beyond the scope of enquiry;

(e) The orders by Special Referee for filing of additional or amended statement of facts by oral application on behalf of plaintiff may be set aside;

(f) In the alternative, Special Referee do file a special report as to why the plaintiff is allowed to file the additional statement of facts in the manner sought to be done and at this stage:

(g) Costs of and incidental to this application may be paid by the plaintiff, and

(h) Such further order or orders be made as to this Hon'ble Court may seem fit and proper.

2. That application was moved before A. N. Sen J. on a notice of motion and an order was made *inter alia* to the following effect:

"And it being made clear that this Court in setting aside the order of the Special Referee as hereinafter mentioned only on the ground that he made the order without a proper application and without giving the defendant opportunity to oppose the same and that this Court is not setting aside the said order on the ground that such an order should not have been made.

It is ordered that the time for the Special Referee to file his report herein be and the same is hereby extended by six months from the date hereof. And it is further ordered that the orders of the said Special Referee for filing of additional or amended statement of facts by oral application on behalf of the plaintiff be and the same is hereby set aside. And it is further ordered that the plaintiff be at liberty to make proper application before the Special Referee for leave to file the additional statement of facts and that such application for leave shall have to be moved upon notice thereof to all the defendants with a copy of the proposed additional statement and also the grounds on the basis of which it is sought to be made and that the defendants be at liberty and entitled to oppose the said application if so advised by using affidavit and that the said Special Referee shall thereupon decide the question in accordance with law upon the materials placed before him. And it is further ordered that the parties concerned and the Special Referee do act on a copy of the minutes of this order signed by an officer of this Court being shown to them and it is further ordered that each party do bear and pay its own costs of and incidental to this application to be if necessary taxed by the Taxing Officer of this Court."

3. When the matter came up before the Assistant Taxing Officer it was contended on behalf of the applicant that the matter before A. N. Sen J. should have been moved by chamber summons and not by way of notice of motion and the bill of cost should be

allowed in accordance with the scale of fees or charges prescribed for chamber summons. The Assistant Taxing Officer upheld the contention. The matter was heard on appeal by the Taxing Officer on 12th August, 1970 and the same was set aside by the said Taxing Officer. It has now come up before this Court for review.

4. Two points are involved in this application. Firstly, whether the application before A. N. Sen J. was such that it should have been moved by way of chamber summons or by way of a notice of motion and secondly, if it was to be moved on chamber summons whether at the stage of taxation the charges should be allowed by the officer concerned on the basis as prescribed for chamber summons.

5. As regards the first point the question is to be decided with reference to the Original Side Rules of this Court. Chapter VI, Rule 11 enumerates 18 items which are to be disposed of in chambers by a Judge. Items Nos. 12, 13 and 18 thereof are relevant for the purpose of consideration of this application and they are set out as follows:—

"12. Applications for time to plead, for leave to amend, for discovery and production of documents, and generally all applications relating to the conduct of any suit or matter.

13. All proceedings in execution, or otherwise under a decree or order.

18. Such other matters as are not expressly required to be disposed of in Court and which the Judge thinks fit to be heard in Chambers, and such other applications as are directed to be made in Chambers."

6. The main Chapter which concerns an application to be made in a pending reference matter is Chapter XXVI of the Original Side Rules which deals with Reference Rules. The relevant rules under the said Chapter XXVI are Rules 50 and 51 which are as follows:

"50. Any officer taking a reference may at any time, pending the reference or on its conclusion, apply for the opinion of the Court on any question which may arise on the reference and for such purpose may report specially. Such special report may be made at the instance of any of the parties or of the officer himself, and shall be brought before the Court or Judge, within such time and by such party as the officer shall direct, by motion on notice that such special report may be confirmed, discharged or varied or that any directions may be given thereon; and on the hearing of

such motion the same may be confirmed, discharged or varied as the Court or Judge shall deem just, or such direction may be given as shall appear to be necessary or expedient in that behalf.

Where such special report is not brought before the Court or Judge in accordance with the directions given, the officer may himself place the same before the Court or Judge, and such directions may be given as may be thought necessary."

51. In case an officer refuses or declines to make a special report when requested by a party so to do, such party may apply to the Judge in Chambers, on summons to the other parties to the reference, for an order requiring the officer to report specially.

The Judge may in his discretion make such order, upon such terms as to costs and otherwise as he may think fit."

7. Another provision under the Original Side Rules which need consideration are items 54 and 55 of Appendix Z which prescribes a list of prescribed Chamber Matters.

8. Chapter XX of the Original Side Rules deals with matters relating to Motions and Rules Nisi and Rule 3 thereof will required consideration in deciding this application. The said R. 3 is set out as follows:

"3. Except wher otherwise provided by Statute or prescribed by these rules, all applications, which in accordance with these rules cannot be made in Chambers, shall be made on motion after notice to the parties affected thereby, unless, according to the practice existing at the time of the passing of these rules, an order might be made ex parte in the first instance; but the Court, where satisfied that the delay cause by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order, ex parte, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court may think just, and any party affected by such order may move to set it aside."

9. In the light of the above provisions, the facts leading to the said application made before A. N. Sen J. have to be considered. In the pending reference proceeding before the Special referee directions were given whereby the plaintiff was to file an additional statement of facts. The same was objected to by the clients of Messrs. J. N. Mitra &

Co. who requested the Special Referee to make a Special report seeking the view of the Court about the filing of such additional statement of facts. The Special Referee declined to do so. Thereupon Messrs. J. N. Mitra & Co. on behalf of the defendant Nos. 1 to 6 and 8 made the said application before A. N. Sen J.

10. The several prayers made herein if considered together would substantially make it an application relating to the conduct of the reference proceedings pending before the Special Referee.

11. In my opinion, the said application before A. N. Sen J. is essentially an application made under Chapter XXVI Rule 51 which expressly provides that such an application has to be made to the Judge in Chambers on Summons to the other parties to the reference. Under the said provision the Judge may, in his discretion, make such order as he would think fit.

12. The sum and substance of the said order of A. N. Sen J. was to the effect that the Special Referee should not have made the order on the oral application of the plaintiff and should have given an opportunity to the defendants to oppose the said application. Obviously that order has been made by the learned Judge under Rule 51 Chapter XXVI of the Original Side Rules. Chapter VI Rule 11, Item 13 of the Original Side Rules contemplates that all proceedings under a decree could be made by Chamber Summons. So also under Item 21 all matters relating to the conduct of any suit or matter should be done by Chamber summons.

13. Mr. B. C. Dutt appearing on behalf of the clients of Mr. H. K. Mitter, Solicitor, contended that Chapter XX Rule 3 should be applied and such a matter should be made by way of notice of motion as has been done before A. N. Sen J. In my opinion, that provision has no application in the facts and circumstances of the application which was disposed of by A. N. Sen J. That provision cannot have any application when there is an express provision prescribed by the said Original Rules dealing with such matter. Accordingly, I cannot accept that contention. Mr. Dutt then contended that the said application before A. N. Sen J. must have been made under Section 151 of the Code of Civil Procedure and the said section had to be invoked in the interest of justice inasmuch as the Special Referee failed to do justice by

his said order. It is settled law that Section 151 of the Code of Civil Procedure can have no application when there is an express provision whereunder the application can be made. Lastly, Mr. Dutt contended that in deciding the said application A. N. Sen J. should be deemed to have taken into consideration the maintainability of the said application by way of Notice of Motion and that point should not be re-opened and re-considered at the stage of taxation. In other words, that point was finally decided by A. N. Sen J. and the application for re-opening the same over again at the stage of taxation would be barred by res judicata.

14. I have already held that for the purposes of taxation the application before A. N. Sen J. was such that it should have been moved by way of Chamber Summons and not by way of Notice of Motion. The Court at that stage must have proceeded on the basis that it was a proper application to be disposed of in Court. The point was neither urged nor decided by the learned Judge. In that view of the matter for the purposes of taxation unless otherwise ordered the point should be gone into at that stage.

15. On the second point my attention has been drawn to the rule of practice which is being followed by the Taxing Office in such matters ever since 1917 pursuant to the Rulings of Chitty and Chaudhury JJ. The said practice direction provide as follows:

"Note by the Regr. (Mr. Hechle as Taxing Officer) on 14-5-1917

I suggest that the profession should be informed that in future if application which can be made in Chambers are made in Court the Taxing Officer will in the absence of a certificate tax the costs of the application as of a Chamber application.

"I see no particular objection of the Registrar in writing to the incorporated Law Society to remind them of what are properly Chamber matters but I think the attorneys ought to learn the Rules for themselves. I do not allow them to evade responsibility or to plead ignorance of the Rules with regard to paragraph 2 of the Note (I felt that I must take it that the Court considered that the application in question was proper for disposal in Court) I think that Counsel should not be allowed on taxation unless there has been a special certificate to that effect. This should apply to matters which have by inadvertence been dealt with in Court though they were real-

ly Chamber matters. It is the duty of the Counsel and Attorneys to see that the application is made in the proper place."

C. W. Chitty,
15-5-1917."

Chaudhury J. "I do not think it is any use to write to the incorporated Law Society Chamber application if made in Court should be taxed as Chamber application unless otherwise directed by the Court. The mere fact they are disposed in Court sometime, does not affect the question of taxation-I do not usually certify for Counsel in Chamber application.

A. Chaudhury
17-5-1917."

"The Taxing Office will please note and act accordingly.

H. H. Hechle
22-5-1917."

16. The said directives were being followed ever since 1917 in similar matters and accordingly such a practice has become the law of the Court. As observed by Tindal C. J. in *Scales v. Cheese*, (1844) 12 M & W 685 at p. 687 "Every Court is the guardian of its own records and master of its own practice."

17. In my opinion, since this practice has existed since at least 1917 I see no reason why the same should not be adhered to without even questioning the reason for doing so. In the case of *Hanutmull Boid v. Federation Bank of India in Suit No. 2020 of 1947 (Cal)* a similar point was raised in taxation and the same came up before G. K. Mitter J. who by his judgment and order D/- 13-9-1961 (unreported) disallowed the fees of counsel charged on the basis of a motion and allowed the fees on the basis of a Chamber application.

18. That being the position I decide that the Bill of cost No. 272 of 1967 in so far as the same related to the application which was disposed of by A. N. Sen J. should be passed in accordance with the charges prescribed for Chamber Summons and not as that of Notice of Motion. The applicant having succeeded should get the costs from Mr. Dutt's clients who opposed. Certified for Counsel.

19. Let the Registrar Original Side circulate the order in a concise form as a practice direction for the benefit of the profession and of the Taxing Office.

Order accordingly.

AIR 1972 CALCUTTA 81 (V 59 C 15)

S. K. CHAKRAVARTI, J.

Lalit Mohan Ghosh, Appellant v. Atal Mondal and others. Respondents.

A. F. A. D. No. 2231 of 1961, D/-14-I-1971.

Tenancy Laws — Bengal Tenancy Act (8 of 1885), Section 48-C, Proviso — Tenant remaining in continuous possession by asserting title as Korfa-tenant for more than 12 years after expiry of lease — Tenant acquires non-ejectable right under proviso to Section 48-C. (X-Ref:— T. P. Act (1882), Section 116). (X-Ref:— Limitation Act (1963), Articles 64-65). (Para 2)

Even if the doctrine under Section 116 of the Transfer of Property Act is applied, continuous possession have been assented to by the landlords. Otherwise it seems impossible to accept the proposition that the landlords would allow the erstwhile right to continue in possession for about 25 years after the expiry of the lease. The tenants had been holding over to the knowledge of the landlord continuously, openly, by asserting title as korfa tenants for more than 12 years, and under the doctrine of adverse possession have also acquired a non-ejectable right. (Para 2)

Cases Referred: Chronological Paras

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| (1959) AIR 1959 Cal 601 (V 46),
Gosta Behari v. Panchanon | 2 |
| (1941) 45 Cal WN 126, Saroj Basini Debi v. Kamala Ranjan | 2 |
| (1930) AIR 1930 Cal 262 (V 17)
= 33 Cal WN 1207, Gopal Chandra v. Khater Karikar | 2 |
| (1927) AIR 1927 Cal 279 (V 14)
= 31 Cal WN 282, Safar Ali v. Abdul Majid | 2 |
| (1917) AIR 1917 Cal 219 (V 4) =
24 Cal LJ 30, Paramananda Singh v. Syjou Singh | 2 |
| (1915) AIR 1915 Cal 625 (V 2) =
22 Cal LJ 119, Kadir Bux v. Birendra Kishore Manikya Bahadur | 2 |
| (1915) AIR 1915 Cal 787 (V 2) =
22 Cal LJ 154, Birendra Kishore v. Girish Chandra | 2 |
| (1907) 11 Cal WN 826 = ILR 34 Cal 396, Ratan v. Farshi | 2 |
| Amarendra Mohan Mitra and Arunendra Nath Basu, for Appellant; Manindra Nath Ghose and Jamini Kumar Banerjee, for Respondents. | |

JUDGMENT:— The only point that arises for determination in this appeal by the defendants is as to whether the plaintiff could claim a right to be declared as Korfa-Raiyats under the de-

fendants-appellants even after the expiry of the period of lease of their predecessor-in-interest, without any direct evidence to show that the landlords had given consent to such holding over.

2. Admittedly, the predecessor-in-interest of the plaintiffs was one Annada and he was in possession of the case-land on the basis of a Kabuliyat for a term of 7 years expiring with the last of the term does not necessarily create a tenancy of any kind (Gopal Chandra v. Khater Karikar, 33 Cal WN 1207 = (AIR 1930 Cal 262)) and though the assent of the lessor cannot be inferred merely from his delay in taking steps to evict the lessee (Ratan v. Farshi, (1907) 11 Cal WN 826), but in a case where the tenant retained possession for 11 years after the expiration of the lease, the Court inferred that there was tenancy by holding over (Safar Ali v. Abdul Majid, 31 Cal WN 282 = (AIR 1927 Cal 279)). The very fact that for about 24 years since the expiration of the term of the lease the erstwhile korfa-tenant continued in possession would go to show that the tenant had been holding over with the consent of the landlord. In Ratan's case the suit was brought within one year and 7 months after the expiry of the lease. That was too short a period to lead to a different conclusion. Mr. Mitra has also relied on the decision of this Court in (Paramananda Singh v. Syjou Singh, 24 Cal LJ 30 = (AIR 1917 Cal 219)). That was a case where the tenancy was governed by Act VIII of 1869. The period of the lease expired with the 12th of April 1907 and on the 8th and 15th of October 1910 notices had been served on the defendants who were also tenants, to quit. So the period was not long enough to raise an inference of consent on the part of the landlord. Moreover, in that case Their Lordships had also observed that the position might have been different if the provisions of the Bengal Tenancy Act had governed that case. Therefore, that case does not lay down any proposition that there cannot be any such holding over. Moreover, there is a clear decision of this Court in Gosta Behari v. Panchanon, AIR 1959 Cal 601 which would go to show that such a suit by the tenant would be admissible. That was also a case where the tenant was in possession on the basis of a Kabuliyat and on the expiry of that Kabuliyat the landlord filed a suit for ejectment but that suit was dismissed on account of bar of special limitation prescribed in Article 1-3 to Schedule III of the Bengal Tenancy Act. Therefore the landlords filed a suit claiming damages for use

and occupation from the expiry of the lease to 1353 B. S. with an alternative claim for rent. This Court held that whatever may be the ground for dismissal of the suit the fact remains that the respondents under-riayats were continuing to occupy their land without any break or interruption and the appellant landlord was no longer entitled to eject them. Mr. Mitra wants to distinguish that case on the ground that there an intervening suit to eject had been dismissed, but in my view that fact is not very much material. In this case also the plaintiffs acquired a non-ejectable right. A korfa tenant can be ejected under Section 48-C of the Bengal Tenancy Act. Certainly he could be ejected under Clause (c) of Section 48-C, on the ground that the term of his lease had expired, but there is a proviso to the main Section 48-C, and, under that proviso, an under-riayat shall not be liable to ejectment on the ground that the term of his lease has expired if he has been in possession of his land for a continuous period of 12 years whether before or after, or partly before and partly after the commencement of the Bengal Tenancy Amendment Act 1928 or has a homestead thereon. In this particular case, it is already in evidence that Annada and after him his heirs have been in continuous possession of land since 1332 B. S. Therefore, under this proviso to Sec. 48-C they have acquired a non-ejectable right in the case-lands and even if the doctrine under Section 116 of the Transfer of Property Act is applied, there is also evidence to show that it must have been assented to by the landlords. Otherwise it seems impossible to accept the proposition that the landlords would allow the erstwhile right to continue in possession for about 25 years after the expiry of the lease. The tenants had been holding over to the knowledge of the landlord continuously, openly, by asserting title as korfa tenants for more than 12 years, and under the doctrine of adverse possession have also acquired a non-ejectable right, (vide Saroj's case, (1941) 45 Cal WN 126, and the cases reported in 22 Cal LJ pp. 119-54) = (AIR 1915 Cal 625 and AIR 1915 Cal 787).

3. Mr. Mitra contends that at the most it may be stated that the landlord's suit would be barred but the tenant cannot file a suit for a declaration of his tenancy right. I do not think that this proposition is a sound one. What actually happens in such a case is that the tenant acquires an indefeasible title to the land by holding it over for a period of 12 years

continuously and whether he is a defendant or a plaintiff is not a relevant factor at all.

4. The result, therefore, is that this appeal fails and is dismissed.

5. There will be no order as to costs in this Court.

Appeal dismissed.

AIR 1972 CALCUTTA 82 (V 59 C 16)
RAMENDRA MOHAN DATTA, J.

Karam Chand Thapar and Bros. (Coal Sales), Plaintiff v. Inder Mohan Kapoor, Defendant.

Suit No. 4243 of 1969, D/- 13-1-1971.

Letters Patent (Calcutta), Clause 12 — Leave under — If defendant will be put to great hardship amounting to injustice when the suit is permitted to be tried in Calcutta High Court leave granted at the time of institution of the suit must be cancelled on a revocation application. (Paras 7 and 8)

At the time of granting leave the balance of convenience of the parties is a relevant factor. It cannot however be considered when the leave is sanctioned ex parte. Then it can be properly determined while revocation of the leave is sought. (Para 1)

The balance of convenience must be shown to be overwhelmingly in favour of the suit being heard by a court other than that granting the leave. Whether the defendant will be seriously prejudiced resulting in injustice when the revocation is not made must be considered. (Para 2)

Thus when in a suit by an employer against an ex-employee the entire evidence is available at Madras, the workshop of the defendant, and it will be tremendously costly to call all the witnesses to Calcutta High Court which has granted the leave and almost the whole of the cause of action has arisen in Madras, great hardship amounting to injustice will be caused to defendant if the suit is allowed to be tried by the Calcutta High Court. Therefore the leave must be revoked. (Paras 5, 7, and 8)

ORDER:— In my opinion, if the materials which are now being placed before the Court had been available to the Court at the time of granting such leave under clause 12 of the Letters Patent then the court, in its discretion, would not have granted the leave considering the balance of convenience of the parties. In exercising its dis-

cretion in granting leave under clause 12 it is always relevant for the Court to consider the question of balance of convenience but it is not possible for the Court to consider the same when the Court grants this leave ex parte at the time of the institution of the suit. Therefore the proper time to consider the balance of convenience is the time when the application for revocation of the leave under clause 12 is heard.

2. To succeed in an application for revocation of leave on the ground of balance of convenience, a strong case has to be made out. In other words, a mere balance of convenience would not be enough but it must be such that it would be overwhelmingly in favour of the suit being heard by a Court other than the Court granting the leave. The paramount consideration for the Court in such a case would be to consider whether in acquiring jurisdiction it would cause serious prejudice resulting in injustice to the defendant if the suit would be permitted to be proceeded with in the Court where it has been instituted with such leave.

3. In my opinion, this is a case where leave ought to be revoked on the basis of the following considerations.

4. The plaintiff has its branch office at Madras. Its registered office is at Calcutta. The defendant resides at Madras. The defendant was appointed as the plaintiff's branch manager at Madras in 1958. As such branch manager the defendant looked after the plaintiff's business in the territory allotted to the Madras branch as per instructions received from Calcutta. Under the supervision of the defendant the books of account and records were maintained at the Madras office. The defendant got his monthly salary and other remunerations at Madras and earned a share of the profit as commission at Madras. The defendant acted as such branch manager till May 23, 1969 when his services at Madras were terminated by the plaintiff. During his service as branch Manager the defendant withdrew various amounts and the same were recorded in a mutual, open and current Account maintained at the said Madras branch. The plaintiff claims herein recovery of such amount to the extent of Rs. 1,10,154.59 P. from the defendant. The plaintiff's further allegation is that the defendant was bound in a fiduciary character and/or charged with the duty of looking after and/or protecting the interests of the plaintiff and its business including the collection of all out-

standings due to the plaintiff and protection of all stores and stocks of the plaintiff at Madras. In breach of trust and/or neglect of duty the defendant failed and neglected to recover or take any steps for the recovery of several large sums of money amounting to a sum of Rs. 1,50,000/- with the result the plaintiff has suffered loss to that extent. Besides the same the defendant also failed and neglected to account for 570 tonnes of coal valued at Rs. 67,197.30 paise. The total claim against the defendant is for a sum of Rs. 3,70,264.62 paise. In annexure 'C' to the plaint a long list of the names of the parties from whom moneys have not been realised by the defendant to the total extent of Rupees 1,10,154.59 paise have been set out. They are mostly of places in and around Madras.

5. It would clearly appear that practically the entire evidence is available at Madras and it would be a tremendously costly affair to call the various witnesses who might be necessary to be called both to prove and to disprove the allegations in the plaint. The entire books of account must be at Madras. It is no doubt true that the plaintiff might be in a position to bring down all these books from its Madras office to Calcutta but it would be extremely difficult for the defendant to call his witnesses, who must all be in or around Madras, if the defendant has to succeed in his defence. In fact, the defendant has set out the names of five witnesses who are residents of Madras. Those persons dealt with the books of account and other ledgers in the Madras office of the plaintiff. They are within the control of the plaintiff. If the defendant has to call them at Calcutta they have to apply for and to obtain leave of office for several days from the plaintiff from time to time and it is difficult to predict whether such persons will be willing to travel this long distance to Calcutta on their own or at the expenses to be provided by the plaintiff. In all probability and very likely the defendant has to bear their expenses for coming down to Calcutta if such persons would at all be granted leave by the plaintiff to give evidence against the plaintiff and in favour of the defendant. The long list of parties practically all of whom are in or around Madras, might be relevant witnesses at the trial to disprove the various charges made against the defendant by the plaintiff in this suit. At least some of them might be called by the defendant. The sum involved is a very large sum and the defendant no doubt has to take proper steps to contest this

suit. In paragraph 20 of the affidavit of the defendant it has been stated that 7 Madras Banks undertook financial assistance in respect of the transactions complained of by the plaintiff. The employees of these Banks and their books might be relevant at the trial of the suit. In short practically the whole of the cause of action excepting a little part thereof arose within the jurisdiction of the Madras Court.

6. The learned Advocate General placed the various terms and conditions of the agreement whereby the defendant was appointed the branch manager and contended that the agreement was entered into at Calcutta and considering the balance of convenience from the point of view of the plaintiff the suit should be allowed to be proceeded with in this Court.

7. In my opinion, the defendant will be put to a great hardship and inconvenience if the suit is allowed to be proceeded with in the Calcutta High Court. On the contrary, considering the facts and circumstances of this case the plaintiff will not in any way, be prejudiced if the suit is proceeded with at Madras where the plaintiff carries on business through its branch office and can well have all the evidence available there. If the defendant has to defend the suit at Calcutta the hardship and inconvenience which would be caused to him would amount to injustice.

8. Accordingly, I have no hesitation to uphold the contention put forward on behalf of the defendant and to revoke the leave under clause 12 of the Letters Patent which was granted at the time of instituting this suit. Upon such revocation being ordered the plaint is liable to be and is hereby directed to be taken off the file with liberty to the plaintiff to present this plaint with suitable modifications at the proper and convenient Court at Madras.

9. I accordingly make an order in terms of prayer 1 of the Summons and I direct that each party would pay and bear its or his own costs. Certified for counsel.

Order accordingly.

AIR 1972 CALCUTTA 84 (V 59 C 17)

K. L. ROY, J.

Deben Adhichary, Petitioner v. State of West Bengal and others, Opposite Parties.

Civil Revn. No. 2442 (W) of 1967, D/- 26-5-1970.

IO/JO/E399/71/JRM/RSK

Contempt of Courts Act (1952), Section 3 — Contempt — No liability will arise if the order claimed to have been flouted has not been served on the contemner but only communicated to him and the act complained of is anterior to such communication. AIR 1952 Cal 919 and (1966) 70 Cal WN 1150, Followed; AIR 1968 SC 1348, Approving AIR 1962 SC 1089 and Halsbury's Laws of England 3rd Edn. Vol. 8, P. 21, Distinguished; AIR 1969 SC 189, Referred. (Para 11)

When that order had prohibited commission of trespass at the factory premises but the contemner was present in the factory as president of labour union, definite proof of trespass is also necessary to show actual and wilful disobedience to that order for rendering him liable.

(Paras 14, 16 and 18)

Cases Referred: Chronological. Paras

(1969) AIR 1969 SC 189 (V 56) =	
1969 Cri LJ 401, Debabrata Bandopadhyaya v. State of West Bengal	13
(1968) AIR 1968 SC 1348 (V 55) =	
1968 Cri LJ 1514, Bunna Prasad v. State of U. P.	16
(1966) 70 Cal WN 1150, Sri Sri Iswar Mitto Gopal Jew v. Angur	11
(1962) AIR 1962 SC 1089 (V 49) =	
1962 (2) Cri LJ 236, Hoshier Singh v. Gurbachan Singh	16
(1952) AIR 1952 Cal 919 (V 39) =	
1953 Cri LJ 136, Tarafatullah Mandal v. S. N. Maitra	10

C. R. Dutt, for Petitioner; Somnath Chatterjee, Naranarayan Gooptu, S. K. Dutt, B. N. Sett and Sinil Mukherjee, for Opposite Parties.

ORDER:— Much of the sting has been taken away from this Contempt proceeding by the passage of time. The petitioner and his wife are the sole share-holders and Directors of Metro Engineering Works Private Limited which has its office and factory at No. 38 Kansaripara Road within the Bhowanipore Police Station. It is alleged that in June 1967, the workers of the aforesaid Company 'gheraoed' the supervising staff on several occasions and also staged a 'gherao' at the residence of the petitioner, and in spite of repeated requests, the Police authorities failed to take any action in regard thereto. On the 19th July, 1967, in an application under Article 226 of the Constitution, the petitioner obtained from this Court a Rule, viz., C. R. 1285 (W)/67 calling upon the State of West Bengal some officials of the State, the Commissioner of Police and the Officer-in-charge Bhowanipore Police Station being respondents Nos. 1 to 6 and 17

workers being respondents Nos. 7 to 24 and the Metro Engineering Works Private Limited Workers Union, represented by Shri Asoke Kumar Bose being respondent No. 25, to show cause as to why a Writ in the nature of Mandamus should not be issued directing the respondents Nos. 1 to 6 to discharge their statutory obligations in protecting the rights of the petitioner and why a Writ in the nature of Certiorari should not be issued to quash the relevant records connected with illegal obstruction, trespass and demonstrations carried on by the members of the aforesaid Union.

2. There was also an Interim order in the following terms:—

"An interim order of injunction restraining respondents Nos. 7 to 24 from preventing the petitioner, his servants and agents from carrying on any trade or business, ingress to or egress from the said office premises at 38 A, Kansari-para Road, Calcutta, or obstructing movement of goods to and from the said premises or from committing assault or trespass at the said premises and restraining the said respondents from calling upon other workers and employees of your petitioner's company to join in any of the said unlawful activities."

3. There was a further interim order directing the respondents Nos. 5 and 6, the Commissioner of Police and the Officer-in-charge Bhowanipore Police Station to provide for such assistance as the petitioner might need for removal of petitioner's manufactured goods from his factory at 38 A, Kansari-para Road, Bhowanipore, Police Station. Liberty was given to the petitioner to serve the respondents Nos. 7 to 24 at the factory site at 38 A Kansari-para Road, Calcutta-25.

4. It is claimed in the present petition that the aforesaid interim order of injunction was duly communicated to the respondents Nos. 7 to 25 by the petitioner's Advocate on the 19th July, 1967. It is further alleged that on the 28th July, 1967, the petitioner's authorised representative accompanied by the Sub-Inspector of Police Bhowanipore Police Station went with 2 Lorries and 18 Coolies to take delivery of the petitioner's manufactured goods from the aforesaid factory where they were obstructed by the said Ashoke Kumar Bose, the President of the aforesaid Union and some of the Workers including the respondents Nos. 7 to 24 and the said Asoke Kumar Bose forced Niranjana Choudhury, the representative of the petitioner, to write a statement and to retire with the Lorries and the Coolies. It is further

alleged that the said Niranjana Choudhury recorded the aforesaid facts in a letter to the Officer-in-charge of the Bhowanipore Police Station on the same date. It is further alleged that the said Asoke Kumar Bose wrote a letter to the Labour Commissioner, Government of West Bengal on the 25th July, 1967, referring therein to a press news which had appeared in "The Statesman" on the 21st July, 1967 that an injunction had been issued on the workers restraining them from trespassing, demonstrating and indulging in acts of violence or threatening the officers of the company with assault or preventing them from carrying on their trade or business. It is submitted that in spite of his knowledge of the prohibitory order issued by this Court on the 19th July, 1967, the said Asoke Kumar Bose and his associates being the respondents Nos. 7 to 24 deliberately disobeyed the orders of this Court by preventing the petitioner's Lorries from entering the Factory premises and driving the said Lorries away by a threat of dire consequences. It is further alleged that the said Asoke Kumar Bose aided, abetted and incited the respondents Nos. 7 to 24 to unlawfully remain in the said premises and to cause obstruction to the execution of this Court's order.

5. On this petition a Rule being C. R. 2442 (W) of 1967 was issued by this Court on the 6th December, 1967, calling upon the opposite parties Nos. 7 to 13 and 15 and 25 to show cause why they should not be dealt with for contempt for the alleged violation of the Court's order dated the 19th July, 1967, in Civil Rule 1285 (W) /67 or why such other or further order or orders made as to this Court may seem fit and proper.

6. As there was some dispute, as to whether Asoke Kumar Bose was one of the persons against whom the aforesaid Rule had been issued, at the time that Rule was attempted to be served on him, by an order from this Court it was directed that the Rule obtained as against Respondent No. 25 stood discharged and Asoke Kumar Bose was added as respondent No. 26.

7. In response to the Rule issued on the respondents by the order dated 6th December 1967 as modified by order dated 8th December 1969 as mentioned above the respondents other than the added respondent No. 26 have appeared, shown cause and have taken up a common attitude, namely that in doing what they did they had been influenced by Shri Asoke Kumar Bose who was the President of their Union and they did not realise that they were wilfully disobeying the orders

of this Court and that they had acted believing the representations made by the said Asoke Kumar Bose. All the respondents against whom the Rule was issued (excepting respondent No. 26) have tendered unqualified apology to this Court and have prayed for being treated leniently. On enquiry I find that these respondents have been taken back in their jobs and they are at present working under the petitioner and that possibly explains their change of attitude. As the main contest now is against the respondent No. 26, nobody is taking any objection to the apology being accepted by this Court. The unqualified apology tendered on behalf of the other respondents is therefore accepted. The Rule obtained by the petitioner against the respondents Nos. 7 to 24 is discharged. There will be no order for costs.

8. This brings me to the main contest. In his affidavit-in-opposition Shri Asoke Kumar Bose has denied the allegations in the petition that on 28th July, 1967 he refused to allow the petitioner's representative and the Lorries with the Coolies to enter into the said Factory premises or to take away any of the manufactured goods stored therein. He also denied that he had used any threat of violence or that he had forcibly extracted any statement from the petitioner's representative Niranjana Choudhury. He however admits that he was inside the Factory premises between 8-30-9-30 a.m. on that date. He further avers that instead of threatening Niranjana Choudhury he rather escorted him to safety outside the Factory premises from the threat of physical violence from the other workers and that the said Niranjana Choudhury voluntarily made a statement to the Sub-Inspector of Police who was also present. So far as the notice of the order of injunction of this Court appearing in "The Statesman" is concerned, this respondent states that on seeing that report he wrote to the Labour Commissioner, Government of West Bengal in discharge of his duties as the President of the Union for the intervention of the Government for obtaining redress of the grievances of the workers.

9. In this state of the affidavits I suggested that the matter do stand to trial on evidence so that the allegations and the counter-allegations might be decided. The learned Counsel for the petitioner, however, submitted that the matter should be decided on the affidavits and on the facts on the record, and no expensive litigation involving taking down of oral evidence

of several witnesses should be undertaken in the circumstances of the case. He submitted that on the affidavits it is clear that on the 21st July, 1967, the respondent Asoke Kumar Bose had knowledge from the notice published in "The Statesman" that an order of injunction had been passed by this Court restraining the workers of the petitioner's company from trespassing, demonstrating and indulging in acts of violence of threatening the officers of the company with assault or preventing them from carrying on their duties. If in spite of the aforesaid knowledge the petitioner aided and abetted the other respondents in deliberately disobeying the order of this Court, he should be found guilty of contempt and should be dealt with accordingly.

10. Mr. Chatterjee, the learned Counsel for respondent No. 26, has pointed out that when an order of injunction against respondents Nos. 7 to 24 was obtained from this Court on the 19th July, 1967 the respondent Asoke Kumar Bose was not a party to the Rule. Again when the alleged act of contempt was committed on the 28th July 1967, neither was the said respondent a party to the proceedings nor was any notice of the order of the Court served on him. It was only on the 31st August, 1967, that the petitioner's Advocate informed him of the order of this Court dated the 19th July 1967. Even on the 6th December 1967 when the Rule for contempt was obtained this respondent was not made a party respondent, but only the union as represented by him was made a party respondent. It was only subsequently that the cause title of the application was amended by making Asoke Kumar Bose as respondent No. 26 after discharging the Rule obtained against the respondent No. 25 which was represented by said Bose as a trade union leader. Mr. Chatterjee has submitted that it is now well-established that a proceeding for committal for contempt for disobedience of the order of this Court cannot be made against a person who was not a party to the proceedings in which the order was made and on whom no notice of the order was served. For this proposition he relied on the case of Tarafatullah Mandal v. S.N. Maitra reported in AIR 1952 Cal 919. There the question was whether a contempt proceeding could be maintained against certain officials of the Government for disobedience of an order passed in a matter in which the Government was a party, but the officers concerned were individually not made parties. In that case P. B. Mukharji J. (as his Lordship then was) made the following observations:

"It is, however, always essential even in India that an individual or an officer who is not a party to the proceeding resulting in the order alleged to have been disobeyed but who is sought to be proceeded against in contempt, must be served with a copy of the order or judgment to be enforced. It is proper course in my opinion, to insert the names of the individuals or the officer in the Rule Nisi and to serve it on him specifying the nature of the contempt with which the individual or officer served is charged.

Before a proceeding for contempt can succeed, it is of paramount importance to establish first, the service of the order of the Court said to have been disobeyed upon the person alleged to have committed contempt thereof, secondly the precise act of contempt, thirdly — the precise responsibility of the contemner in the act of contempt, and fourthly the date of the alleged contempt being subsequent to the service of the order said to have been disobeyed. These are the four indispensable requisites and failure to establish any one of them must mean dismissal of the petition for contempt".

11. It must be accepted that the first and the last of the aforesaid conditions are not satisfied in the present case, namely that the order dated the 19th July, 1967 was not served on respondent No. 26 and that the alleged act of contempt was anterior to the service of the order. In this case the order was only communicated to the said respondent by the petitioner's Advocate on August 31, 1967 even though the alleged act of contempt was committed on the 19th July, 1967. Not only is this decision binding on me, it has also my respectful concurrence. A. N. Ray, J. (his Lordship as he then was) had considered this question in the case of *Sri Sri Iswar Mitto Gopal Jew v. Angur Bala Mullick* reported in 70 Cal WN 1150 where his Lordship observed that the foundation of an application for contempt is personal service of the order alleged to have been violated unless it could be shown that he was evading service, and his Lordship relied on the aforesaid decision of the Division Bench.

12. Mr. Chatterjee has argued that even assuming that the respondent No. 26 could be charged with contempt on the ground that he had knowledge aliunde of the prohibitory order of this Court, it has not been established that he had committed any act of trespass. The allegations in the petition charge him with definite acts of disobedience of the order and the only allegation of aiding and abetting is that of inciting

the other respondents in threatening the representative of the petitioner. It is submitted that a proceeding for contempt being a quasi-criminal proceeding a strict degree of proof is necessary in order to punish a person for such conduct.

13. Reliance has been placed on a decision of the Supreme Court in the case of *Debabrata Bandopadhyaya v. State of West Bengal* reported in AIR 1969 SC 189 where it has been observed as follows:

"A question whether there is contempt of court or not is a serious one. The Court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowance for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct, not explainable otherwise, arises that the contemner must be punished."

14. It is submitted that in this case the respondent No. 26's contention is that he was present at the factory premises on the material date as the President of the Union to protect the interests of the workers. This seems to be supported by his communication to the Labour Commissioner. In the absence of any oral evidence establishing that there was any act of trespass, it is very difficult to say if there was any violation of the prohibitory order of this court by respondent No. 26 by committing trespass in the petitioner's factory.

15. Mr. C. R. Dutt, the learned Counsel for the petitioner, has referred me to Halsbury's Laws of England (Third Edition) Volume 8, page 21 where it has been stated:

"Strangers to actions. A stranger to an action who aids and abets the breach of a prohibitory order obstructs the course of justice, and this contempt is punishable by committal or attachment. The punishment is inflicted, not for a technical infringement of the order, but for aiding and abetting others in setting the court at defiance."

16. Certain authorities in support of the above proposition as set out in Halsbury was also cited by Mr Dutt. I do not think that anybody would challenge the legal proposition set out therein that a stranger would be liable for contempt if he deliberately obstructs the course of Court's justice by aiding and abetting others. He would certainly be liable for contempt, but before he could be so committed, it must be proved that the order complained of had been served on him or he had knowledge otherwise of the

contents of that order and that he had deliberately chose to flout the order in order to obstruct the course of justice. In this case, as I have already pointed out, in the absence of oral testimony, it is not possible for me to determine whether there was actual and wilful disobedience to the orders of this Court. The other authority cited by Mr. Dutt is a passage from the Supreme Court in the case of *Bunna Prasad v. State of U. P.* reported in AIR 1968 SC 1348, where in paragraph 10 their Lordships quoted with approval an observation of a previous decision reported in AIR 1962 SC 1089 at page 1094:—

"In order to justify committal for breach of a prohibitive order it is not necessary that the order should have been served upon the party against whom it has been granted, if it be proved that he had notice of the order aliunde, as by telegram or newspaper report, or otherwise, and knew that it was intended to be enforced, or if he consented to the order, or if he was present in Court when the order was pronounced, or when the motion was made although he left before the order was pronounced."

17. But the above observations were made in respect of a person who was a party to the proceeding. It has no application to a stranger. In the case of a stranger the knowledge of or notice of the prohibitory order must be established to the satisfaction of the Court in order to establish that the person concerned had deliberately chose to flout the order of the Court in order to obstruct the course of justice.

18. As I am not satisfied in this case that the respondent No. 26 was deliberately obstructing the prohibitory order made by this Court after having had knowledge of its passing, I must hold that this Rule as against respondent No. 26 must be discharged, and it is ordered accordingly. There will be no order for costs.

19. In the result this Rule is discharged as against all the respondents against whom it was issued. There will be no order for costs.

Petition dismissed.

AIR 1972 CALCUTTA 88 (V 59 C 18)

SALIL KUMAR DATTA AND MURARI MOHAN DUTT, JJ.

Jayanta Mohan Chatterjee, Plaintiff-Appellant v. Jagat Mohan Chatterjee and others, Defendants-Respondents.

A. F. O. D. No. 342 of 1968, D/- 7-9-1971.

KO/LO/T663/71/LGC/SSG

(A) Civil Procedure Code (1908), Order 6, Rule 17 — Amendment of plaint in appeal — Amendment of plaint practically changing the nature and character of the suit and raising fresh issues triable on evidence, cannot be allowed at the belated stage of appeal. (Para 7)

(B) Civil Procedure Code (1908), Order 41, Rule 27 — Additional evidence in appellate court — Where the mortgage was referred to in the plaint with full particulars and in fact the legality and validity of that mortgage as also the proceedings arising therefrom are the subject-matter of challenge in the suit as also in the appeal, the appellate court can allow the defendant to produce certified copy of the registered mortgage deed in question as it is necessary for the appellate Court to consider that document in greater detail for reaching the decision in appeal. (Para 8)

(C) Trusts Act (1882), Section 66 — Beneficiary's charge — Where the trustee has mixed up his own fund with the funds of the trust estate, the beneficiary is entitled to a charge on the property bought or acquired out of mixed fund to the extent of trust money applied. (X-Ref:— Section 63). (Case law discussed). (Para 14)

The funds of the trust estate with interest invested in the property remains at all times a charge on such property so acquired. For such declaration, before a relief is granted, the amount of trust fund that was utilised for the acquisition of the property has to be ascertained. The beneficiary is entitled on that basis to relief as provided under Sections 63 and 66. An action would lie for such relief but no relief, can be granted unless the amount of the trust estate invested in the said properties is ascertained in accordance with law and the suit is for declaration of charge on such properties for the said amount and interest thereon if found admissible. (Para 14)

(D) Trusts Act (1882), Section 64 — "Transferee" and 'conveyance', meaning of — Where the mortgagee at the time of execution of the mortgage deed acted in good faith and without any knowledge of the trust, the trust property in the hands of mortgagee in good faith for consideration, cannot be followed by the beneficiary. The mortgagee is entitled to protection under Section 64. (X-Ref:— Section 63). (Case law discussed). (Paras 18 & 19)

The word used in Section 64 is 'a transferee' and not a purchaser. The transferee includes the purchaser as also

other transferees of title of properties in transactions like mortgage, or exchange. Such transferee, to be entitled to protection, must act in good faith without notice of trust, either at the time when purchase money was paid which connotes a buyer for price paid or when conveyance was executed which connotes other transferees.

(Para 18)

Further, the word "conveyance" in Section 64 includes documents of sale, mortgage, charge, exchange and other transfer of property, so that the protection under that section is available to mortgage. (Para 18)

Cases Referred: Chronological Paras

- (1939) AIR 1939 PC 14 (V 26) = 43 Cal WN 281, Ramkinkar v. Satyacharan 15
- (1933) AIR 1933 PC 148 (V 20) = 60 Ind App 203, Official Assignee of Madras v. T. Krishnaji Bhat 9, 13
- (1933) AIR 1933 Cal 366 (V 20) = ILR 60 Cal 262, Chartered Bank of India, Australia and China v. Imperial Bank of India 18
- (1930) AIR 1930 Mad 405 (V 17) = 57 Mad LJ 219, Sivaswami Iyer v. Thirumudi Chettiar 9, 16
- (1927) AIR 1927 Cal 725 (V 14) = 31 Cal WN 973, Bengal National Bank Ltd. v. Jankinath 15
- (1880) 13 Ch D 696 = 49 LJ Ch 415, In re Hallett's Estate, Knatchbull v. Hallett 13
- (1812) 18 Ves 499 = 34 ER 406 Denton v. Davis 10, 12

Apurbadhan Mukherjee, Jyotir Lal Das and Ram Sankar Mazumdar, for Appellant; Pramatha Nath Mitra, Chandra Nath Mukherjee (for No. 3), for Respondents.

SALIL KUMAR DATTA, J:— This appeal is by the plaintiff against a judgment and decree dismissing his suit. The case of the plaintiff as stated in the plaint is as follows:—

2. The grand-father of the plaintiff, Ramani Mohan Chatterjee (since deceased) left considerable properties in Government Securities, shares of Companies, debts payable by different parties as also landed properties. He left a will with a codicil whereby his two sons, Rajat and Jagat (defendant 1) were given specified annuities during their life time and there were provisions for others also. The trustees appointed by the will were directed to hold the residue of the estate upon trust during the natural life of the said sons and after their death to divide the estate with its accumulations of income in equal shares amongst his grand sons through the said sons. The trustees were empowered to sell the

properties belonging to the estate and invest them under such stocks, funds, shares, securities, landed properties or otherwise as they would think fit. The trustees or their survivors were empowered to appoint new trustees or trustees in place of deceased or retiring trustee or trustees. The will, which was executed on September 13, 1918, and the codicil were duly probated on March 8, 1919. The executors named in the will duly administered the estate since then till January 28, 1927 and by a deed dated January 29, 1927 new trustees namely Rajat, Jagat and Tapan Mohan, a cousin of Jagat were appointed and all the properties belonging to the estate were assigned to the said new trustees by the said instrument which was registered. Shortly thereafter, Tapan Mohan resigned from the office of the trustees and surviving trustees namely Rajat and Jagat began to administer the estate as such trustees. On or about March 6, 1931 a sum of Rupees 34,000 was withdrawn from the estate account with the Imperial Bank of India now the State Bank of India and was lent to Benoyendra Das and his brothers against the mortgage of premises No. 24-C, South Road, Entally being the suit properties (since known as 24-C and 24-D, Dr. Suresh Sarkar Road) Calcutta. The said mortgage was enforced by Rajat and Jagat by a mortgage suit and in execution of the decree they purchased the suit premises and obtained possession thereof in 1936 or 1937. Thereafter they made various improvements and additions to the said premises with the funds of the trust estate. The plaintiff averred that as the said properties were acquired with the estate funds and improvements made thereon with the same funds, they belonged to the trust estate of Late Ramani Mohan Chatterjee. Rajat and Jagat had no means, having no or small income, to acquire personally such valuable properties which were well worth rupees two and a half lakhs. In or about January 22, 1948 they mortgaged these properties as their personal properties to Hindustan Co-operative Insurance Society Ltd. (Hereinafter referred to as Society) for securing its loan to them for a sum of Rs. 70,000/-, and the Society obtained the mortgage decree in enforcement of the said mortgage in Title Suit No. 171 of 1953. Thereafter the assets of the Society vested in the Life Insurance Corporation of India, the defendant No. 3 herein, hereinafter referred to as the Corporation. The decree had since been put into execution in Title Execution case No. 11 of 1957 of the Seventh Court of the Subordinate Judge at Ali-

pore for realisation of the decretal dues by sale of the suit properties.

3. Under the provisions of the will, Rajat and Jagat had no right to the corpus of the estate and the grand-son or grand-sons of the testator were the owners of the estate. Rajat died on April 2, 1958 leaving him surviving his widow, Smt. Jyotsna Devi; defendant No. 2. The plaintiff, the only son Jagat and also the only grand-son of Ramani Mohan was entitled to the trust estate including the suit properties subject only to the annuity payable to the defendant No. 1 during his life time. It was stated that neither Rajat and Jagat had any right to mortgage the suit properties which belonged to the estate of Ramani Mohan Chatterjee and the said properties were not affected by the mortgage created by them nor liable to be sold in execution of the mortgage decree. The plaintiff in or about November, 1957 came to know for the first time about this mortgage and filed a claim case being Miscellaneous Case No. 90 of 1957. Thereafter, on the plaintiff's application this Court which granted the probate, discharged Jagat from further acting as trustee as aforesaid, and, appointed the plaintiff as the sole trustee by order dated May 28, 1958 and since then the plaintiff had been in possession of the said premises as the sole trustee. The plaintiff filed the suit in the said circumstances for a declaration that the said premises were acquired with the funds of the estate of late Ramani Mohan and as such belonged to his estate and further the mortgage decree obtained by the Society did not affect the said properties which thus were not liable to be sold in execution of the said mortgage decree.

4. The suit was contested only by the Corporation by filing a written statement wherein all material allegations in the plaint were denied. It was averred that the sum of Rupees 34,000/- lent by Rajat and Jagat on March 6, 1931 was out of their own funds and mortgage was taken in their own names. The mortgage suit was filed by them personally, resulting in decree in their favour personally and in the title execution case following the properties were purchased by them in their personal names, in their interest and for their own benefit. Since then they had been in exclusive possession of the properties as their personal properties on assertion of their own title by mutating their names as owners in the Collectorate as also in the Corporation of Calcutta. They also made various improvements to the

properties and had been realising rent from tenants ever since to the exclusion of alleged executors and to the knowledge of the plaintiff. There was a further allegation that the plaintiff having allowed Rajat and Jagat to hold out and represent the properties as their own, he was estopped from setting up his own title thereto. It was further averred that the Society was a bona fide transferee mortgagee for valuable consideration without notice of the trust and accordingly the plaintiff was not entitled to any relief in the suit against the Society or its successor the Corporation. There was an amendment to the written statement whereby it was further averred by way of addition to the original written statement that the Society was a bona fide transferee for consideration without notice, after taking reasonable care to ascertain that the transferors had power to transfer the premises in suit and it acted in good faith as a bona fide mortgagee thereof.

5. The suit was tried on evidence before the learned Judge when parties adduced evidence oral and documentary. The learned Judge on a consideration of materials on record came to the conclusion that the suit properties were acquired by withdrawal from the trust account and they belonged to the trust estate but the mortgagee Society was a bona fide mortgagee without notice of the trust. Accordingly, the suit properties were liable to be sold in execution of the mortgage decree passed against Rajat and Jagat and the plaintiff was not entitled to the declarations prayed for in the suit. As a result the suit was dismissed.

6. Against the said decision the plaintiff preferred this appeal while the Corporation filed a cross-objection challenging the findings of the trial Court that the suit properties belonged to the trust estate. This appeal was filed on September 18, 1958 and on April 9, 1970 the appellant filed an application under Order 6, Rule 17 of the Code of Civil Procedure for amendment of the plaint. The proposed amendment is to the effect that as trustees it was beyond the power and authority of Rajat and Jagat to mortgage the properties to the Society which also thus had no right to enforce the mortgage and accordingly the mortgage decree was not enforceable against the properties. This application is opposed by the Corporation who has filed an affidavit-in-opposition in support to which there is affidavit-in-reply by the appellant.

7. On hearing the learned Advocates and on a consideration of the

materials on record, it appears that the parties went to trial on the issue as to whether the properties were acquired from the funds of the trust estate and as such they belonged to the trust and whether the suit properties were affected by the mortgage in favour of the Society and the decree passed in the mortgage suit and thus liable to be sold in execution of the said decree. There was never any issue in the suit as to whether the mortgage was beyond the power and authority of the trustees under the trust and it is to be remembered that the properties were standing in the name of the trustees personally and was dealt with by them as such. The proposed amendment, in our opinion, will practically change the nature and character of the suit raising fresh issues triable on evidence. In these circumstances, we do not think that it would be fair and proper to grant amendment of the plaint prayed for by the appellant at this belated stage. The application, in the circumstances, is dismissed without any order as to costs.

8. The Corporation has filed on June 24, 1971 an application for admission of additional evidence which is the certified copy of the registered mortgage executed by Rajat and Jagat in favour of the Society dated January 22, 1948 for enforcement of which the Title Suit No. 171 of 1953 was instituted. There is no reason why such document could not be filed in proper time. But even so the mortgage was referred to in paragraph 8 of the plaint with full particulars and in fact the legality and validity of this mortgage as also the proceeding arising therefrom are the subject-matter of challenge in the suit as also in the appeal before us. In view of the contentions raised by the appellant Corporation as also the argument advanced in opposition by the appellant thereto, it is, in our opinion, necessary for us to consider the provisions of the said document in greater details for enabling us to reach our decision in the appeal. We, therefore, allow this application without cost and direct that the certified copy of the mortgage mentioned above be admitted in evidence dispensing formal proof thereof and marked as Ext. Z as the secondary evidence of the original mortgage which was filed in the said Title Suit No. 171 of 1953 and thus formed inseparable part of its records.

9. Mr. Apurbadhan Mukherjee, the learned Advocate appearing for the appellant, has contended that the Court below has found that the suit properties belonged to the trust estate

and that being so the trustee could not treat the properties as their own. Under Section 63 of the Trusts Act, the beneficiary was entitled to follow the properties in the hands of the Society and thereafter of the Corporation and obtain requisite declarations prayed for in the suit. Further Section 64 affords no protection either to the Society or the Corporation as the instant transaction is a mortgage and not a sale and the said section protects only bona fide purchaser in good faith for consideration without notice of the trust. In support, reference was made to the decision in Sivaswami Iyer v. Thirumudi Chettiar, AIR 1930 Mad 405 in which it was held that simple mortgagee could have no protection under Section 64. The reliance was also placed on the decision in Official Assignee of Madras v. T. Krishnaji Bhat, AIR 1933 PC 148 in which it was held that the beneficiaries are entitled to follow up the asset acquired out of trust funds which form the part of such asset and to a charge thereon. Mr. Mukherjee further contended that the onus to establish that the Society was a bona fide transferee without notice of the trust lay entirely on the Corporation. That onus however was not discharged and no director or competent person of the Society or the Corporation came to depose that the Society was such transferee. The only evidence that was given on this issue was by an assistant solicitor of the firm of solicitors who was engaged in the transaction of mortgage and even so it would not appear from such evidence that proper and bona fide enquiry was made by the Society or its solicitors to establish that the Society was a transferee without notice. For all these reasons, Mr. Mukherjee contended that the trial court should have decreed the suit as prayed for.

10. Mr. Pramathanath Mitra the learned Advocate appearing for the Corporation, contended in support of the cross-objection that the account with the Imperial Bank of India which was withdrawn by Rajat and Jagat at the material date on March 6, 1931 was not a trust account nor the amounts which were transferred to the said account were also from such trust account (Ex. 8). The said account was maintained and operated as the personal account of Rajat and Jagat and not as a trustees and it was also obvious that the personal funds were mixed up with trust funds without any scope for identification (vide deposits of Rs 2,000/- on June 7, 1928, Rs. 500/- on June 14, 1928 from S. B. a/c.) while the account at times was overdrawn.

He also drew our attention to the amount of Rs. 34,000/- which was lent to Benoyendra Das and others on the said date was overdrawn in the said account as loan granted by the Bank and not a withdrawal from the funds in credit of the said account and accordingly it could not be said that the amount that was invested in the mortgage was a part of the trust funds. It may be that the said loan was repaid by the realisation of the assets of the trust estate but that did not make the said mortgage a part of the trust asset. If this amount of loan was repaid by the trust fund, the trustees would be guilty of breach of trust only to the beneficiary for such fund misappropriated but the beneficiary will not be entitled to follow the properties. In support, he referred to the observations made in Lewin (16th Edition) p. 653 as also to the decision in *Denton v. Davis* (1812) 18 Ves. 499 = 34 E. R. 406 for the proposition that if property is acquired by borrowed money and the loan is repaid by sale proceeds of estates under the settlement, the purchased lands could not be treated as purchased by the trust money and liable to the trust of the settled estates. Mr. Mitra further contended that the properties were mortgaged to the Society by way of English mortgage which is really a transfer of the legal interest in the property subject to a right of redemption only. Such mortgage as English mortgage was accepted in England as a sale as the terms of the deed would indicate and this conception of English mortgage must be deemed to govern the provisions of Section 64 of our Trust Act which came into force sometime before the Transfer of Property Act though both these statutes are of 1882. Accordingly Mr. Mitra contended that Section 64 covered the instant transaction and as such the beneficiary is not entitled to any relief against such bona fide mortgagee.

11. Mr. Apurbadhan Mukherjee has further submitted, in reply to the contention of Mr. Mitra that the amount invested in mortgage of Benoyendra was out of loan from the Bank, that such amount was granted as a loan to the trustees by the Bank on the security of shares and Government papers which were lodged with the Bank. He referred to the receipts granted by the Bank Ext. 2 as also Ext. 1 and contended that the loan was not a loan simpliciter to the trustees but was one against the security of the trust estate and as such the properties acquired were impressed with the trust.

12. Examining the respective contentions of the parties, it will appear

that the account wherefrom the amount of Rs. 34,000/- was withdrawn was opened on February 15, 1927 and on that date a sum of Rs. 2428-15-1 was credited by transfer from the balance of the account of Mohini Mohan Chatterjee, Rajani Mohan Chatterjee, Mohi Mohan Chatterjee, executors of the estate. It would also appear that various amounts were deposited and withdrawn in the said account which stood in the name of Rajat, Jagat and Tapan Mohan in their personal names and not as trustees. It is also in evidence of Tapan Mohan that Rajat and Jagat had really no income, so as to support the deposits in the said account as being their personal income. Nonetheless, the account was opened and operated as the personal account of Rajat and Jagat, Tapan Mohan having retired after a short period. There is no evidence that all the amounts which were credited in the account arose out of the asset or securities of the trust and it may be that the some amounts belonged to Rajat and Jagat personally. It is obvious, therefore, that the trustees mixed up their personal fund though insignificant with the funds of the trust estate. Just immediately before March 6, 1931 a small amount was lying in credit in the same account. On March 6, 1931, a sum of Rs. 2,000/- was deposited and an amount of Rupees 34,000/- was withdrawn from the said account. A dispute was raised by Mr. Mitra but we have no doubt that this amount was invested in the mortgage of the suit properties to secure the loan to Benoyendra and others. On this date, therefore, even assuming the sum of Rs. 2,000/- as belonging to the trust estate of which there is no specific evidence, a sum of about Rs. 31,000/- and odd appears to have been lent by the Bank to Rajat and Jagat personally. Now there is no evidence to indicate that this loan was granted by the Bank to them as trustees against the securities of the trust estate referred to by Mr. Mukherjee. Even though it may be that the Bank will not advance any amount except against securities, in absence of any specific evidence it could not be said that the loan was against any security of the assets of the trust estate. No evidence was called for from the Bank by the plaintiff to substantiate his case that the mortgage was obtained through a loan secured by the assets of the trust while the plaint case was that Rs. 34,000/- was withdrawn from trust account. In absence of such evidence in respect whereof the onus was with the plaintiff, it could not be said that the loan was accommodated against the assets of the

trust estate. It may also be true that this loan was repaid by Rajat and Jagat out of the realisations of the trust estate but that will not make the amount of Rs. 31,000/- or the interest of Rajat and Jagat in the suit properties as mortgagees a part of the trust estate. It was observed in (1812) 18 Ves 499 = 34 ER 406 (supra), approved by Lewin in his "Trust". that—

"It appears, that the defendant borrowed money for this purchase; and he applied part of the money arising from the sale of the settled estates in paying off part of that debt. That cannot be represented as a purchase made with the trust money; supposing land, purchased with the produce of the trust estate, would have belonged to the trust."

13. There can be no dispute as pointed by the Privy Council in the case of Official Assignee of Madras, AIR 1933 PC 148 (supra), pursuant to the doctrine of following the trust fund which has been provided in Section 66 of the Trust Act, that the beneficiary would be entitled to a charge upon the assets in the hand of third parties for the amount of trust fund invested in such assets. In re Hallet's Estate, Knatchbull v. Hallet (1880) 13 Ch. D 696 (at p. 709) Jessel M. R. observed:—

".....where a trustee has mixed the money with his own, there is this distinction that the cestui que trust or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simply or purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust-money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee as including all persons in a fiduciary relation....."

14. It is obvious that on the authority of the above decisions, the beneficiary is entitled to a charge on the property bought or acquired out of mixed fund to the extent of trust money applied, however much it may have changed or altered in its nature or character. Accordingly the funds of the trust estate with interest invested in the property remains at all times a charge on such property so acquired. For such declaration before a relief is granted, it has to be ascertained the amount of trust fund that was utilised for the acquisition of the property. The beneficiary is entitled on that basis to relief as provided under Sections 63 and 66 of the Act in view of what has been stated. Before those sections however, are made applicable to the

fact of this case, it cannot be said that the trust property has come into hands of a third person inconsistently with the trust except in respect of the amount of the trust assets which could be said on evidence to be in the credit of the trust estate and invested in assets acquired on the material date that is on March 6, 1931. An action would be lie for such relief but no relief in our opinion, can be granted to the plaintiff in this suit unless the amount of the trust estate invested in the said properties is ascertained in accordance with law and the suit is for declaration of charge on such properties for the said amount and interest thereon if found admissible.

15. The next question for consideration is whether the mortgagee is entitled to any protection under Section 64 of the Act assuming that Section 63 is otherwise applicable. We have noted the contentions of Mr. Mukherjee who relied on provisions of the section which, according to him, is confined only to a case of sale while according to Mr. Mitra it will also apply to a case of English mortgage which is in effect a sale. The proposition that English mortgage is an absolute transfer or sale was not accepted by the Privy Council in the case of Ramkin-kar v. Satyacharan, 43 Cal WN 281 = (AIR 1939 PC 14) in which it was held that under the Indian law a mortgage of a lease does not amount to a transfer of the whole and absolute interest nor does it create a privity of estate between the lessor and the mortgagee. The decision in Bengal National Bank Ltd. v. Jankinath, 31 Cal WN 973 = (AIR 1927 Cal 725) which held that an English mortgage was a transfer of absolute interest subject to equity of redemption was not accepted on the view that the interest which is inconsistent with sale retained by the mortgagor was a legal and not merely equitable interest. Mr. Mitra's contention that English mortgage should be treated as a sale regard being had to the conception of English law at the time when the Trusts Act came into force on March 1, 1882 before the Transfer of Property Act which came into force on July 1, 1882, does not appeal to us and it will not be proper to import the concepts of English law to our law, particularly after the judgment of the Privy Council has referred to above. It will appear that if such interpretation was intended to prevail, as suggested by Mr. Mitra, after the Privy Council's decision there would have been suitable amendments to the Trusts Act in respect of Section 64 for retaining such import.

16. Mr. Mitra further contended that "purchase" in law means acquisition of land by lawful act as opposed to acquisition of title by act of law as devolution of interest by succession, and purchase will include a mortgage. In support he has relied on the definition of purchase in law dictionary which gives the widest connotation to purchase as stated above while according to Mr. Mukherjee the purchase can only mean a transfer of ownership for price and never a mortgage which is not a transfer of ownership. If we turn to the provision of Section 64 of the Trusts Act it will appear that certain transferees had been given protection against the provisions of Section 63. Both the sections referred to properties in the hands of a third party and in *Sivaswami Iyer's case*, AIR 1930 Mad 405 (*supra*) it was observed that the protection is only with reference to the properties in the hands i. e. possession of the alienee and not to a transfer by way of simple mortgage. In our opinion the word "in the hands of a third party" includes possession of the moveable properties or of the immovable properties including cases where transfer of title takes place. It is not always co-extensive with the actual possession but also includes cases where there is transfer of title of properties.

17. Section 64 provides as follows:—

64. "Savings of rights of certain transferees. Nothing in Section 63 entitles the beneficiary to any right in respect of properties in the hands of (a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or (b)"

It would appear that the word used is "a transferee" and not a purchaser. It also further provides that transferee must act in good faith in the transaction without any notice of trust either at the point of time when purchase money was paid or when the conveyance was executed. If transferee was intended to mean or be co-extensive with buyer or purchaser, then suitable word would have been used as has been used in Section 92 of the Act. The transferee includes the purchaser as also other transferees of title of properties in transactions like mortgage, or exchange. Such transferee, to be entitled to protection, must act in good faith without notice of trust, either at the time when purchase money was paid which connotes a buyer for price paid or when conveyance was executed which connotes other transferees. "Conveyance" according to Wharton's "Law

Lexicon" is an instrument which transfers property from one person to another and under Law of Property Act, 1925, Section 205, includes mortgage, charge, lease, assent, vesting declaration, and every other assurance of property or any interest therein. Under different statutes in British Law, 'conveyance' means any deed which transfers a title in property. In Section 5 of the Transfer of Property Act, 1882, 'transfer of property' means an act by which one conveys a property. 'Conveyance' defined in Section 2 (10) of the Indian Stamp Act, 1899, includes a conveyance on sale and every instrument by which property, whether moveable or immovable, is transferred inter-vivos which is not otherwise specifically provided by Schedule 1 or Schedule 1-A as modified under the Bengal Amendment Act, 1922.

18. Though the Trusts Act came into force in 1882, a few months earlier than the Transfer of Property Act, the word "Conveyance" in Section 64 must be deemed to have such connotation as was in the prevailing British laws as also in effect accepted in the subsequent Indian statutes. It would thus appear that "Conveyance" in Section 64 of the Trusts Act should have such a connotation as including any deed whereby interest in properties is transferred and this interpretation finds support in the use of the word "transferee" instead of "buyer" in the said section. Accordingly we are of opinion that the word "conveyance" in Section 64 includes documents of sale, mortgage, charge, exchange and other transfer of property, so that the protection under that section is available to mortgage with which we are concerned. In *Chartered Bank v. Imperial Bank of India, Australia and China*, AIR 1933 Cal 366 (370) it was held that even if trust receipts created trust, it could not affect the defendant bank who having no notice of them, bona fide gave valuable consideration for the goods pledged (Section 64, Trusts Act). It would also appear incongruous that while under Section 64, according to the appellant, protection is given to purchasers in good faith without notice while the third party in exchange in similar circumstances would be denied of the protection for no apparent reason and the same will be the position in regard to mortgages.

19. As to the question of notice, the evidence adduced on behalf of the solicitors is not quite satisfactory in regard to the investigation of title of the properties. There is however evidence that the solicitors firm was entrusted with the completion of the transaction and in normal course of events it would be unreasonable to think that the soli-

citors firm would advise an improper transaction of mortgage in respect of properties which are the subject of the trust. In the requisition on title (ex. M), a specific enquiry was made in regard to the properties as to whether they were subject to trust and the solicitors acting for Rajat and Jagat did not state in their reply to the requisition that there was any trust relating the properties. It would further appear that in declaration that was obtained from Rajat and Jagat, prior to mortgage ext. J. there was a specific declaration by them that the properties are their personal properties. Even if the searches were made it would not indicate that the properties were subject to any trust. The mortgage to Benoyendra Das as also the decree following, the certificates of sale issued by Court Corporation Tax receipts are all in the personal names of Rajat and Jagat. It would, therefore, appear that there could not be notice of any trust in the said circumstances and to impute the knowledge of a trust on the Society from the statement of account would be beyond reasonable scope of enquiry. For all these reasons, we are of opinion that the Society at the time of execution of the mortgage deed acted in good faith and without any knowledge of the trust and is therefore entitled to protection under Section 64 of the Act.

20. The appeal accordingly fails and is dismissed with costs. The cross-objection in the view we have taken succeeds to the extent that the property was not acquired out of the trust fund nor formed part of trust estate and the finding in the judgment contrary thereto is set aside. There would be however no order as to costs in the cross-objection.

MURARI MOHAN DUTT, J.:— 21.
I agree.

Appeal dismissed.

AIR 1972 CALCUTTA 95 (V 59 C 19)
MASUD, J.

Sm. Sovabati Dassi, Appellant v. Kashi Nath Dey and another. Respondents.

Suit No. 952 of 1959, D/- 2-9-1971.

Hindu Law — Religious endowments — Shebaitship — Nature of — If can be transferred by gift or will — Principles — Sole shebait under a deed of settlement held had validly transferred his shebaiti right by his will under the Dayabhag School.

A shebaiti right can be transferred by will according to the facts and cir-

cumstances of a case. The distinctive feature of a shebaiti right is that it cannot be absolutely alienable like all other properties inasmuch as it is an office enjoining certain religious and spiritual duties to perform. Similarly as there is an element of property also in the concept of shebaiti right the view that it cannot be transferred at all can no longer be accepted. Thus, unless there is an absolute bar under Hindu Law or an express prohibition in the deed of religious endowment, there should not be any limitation of the power of a shebait to transfer his shebaiti right by gift or by will. (Paras 6, 11)

The general limitations under which such transfer is permissible may be set out as follows:—

(a) The transfer of shebaiti right is permissible if such transfer is not contrary to the intentions of the founder as expressed in the Deed of Endowment unless an ancient or reasonable custom or usage has been followed to the contrary.

(b) Where there is perpetual or hereditary line of succession of shebaitship prescribed by the founder in his Deed of Endowment a particular shebait cannot change the line of succession by any Deed of transfer unless the shebait transfers the totality of his rights in favour of the succeeding shebait or shebait during his lifetime.

(c) A transfer of a shebaiti right is also permissible for the benefit of the idol or the deity or for imperious necessity under special circumstances.

(Para 9)

Under a deed of endowment the settlor appointed his wife for her life as the shebait and after her death his son P, and after P's death his heirs as joint shebait. After P's death the shebaiti right devolved on P's son K as the sole shebait, who by his will appointed his adopted son, the defendant as the sole shebait of the idol and the properties attached thereto. The plaintiff who was the widow of the predeceased natural son of K brought a suit for declaration that she is also the joint shebait along with the defendant and also for consequential reliefs.

Held that the sole shebait K had validly transferred the shebaiti right by his will to the defendant thereby exhausting the line of succession prescribed by the founder in the deed of endowment and therefore the plaintiff could not claim any shebaiti right under the deed of endowment along with the defendant. Case law reviewed.

(Paras 10, 13)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 569 (V 56)
= (1969) 1 SCR 874, Chokalinga
Sethurayar v. Arumanaykarn

- (1968) AIR 1968 Cal 496 (V 55)
= 69 ITR 139, Pran Krishna Das v. Controller of Estate Duty, West Bengal 6, 11
- (1963) AIR 1963 Cal 85 (V 50)
= 67 Cal WN 258, Banku B. Das v. Kashinath Das 11
- (1961) AIR 1961 Orissa 137 (V 48)
Ramprapanna Ramanuj Das v. Sudarsan Ramanuj Das 11
- (1958) AIR 1958 All 371 (V 45)
= 1957 All LJ 777 (SB), San-katha Pandey v. Brij Mohan Pandey 3
- (1957) AIR 1957 Cal 685 (V 44)
= 100 Cal LJ 15, Hemanta Ku-mar v. Prafulla Kumar 8
- (1954) AIR 1954 SC 282 (V 41)
= 1954 SCR 1005, Commr., Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar 6
- (1951) AIR 1951 SC 293 (V 38)
= 1951 SCR 1125, Sm. Angur-bala Mallik v. Debabrata Mallik 3, 4, 5, 6, 12
- (1951) AIR 1951 Cal 490 (V 38)
= 84 Cal LJ 237, Bameswar Bamdev v. Anath Nath 3, 6, 8, 12
- (1946) 50 Cal WN 272, Official Receiver v. Sm. Jogmaya Dassi 8, 11
- (1943) AIR 1943 PC 89 (V 30) = 70 Ind App 57, Bhabatarini Debi v. Ashalata Debi 6, 10, 12
- (1938) AIR 1938 Cal 709 (V 25)
= 42 Cal WN 1138, Nirmal Chandra Banerjee v. Jyoti Pra-sad Banerjee 11
- (1936) AIR 1936 PC 318 (V 23)
= 63 Ind App 448, Ganesh Chunder Dhur v. Lal Behari Dhur 11
- (1932) AIR 1932 Cal 791 (V 19)
= 37 Cal WN 29 (FB), Manohar Mukherjee v. Bhupendranath Mukherjee 3, 6, 12
- (1931) AIR 1931 Mad 505 (V 18)
= 1931 Mad WN 8, Muthu-kumara Swami v. Subbaraya 4
- (1930) AIR 1930 Cal 180 (V 17)
= 50 Cal LJ 382, Panchanan Banerji v. Surendra Nath 8, 12
- (1926) AIR 1926 Cal 490 (V 13)
= ILR 53 Cal 132, Nagendra Nath v. Rabindra Nath 4, 8, 12
- (1923) AIR 1923 Bom 358 (V 10)
= ILR 47 Bom 529, Raghunath v. Purnanand 4
- (1922) AIR 1922 PC 235 (V 9)
= ILR 48 Cal 1019, Peary Mo-han Mukherjee v. Monohar Mukherji 12
- (1915) AIR 1915 Cal 161 (2) (V 2)
= ILR 42 Cal 455, Mahamaya v. Haridas 8
- (1909) ILR 36 Cal 975 = 13 Cal WN 1084, Nirode Mohini Dassi v. Shiba Das Pal 8, 11
- (1908) ILR 35 Cal 226 = 12 Cal WN 323, Rajeshwar v. Gopeswar 4, 13
- (1895) 22 Ind App 94 = ILR 22 Cal 843 (PC), Bhagban Ramanuj Das v. Roghunundun Ramanuj Das 11
- (1892) ILR 15 Mad 183 = 2 Mad LJ 19, Narayana v. Ranga 4
- (1890) ILR 17 Cal 557, Khetter Chunder Ghose v. Hari Das Bundopadhya 8
- (1888) 16 Ind App 137 = ILR 17 Cal 3 (PC), Gossami Sree Geer-dharjee v. Romanlaljee Gossami 3, 10
- (1882) ILR 6 Bom 298, Mancharam v. Pranshankar 8, 11, 13
- (1876) 4 Ind App 76 = ILR 1 Mad 235 (PC), Rajah Vurmah v. Ravi Vurmah 8
- (1869) 6 Bom HCR 250, Sitaram Bhat v. Sitaram Ganesh 8

JUDGMENT:— The important point to be decided in this suit is whether a sole shebait can lawfully alienate his right to shebaitship by will under Daya-bhaga School of Hindu Law. The facts of the case may be briefly stated as follows:

2. The settler of a deed of endowment, Kashinath Dey, died in 1902 leaving his widow Sm. Jhanobi Moni Dassi and a son Pulin Behari Dey. Pulin Behari Dey died a few years after the death of Kashinath Dey, as stated by Mr. Dipankar Ghosh on behalf of the defendant and not objected to by Mr. Debi De on behalf of the plaintiff, leaving Kalicharan Dey as his sole heir. Kalicharan died on December 20, 1958 leaving Kashinath Dey, the present defendant, being the adopted son of Kalicharan. Kalicharan had a natural son Panchugopal who died in May 1933. Kalicharan left a will dated November 21, 1958 whereby he appointed the defendant as the sole shebait. The material portions of the Deed of Settlement dated September 22, 1884 are stated below:

".....Also witnesseth that In consideration of the premises the said Kassi Nath Dey (Doth) hereby appoint his wife the said Shreemutty Jhanobee Monee Dassi to be the sole sabait of the said Idol Sree Sree Iswar Sreedhar Jew Thakur and to perform in the daily and periodical worship on the said Idol and to perform the several poojahs hereinbefore mentioned and from and after her death the said Kassi Nath Dey hereby appoint his son Poolin Behari Dey to be the sabait of the said Idol Sree Sree Ishwar Sreedhar Jew Thakur and from and after his death the said Kassi Nauth Dey hereby appoints the heirs of the said Poolin Behary Dey

to be the joint sabait of the said Idol but in the event of the said Poolin Behary Dey having no heirs surviving then and in that case the said Kassi Nauth Dey hereby appoints his grandson by daughters to be the joint sabait of the said Idol

The immovable properties under the said deed of endowment are the family dwelling house No. 4 Gobinda Chandra Sen Lane, Calcutta and premises No. 19, Gobinda Chandra Sen Lane, Calcutta. It is also provided in the said Deed of Endowment that the idol will remain installed in the upper floor of premises No. 4 Gobinda Chandra Sen Lane and that shebait or shebait will reside in the said floor. The deed also provides for performance of the daily and periodical worship of the Idol, the performance of Rashjatra, Doljatra, Jhulanjatra, Janmashtami ceremonies and also for the support and maintenance of the shebait out of the income of the remaining tenanted portions of the said two buildings. In 1935 the widow of Panchu Gopal was a minor and she through her father and next friend Prosad Das Dey instituted a suit against Kalicharan Dey (suit No. 1096 of 1935). On July 28, 1936 a consent decree was passed relevant portions of which are as follows:

"I. That the plaintiff would be paid Rs. 20/- a month for her maintenance by the defendant Kalicharan Dey and after his death out of his estate.

II. That the specific portion in the first floor of premises No. 4 Gobinda Sen Lane as fully shown and described in the said terms of settlement as well as in the plan annexed thereto was set apart for the exclusive residence of the plaintiff."

In or about 1938 the plaintiff attained majority. The said specific portion of premises No. 4 Gobinda Chandra Sen Lane is still in the control of the plaintiff. On an application by the plaintiff before the Execution Court a consent order was passed on February 23, 1938 to the effect that the plaintiff, inter alia, accepted Rupees 3,600/- and Rs. 460/- in full satisfaction of her claim against Kalicharan or his estate for future maintenance and costs respectively. On or about May 1, 1949 Kalicharan adopted the defendant Kashinath. On December 20, 1958 Kalicharan died leaving himself surviving the defendant Kashinath and the plaintiff, the widow of the said pre-deceased son Panchu Gopal. In July 1959 the plaintiff has instituted this suit claiming for a declaration that she is also a shebait of the said deity and for other consequential benefits of a

shebait as provided under the Deed of endowment. She even has asked for removal of the defendant Kashinath. Her counsel, however, abandoned the latter relief, i. e., removal of Kashinath from his office of shebaitship. The counsel, on behalf of the guardian of the deity without mentioning any ground, has submitted that a scheme for the administration of the estate should be framed by this Court. The counsel for all the parties agreed to have the matter disposed of without adducing any oral evidence. The following issues have been framed and settled:

1. Is the plaintiff a Sebait of the Defendant Deity under the Deed of Trust dated September 22, 1884?

2. Is the plaintiff's claim as a Sebait for residence and maintenance barred under the earlier consent decree and Order passed in suit No. 1096 of 1935?

3. Is the suit as framed maintainable?

4. To what relief, if any, is the plaintiff entitled?

Issues Nos. 1 and 2:

3. Mr. De, on behalf of the plaintiff, has argued that the plaintiff is entitled to be a coshebait with Kashinath inasmuch as under the Hindu Law a shebait cannot create a new line of succession in respect of the shebaitship and no alienation of shebait right by will is permissible as it was done by Kalicharan in favour of Kashinath in the present case. Reliance has been placed by him on Manohar Mukherjee v. Bhupendra Nath Mukherjee, AIR 1932 Cal 791 (FB) and also Sankatha Pandey v. Brij Mohan Pandey, AIR 1958 All 371 (SB). It has also been strenuously argued by him that shebaitship being an inseverable combination of an office and a proprietary right is a special kind of property which cannot be transferred by will. Reference has been made by him to Barneswar Bamdev v. Anath Nath, AIR 1951 Cal 490, the observations of Mr. B. K. Mukherjee J. on the Hindu Law of Religious and Charitable Trust (third edition) pages 169, 177, 181 and 183, Gossami Sree Girdharjee v. Romanlaljee Gossami, (1888) 16 Ind App 137 (144) (PC) and Sm. Angurbala Mallik v. Debabrata Mallick, AIR 1951 SC 293 (296, 299). He has, therefore, requested, the court to hold that the plaintiff and the defendant being the heirs of the founder are jointly entitled to be the shebait of the said debattar estate.

4. Mr. Ghosh, however, on behalf of the defendant, has argued that apart from the fact that the plaintiff is

not an heir of Pulin and, as such, is not entitled to claim shebaitship there is no absolute bar to the transfer of a right of shebaitship under certain limitations. He has, therefore, submitted that his client is the sole shebait under the said Deed of Settlement and that the plaintiff in spite of being an heir of Kalicharan cannot claim shebaitship along with Kashinath. It appears to me that there has been an evolution of juridical thought on the subject of shebaitship. Originally a shebait was considered to be only a manager of a deity and is entitled to discharge the religious, spiritual or even the mundane duties which are required for the worship of the deity. Although, unlike the law of Trust, the debattar estate is not vested in the shebait various principles relating to the law of Trust are applicable to the case of shebaitship. The duties of shebait are personal and, as such cannot be delegated to any other person. Not only the shebait is enjoined to arrange or perform religious ceremonies or practices but also he is entitled to get the benefit which the settler has provided in the Deed of endowment or the Arpannama as secular benefits to the office of shebaitship. As shebaitship involves religious duties it was thought that ordinarily right of shebaitship could not be alienated. It was subsequently, however, thought that if a shebait duly appointed under the Deed of Endowment, relinquishes or surrenders his right of shebaitship he can do so provided he has transferred all his rights of shebaitship to the transferee and also that he transfers the same in favour of all the persons who are next entitled to shebaitship under the Deed of Endowment. But the courts in India have also held that the transfer of shebait rights is valid provided the transfer is not inconsistent with the consent of a religious office in shebaitship and also the intention of the founder of the trust. A new situation, however, arose when the Supreme Court in AIR 1951 SC 293 (supra) has held that shebaitship is a recognised form of property in Hindu Law and there is nothing in the Hindu Women's Right to Property Act, 1937 which prevents the General Law as Succession to be applicable to shebaitship as well. In certain cases, the validity of a transfer inter-vivos or by will by a shebait in favour of some or all the heirs of the last shebait arose and the learned Judges in the facts of the respective cases came to conflicting conclusions validating or invalidating such transfer. Juristically the "concept of property" or ownership involves a right of alienation but there are special laws relating to transfer of certain categories of property. To illus-

trate, right of franchise is a property which cannot be transferred under any circumstances. Similarly copyright or patent rights can be transferred only in a qualified manner. A right to sue cannot be transferred but an actionable claim or a chose in action can be assigned under certain limitations. Shebaitship also constitutes a special kind of property, transfer of which is permissible in a qualified sense. Transfer of a shebait right is invalid if the transferee is a person who is incapable or incompetent to discharge the religious duties according to Hindu Law or whose appointment as a shebait is not beneficial to the worship of the deity. Thus, the transfer of shebaitship might be declared valid if it does not conflict with well established principles of Hindu Law. It is well settled now that shebaitship comprises religious office and also some mundane benefits in the form of right of residence in the endowed property or the share of puja offerings or other benefits. If shebaitship would have been a religious office only, it would not be freely alienable. Similarly if the shebaitship comprises only material benefits it should not be absolutely inalienable. But shebaitship being both an office and profits can only be described as a special kind of property the alienability of which should be permissible under special circumstances. In this connection reference may be made to the observations of B. K. Mukherjee J. in his said Treatise at page 178:

"Although shebait right is heritable like any other property, it lacks the other incident of proprietary right, viz. the capacity of being freely transferred by the person in whom it is vested. The reason is that the personal proprietary interest which the Shebait has got is ancillary to and inseparable from his duties as a ministrant of the deity, and a manager of its temporalities. As the personal interest cannot be detached from the duties, the transfer of shebaitship would mean delegation of the duties of the transferor which would not only be contrary to the express intentions of the founder but would contravene the very policy of law. A transfer of shebaitship or for the matter of that of any religious office has nowhere been countenanced by Hindu Lawyers."

Mukherjee J. however, after discussing the general principles of cases some of which were cited before me also in conclusion made the following observation at page 180:

"Though the general proposition laid down in the cases referred to above

has never been disputed, yet there are decisions of different High Courts in India, in which the rule against alienation of shebaiti right has been relaxed to some extent by reason of certain special circumstances. These circumstances may be conveniently grouped under three heads: (1) Where the transfer is not for any pecuniary benefit, and the transferee is the next heir of the transferor or stands in the line of succession of Shebait and suffers from no disqualification regarding the performance of the duties. (2) When the transfer is made in the interests of the deity itself and to meet some pressing necessity. (3) When a valid custom is proved sanctioning alienation of shebaiti right within a limited circle of purchasers, who are actual or potential Shebait of the deity or otherwise connected with the family."

Mukherjee J. has elaborately discussed large number of cases at pages 181 to 187 and came to the conclusion that within certain limits alienation of shebaitship is permissible. Reference may be made to the observation of the learned Judge at page 183 in the following manner:

"Strictly speaking, there is no specific authority of the Calcutta High Court, where apart from any custom, a transfer of Shebaitship to one in the line of Shebait has been held to be valid. Of course when the transferee is the sole and immediate heir of the transferor, the transfer can be looked upon as a surrender of the office in favour of the next heir, and such surrender does not offend either against the presumed intentions of the founder or the general policy of Hindu Law. A shebait like a trustee cannot delegate his duties to another person, but he is not bound to accept his office, and if he renounces his duties which he always can, then even if the renunciation be in the form of a transfer in favour of the next heir, it can be held valid in law. This is the view of Madras High Court, and this is exactly the view taken by Mr. Justice Page in *Nagendra Nath v. Rabindra* (vide *Narayana v. Ranga*, (1892) ILR 15 Mad 183) *Muthu Kumaraswami v. Subbaraya*, AIR 1931 Mad 505 and *Nagendra Nath v. Rabindra Nath*, ILR 53 Cal 132. = (AIR 1926 Cal 490). A transfer by one Shebait to the remaining Shebait may also be justified on the same principle. A transfer by one of the Shebait of his rights in favour of the grantor can scarcely be supported and has been expressly held to be invalid in a Bombay case, (*Raghunath v. Purnapand*, ILR 47 Bom 529 = (AIR 1923 Bom 358)). It has been pointed out by the learned

Judges in that case, that if any one of the Shebait intends to get rid of his duties, the proper thing for him to do would be to surrender his office in favour of the remaining shebait. When the transfer is in favour of the remaining Shebait, or the sole and immediate heir of the transferor, it can safely be said that no policy of Hindu Law is likely to be affected, nor can such transaction be held to be against the presumed intentions of the founder. Within these limits therefore the alienation of a religious office can be legally permitted. It goes without saying that whatever the form of transfer may be, it cannot be by will, for nothing which the Shebait has, can pass by his will which operates only at his death. (*Rajeshwar v. Gopeshwar*, (1908) ILR 35 Cal 226)."

5. But *Rajeswari's* case relied upon by Mukherjee J. did not contemplate cases where Shebaitship is not vested in the heirs of the founder. The case, however, accepts the proposition that alienation of a Shebaiti right inter vivos may be justified under special circumstances. Mr. Mukherjee has discussed the nature of shebaitship in the wellknown case, AIR 1951 SC 293 (supra). In that case the dispute between the parties was whether the plaintiff appellant the second wife of one Mritunjoy Mullick has a right to act as shebait of an idol founded by Mritunjoy and his mother, either solely or jointly with the defendant, her step son. There Mritunjoy and his adoptive mother Nityasundari jointly dedicated certain Calcutta properties to a deity. The relevant portion in the Deed of Endowment regarding devolution of shebaitship reads as follows:—

"That the said Sm. Nitto Sundari Dassi doth hereby constitute and appoint herself the Shebait of the said Thakur for and during the term of her natural life and doth hereby declare that after her death her son the said Mritunjoy Mullick shall become the Shebait of the said Thakur & after his death his wife Sm. Kiranbala Dassi and after her death the heirs of the said Mritunjoy Mullick shall be and act as the Shebait or Shebait of the said Thakur and she doth hereby declare him or them such shebait or Shebait accordingly & doth hereby direct and declare that the daily worship and other periodical festivals & ceremonies of the said Thakur should be performed by such Shebait or Shebait. Provided, however, that in case the said Mritunjoy Mullick shall happen to die without any issue or without giving any authority to his wife him surviving, to adopt, then in such case it shall

be competent for the said Mrityunjoy Mullick to appoint by will or otherwise a Shebait who would act as such after the death of his said wife as aforesaid but in case the Mrityunjoy Mullick shall happen to die without any issue the shebaitship of the said Thakur after the death of his wife shall devolve upon his heirs under the Hindu Law."

Admittedly Nityasundari acted as Shebait till her death and after her death Mrityunjoy became the shebait. The first wife of Mrityunjoy died leaving the defendant Debabrota. After the death of the first wife Mrityunjoy married Angurbala and within five months after their marriage Mrityunjoy died. The suit was filed in the Original Side of Calcutta High Court and she prayed for a declaration that she was the sole shebait of the deity under the terms of the indenture or in the alternative was entitled to the shebaitship jointly with her step son, she being a co-heir of her step son under the provisions of the Hindu Women's Right to Property Act. Mr. Mukherjee, J. has stated at page 296:

"In the conception of shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property

Unless, therefore, the founder has disposed of the shebaitship in any particular manner and this right of disposition is inherent in the founder or except when usage or custom of a different nature is proved to exist shebaitship like any other species of heritable property follows the line of inheritance from the founder."

In the facts of that case and on the construction of the Deed of Endowment Mukherjee, J. came to the conclusion that the stepmother and her step son being the heirs of Mrityunjoy are the joint shebait in respect of the Debottar estate. The important point in that said decision is that shebaitship like other properties is also "a property" in the general sense and that the general law of succession governs also succession to shebaitship as well. The result of the said appeal went in favour of joint shebaitship because there the Deed was construed in favour of the widow of Mrityunjoy inasmuch as Mrityunjoy was one of the founders of the Deed and that the line of succession opened on the death of Mrityunjoy. But different consequences must follow where

the line of succession is specifically provided in the deed of endowment by the founder who puts an end to the line of succession at a particular point, where the founder intends to have the line exhausted.

6. The conspectus of various decisions on the character of the shebaiti right and also its alienability may now be discussed. On the question of the nature of shebaiti right, it is well settled now that Shebaiti right is an amalgam of office which enjoins the performance of some religious or spiritual duties and also some material benefits and, as such, is a property. But the concept of "property" in its application to the office of a shebait is to be understood not in its ordinary or unqualified sense. Shebaitship thus is a property of a very special nature. Reference may be made to AIR 1932 Cal 791 (supra); Bhabatarini Debi v. Ashalata Debi, (1943) 70 Ind App 57 = (AIR 1943 PC 89); Pran Krishna Das v. Controller of Estate Duty, West Bengal, AIR 1968 Cal 496; AIR 1951 SC 293; and Commr Hindu Religion Endowments v. Shri Lakshmindra Thirtha Swamilar, AIR 1954 SC 282; AIR 1951 Cal 490 (supra).

7. Further, the intention of the founder, as expressed in the deed of endowment, if any, is the primary consideration for determination of the claim for shebaitship of a particular person. The founder might prescribe a perpetual or a hereditary line of succession of shebaitship so that the religious or spiritual duties might be performed by persons who are included in such line of succession. But at the same time a shebaitship might also confer some personal benefits like the right of residence, right of receiving income or other benefits out of a debattar property, like the right to enjoy the balance sum of the offerings to the idol. Thus in most cases some mundane interests are also involved in the office of shebaitship. It is therefore necessary to determine the scope and extent of the alienability of the shebaitship.

8. On the question of transfer of a shebaiti right the learned judges in the past have expressed different views on the matter which may be enumerated as follows:

(a) A shebaiti right cannot be transferred inasmuch as such transfer would mean delegation of the duties of the delegated authority and as such, contrary to public policy: vide *Rajah Vurmah v. Ravi Vurmah*, (1876) 4 Ind App 76 (PC).

(b) A shebait is not bound to accept his office and he can transfer his right to the shebaitship in favour of his next

heir by way of "renunciation", "surrender", "resignation" or "abdication" of his entire interest: vide ILR 53 Cal 132 = (AIR 1926 Cal 490). Panchanan Banerji v. Surendra Nath, AIR 1930 Cal 180 and AIR 1951 Cal 490 (supra).

(c) A shebaiti right can be transferred if there is a valid and reasonable custom allowing such transfer: vide Mahamaya v. Haridas, ILR 42 Cal 455 = (AIR 1915 Cal 161 (2)); Hemanta Kumar v. Prafulla Kumar, AIR 1957 Cal 685.

(d) A shebaiti right can be transferred to a person in line of succession who is not otherwise disqualified or unfit to perform the religious or spiritual duties: vide The Official Receiver v. Sm. Jogmaya Dassi, (1946) 50 Cal WN 272.

(e) Alienation of the office of shebait inter vivos in favour of a closely connected member of the family who seems to have more interest in the worship of the deity and without any idea of personal gain is valid: Nirod Mohini Dassi v. Shibadas Pal, (1909) ILR 36 Cal 975.

(f) Sale of a shebaiti right for valuable consideration is invalid unless such sale was made in favour of all the immediate successor shebaiti: vide Sitaram Bhat v. Sitaram Ganesh, (1869) 6 Bom H. C. R. 250. The transfer in the case was held to be valid also on the ground of custom.

(g) A shebaiti right can be transferred by gift inter vivos on the basis of the doctrine of necessity or benefit of deity only: vide Rajeshwar v. Gopeshwar, (1908) ILR 35 Cal 226. The decision was also justified on the special circumstances in that case following Khetter Chunder Ghose v. Haridas Bundopadhyaya (1890) ILR 17 Cal 557.

(h) The transfer of a shebaiti right by will has also been held valid in law even in favour of a possible successor shebait: Mancharam v. Pranshankar, (1882) ILR 6 Bom 298.

9. In my view, as stated above, shebaitship comprises a distinctive category of property, the transfer of which is permissible unless such transfer is repugnant to the principles of Hindu Law. Shebaitship, being an amalgam of office and property, it will not be correct to say that it is absolutely alienable like any other property or that it is not alienable under any circumstances. The general limitations under which such transfer is permissible may be set out as follows:

(a) The transfer of a shebaiti right is permissible if such transfer is not contrary to the intentions of the founder as expressed in the Deed of Endowment unless an ancient or reasona-

ble custom or usage has been followed to the contrary.

(b) Where there is a perpetual or hereditary line of succession of shebaitship prescribed by the founder in his Deed of Endowment a particular shebait cannot change the line of succession by any Deed of transfer unless the shebait transfers the totality of his rights in favour of the succeeding shebait or shebaiti during his lifetime.

(c) A transfer of a shebaiti right is also permissible for the benefit of the idol or the deity or for imperious necessity under special circumstances.

10. Applying the said principles to the facts of the present case I hold that Kalicharan Dey has lawfully transferred his shebaiti right by the will dated November 21, 1958 whereby he appointed the defendant as the sole shebait after his death. In my view there are good reasons for the same. The relevant portions of the Deed of Endowment read as follows:

".....the said Kassi Nauth Dey (doth) hereby appoint his wife the said Sreemutty Jhanabee Monee Dassee to be the sole sabait of the said Idol Sree Sree Ishwar Sreedhar Jew Thakoor and to perform in the daily and periodical worship on the said Idol and to perform the several poojahs hereinbefore mentioned and from and after her death the said Kassi Nauth Dey hereby appoint his son Poolin Behari Dey to be the sabait of the said Idol Sree Sree Ishwar Sreedhar Jew Thakoor and from and after his death the said Kassi Nauth Dey hereby appoints the heirs of the said Poolin Behari Dey to be the joint sabaiti of the said Idol....."

Thus, under the said Deed the founder has appointed his wife for her lifetime, after her death Poolin Behari and after his death his heirs. The founder has not stated that after the death of Poolin Behari his own heirs will be the succeeding shebaiti. Nor has he stated that after the death of Poolin the heirs of Poolin and thereafter their heirs from generation to generation. The language of the said Deed shows that the founder has expressed a desire that after the death of his wife and Poolin, the heirs of Poolin will be the shebaiti. Plaintiff's husband died in 1933 and Poolin died long before. Thus after the death of Poolin, Kalicharan Dey being the only son of Poolin became the sole shebait. If during his shebaitship, Kalicharan Dey would not have disposed of his shebaiti right by will the plaintiff, being an heir of the founder, would have a claim in shebaitship, vide, (1888) 16 Ind App 137 (PC). But in the present case Kalicha-

ran has executed a will in favour of his adopted son Kashinath Dey and obtained a probate of the same. Thus, the direction of the founder as to the line of succession exhausted itself as soon as Kalicharan Dey disposed of the totality of his rights as shebait by will. The settlor here did not prescribe a perpetual or hereditary line of shebaitship. On the contrary, the testator has prescribed a line of succession for the devolution of shebaitship only upto a point and not beyond it. In support of such conclusion reliance may be placed on, (1943) 70 Ind App 570 = AIR 1943 PC 89 *Chokalinga Sethravayar v. Arumanayakam*, AIR 1969 SC 569. In the present case the plaintiff in paragraph 9 of the plaint has claimed shebaitship as Kalicharan Dey's heir. It is not her case that as heir of Kalicharan Dey she has also become the heir of founder or of Poolin Behary Dev. As stated earlier if there is no perpetual or hereditary line of succession to shebaitship, after the death of the last shebait, the heirs of the founder of the settlement should be appointed shebait. But in a case where there is no perpetual or hereditary line of succession and the shebaitship has devolved on a particular person according to the Deed of Endowment his successor should be appointed from among the heirs of the founder unless shebaitship has been disposed of by the last shebait. In my opinion, in the present case there is no perpetual or hereditary line of succession prescribed by the settlor. It is well settled that in construing a will the intention of the testator is the primary consideration. If Kashinath Dey the founder or the settlor wanted that all his heirs would be entitled to be shebait, he would have stated so in the Deed of Settlement. According to him after his death his widow would be the shebait during her lifetime; thereafter his son for his lifetime and after the death of his son the heirs of the son. Kalicharan Dey admittedly became the sole shebait of the Endowment after the death of his grandmother Sm. Jhanoobi Moni Dassi and his father. Pulin Behary and therefore the plaintiff and Kalicharan's adopted son, the defendant, after Kalicharan's death should have been ordinarily appointed as the joint shebaits as heirs of the founder. But as Kalicharan Dey has already disposed of his shebait right by will the plaintiff cannot claim shebait right along with Kashinath.

11. As discussed above, there are conflicting views as to the validity of the transfer of shebait right by will. I am, however, inclined to accept the

view that a shebait right can be transferred by will according to the facts and circumstances of a case. The distinctive feature of a shebait right is that it cannot be absolutely alienable like all other properties inasmuch as it is an office enjoining certain religious and spiritual duties to perform. Similarly as there is an element of property also in the concept of shebait right the view that it cannot be transferred at all can no longer be accepted. Thus unless there is an absolute bar under Hindu law or an express prohibition in the Deed of religious endowment, there should not be any limitation of the power of a shebait to transfer his shebait right by gift or by will. Reliance may be placed on (1882) ILR 6 Bom 298 (Supra). The principles laid down in the said Bombay case have also been extended in (1909) ILR 36 Cal 975 (Supra) and also in (1946) 50 Cal WN 272 (Supra) and *Banku B. Das v. Kasinath Das*, AIR 1963 Cal 85 and AIR 1968 Cal 496. In this connection reference may also be made to *Ganesh Chunder Dhur v. Lal Behary Dhur*, 63 Ind App 448 = (AIR 1936 PC 318); *Nirmal Ch. Banerjee v. Jyoti Prasad Banerjee*, 42 Cal WN 1138 = (AIR 1938 Cal 709) and *Ramprasanna Ramanuj Das v. Sudarsan Ramanuj Das*, AIR 1961 Orissa 137; *Bhagaban Ramanuj Das v. Roghunundun Ramanuj Das*, (1895) 22 Ind App 94 (PC) where the various courts proceeded on the basis that a shebait right can be transferred by will.

12. Mr. De has relied upon the judgment of S. R. Dasgupta, J. in AIR 1951 Cal 490 (Supra) where the learned Judge after examination of various decisions on the point has expressed his view that a shebait cannot transfer his shebait right unless there is a complete renunciation of his right in favour of all the successor shebaits. In my view the learned judge made the said observation with reference to the facts and circumstances of that case. There the testator died leaving a will in which he had provided for the devolution of the shebaitship. By a decree of the court the descendants of the testator's brothers were declared shebaits. One of the shebaits died transferring his 1/7 share of his shebait right to another shebait who as a result of the transfer got 2/7th share in the shebait right. The question arose whether this shebait who was holding 2/7th share could transfer 1/7th to his son and reserve 1/7th for himself. Thus the shebait right, according to Dasgupta, J., is not severable. Further the learned judge has also held in the facts of that case that the

said transfer by the father to his son only for the purpose of eligibility of the son to be the secretary of a board of shebait was not made bona fide. The learned Judge, it may be added here, followed the reasonings of Page, J., in ILR 53 Cal 132 = (AIR 1926 Cal 490) (Supra), and also Rankin, J. in AIR 1930 Cal 180 (Supra). But it appears to me that those earlier decisions were based upon the concept that shebaiti office was more a religious office than a property. In fact it was for the first time expressly laid down in AIR 1932 Cal 791 (FB) (Supra) that shebaiti right is substantially of property and this principle was consistently followed by the Privy Council and Supreme Court in 70 Ind App 57 = (AIR 1943 PC 89) (Supra) and AIR 1951 SC 293 (Supra) respectively. It may be added here that the personal interest of a shebait apart from his religious duties has also been faintly referred to by the Judicial Committee in *Pearry Mohan Mukherjee v. Monohar Mukherjee*, ILR 48 Cal 1019 = AIR 1922 PC 235.

13. Mr. De also has relied upon a decision in (1908) ILR 35 Cal 226 (Supra) where it was decided that a shebaiti right can be transferred by a Deed inter vivos but not by a will. In the said decision the learned Judges disagreed with the principles laid down in (1882) ILR 6 Bom 298 (Supra). In my view this decision also was based upon the earlier concept that the shebaiti right is a personal right involving certain religious and spiritual duties and a certain personal benefit attached to the office of shebaitship. Emphasis was not made on the property aspect of the concept of shebaitship. But it may be added here that even in this decision the learned Judges also added that the transfer of a shebaiti right by a gift inter vivos is permissible under special circumstances. Although the present case is not a case of transfer inter vivos, in my view, there are many special circumstances in this case which would justify the validity of the will executed by Kalicharan Dey in favour of the defendant:

(a) The mode of devolution of shebaitship in the Deed of Endowment does not show that the settlor intended to have a perpetual or hereditary line of succession. The settlor specifically appointed his widow for her lifetime and after her death to his son Poolin and after the death of Poolin to his heirs. As discussed above the line of succession for the devolution of shebaitship was exhausted when Poolin's heirs. Kalicharan Dey was appointed the sole shebait. If, of course, Kalicharan Dey would not have trans-

ferred his shebaitship by will the plaintiff could have legitimately claimed as the heir of the founder. But admittedly Kalicharan Dey was the sole shebait under the Deed of Endowment. During the lifetime of Kalicharan Dey admittedly the plaintiff did not claim shebaitship at all. It was only after the death of Kalicharan the plaintiff claimed her shebaiti right. The adoption of Kashinath Dey has not been challenged. Kashinath Dey also admittedly obtained the probate of the will of Kalicharan Dey. The line of succession having been prescribed upto Poolin's heir, Kalicharan, there was no limitation on his power to transfer by will his shebaiti right.

(b) Further it appears from the fact of this case that the plaintiff instituted a suit (suit No. 1096 of 1935) against Kalicharan Dey for maintenance and on July 28, 1936 by a consent decree the plaintiff agreed to accept Rs. 20/- per month as maintenance from Kalicharan Dey. By the said decree a specific portion of premises No. 4 Gobinda Sen Lane was reserved for her exclusive residence. Again on February 4, 1938 another consent order was passed in an execution application in the said suit whereby the plaintiff accepted a consolidated sum of Rupees 3,600/- in full satisfaction of her claim for maintenance against the said Kalicharan Dey or his estate. In fact by the consent decree dated July 28, 1936 and the consent order dated February 4, 1938 sums of Rs. 1,000/- and Rs. 460/- respectively were directed to be paid to the plaintiff as her settled costs. It is true that the said consent decree has been qualified with the words "without prejudice of the plaintiff's right" but the fact remains that the plaintiff not only got the right of residence but also obtained a decree for maintenance. The consent order dated February 4, 1938 however has not been similarly qualified. It is significant that, although the plaintiff has been given the right of residence in the endowed property, she has not been residing there. The various proceedings between the plaintiff, on the one hand, and the Kalicharan Dey or Kashinath Dey on the other, show that the relationship between them was not normal and on account of the strained relationship between the plaintiff and the defendant the performance of the Poojah of the Thakoor may not be properly done. Thus even for the benefit of the deity the transfer of the Shebaiti right by the will of Kalicharan can also be justified.

(c) Further as stated above the right of maintenance and the right of

residence of the widow have been fully covered by the previous orders of the court. In fact in the said consent orders she has agreed to accept the sum of Rs. 3,600/- in full satisfaction of her right of maintenance. It is true that the said right of maintenance has been claimed against Kalicharan and his estate but in the instant case the Deed of Endowment also provides for the maintenance to a shebait. It appears to me that as by consent her right of maintenance and right of residence has been fully provided for, she cannot be allowed to get maintenance again which will be payable to the plaintiff as a consequential benefit, if she is appointed as a co-shebait.

14. In the premises, the issues Nos. 1 and 2 should be answered in the negative.

Issue No. 3

15. Mr. Ghosh on behalf of the defendant, has argued that as by the consent decree dated July 28, 1936 and the consent order dated February 4, 1938 the plaintiff in full satisfaction of her legal rights was allowed the right of residence and the sum of Rs. 3,600/- towards maintenance, the present suit is not maintainable. But this contention cannot be accepted inasmuch as the said consent decree has been specifically qualified by the following statement "without prejudice to the plaintiff's right which she may be entitled to upon the death of the defendant". In the premises, this issue is answered in the affirmative.

Issue No. 4

16. The plaintiff is not entitled to any relief and, as such, the suit is dismissed. The costs of the parties and the costs of guardian-ad-litem will come out of the estate. The costs of the guardian-ad-litem will come at the first instance.

Suit dismissed.

AIR 1972 CALCUTTA 104 (V 59 C 20)

S. K. CHAKRAVARTI, J.

Smt. Luxmi Devi and others, Petitioners v. Akul Mahato, Opposite Party.

C. R. No. 999 of 1971, D/- 1-9-1971.

Tenancy Laws — W. B. Land Reforms Act (10 of 1956), Section 21 — Bar of jurisdiction of Civil Court — Where the Civil Court of certain place had jurisdiction to entertain a suit at the time, the same was instituted and during the pendency of the suit the Act depriving the Civil Court of its jurisdiction was extended to that place, the Court will continue to have that

Jurisdiction in respect of the suit. (X-Bef.— Civil P. C. (1908), Section 9).

(Para. 3)

Miss. N. K. Chaturvedi, for Petitioners; R. B. Mahato, for Opposite Party.

ORDER:— An intriguing point arises for determination in this Rule obtained by the plaintiffs. On the 15th of April, 1965 the petitioners filed a suit against the opposite party for recovery of a sum of Rs. 176/- as the price of the bhag produce in their share from the opposite party who was alleged to be their bargadar in respect of the land in question in the court of the Munsif at Raghunathpur in the district of Purulia. This sum included Rs. 16/- by way of interest. It is an admitted position that at the time the suit was instituted the West Bengal Land Reforms Act was not extended to Purulia. During the pendency of the suit, by Notifications dated the 24th June 1967 the Governor was pleased to appoint the 30th June 1967 as the date with effect from which the West Bengal Land Reforms Act, 1955 was to extend to the transferred territories including Purulia. By another Notification bearing the same date and published on the same date as before, the Governor was pleased to specify the 1st day of July, 1967 as the date on which Section 2, Section 3, Section 16, Section 17 (excepting sub-section (3) thereof), Section 18, Section 18-A, Section 19, Section 19-A, Section 19-B, Section 20, Section 21, Section 57, Section 58, Section 59 (so far as it relates to clause (7), thereof), Section 60 shall come into force in all the areas transferred from Behar to West Bengal under the Behar and West Bengal (Transfer of Territories) Act, 1940. A question, therefore, was raised before the learned Munsif that under Section 21 of the West Bengal Land Reforms Act, 1955, hereinafter referred to as the Act, the Civil Court would have no jurisdiction to entertain the suit as it is a matter covered by Section 18 of the Act. This contention prevailed with the learned Munsif who dismissed the suit. The plaintiffs preferred an appeal and the learned Subordinate Judge, sitting in appeal, agreed with the learned Munsif that the Civil Court would have no jurisdiction and directed a return of the plaint. Against this order the plaintiffs have come up in this Rule.

2. Now, if the suit had been instituted after the relevant sections of the Act had been extended to Purulia, the question whether the Civil Court would have jurisdiction to entertain the suit would definitely arise. But

herein the Civil Court had admittedly the jurisdiction to entertain the suit at the time the same had been instituted. Section 21 of the Act is the relevant section in this connection. Under sub-clause (1) of Section 21 no Civil Court "shall entertain any suit or proceeding in respect of any matter mentioned in Sections 17 and 18". It has to be considered as to whether this has the effect of divesting the Civil Court of the jurisdiction it had admittedly at the time the suit was instituted. Both the courts have held on an interpretation of Section 21 that Civil Courts would not have any such jurisdiction.

3. Upon hearing the learned Advocates on both sides I am, however, of a different opinion. It is a common maxim of law that the jurisdiction of the Civil Court, if it has to be taken away, must be taken away expressly or impliedly where there can be no question that such jurisdiction has been taken away. But if there is any question as to whether in any pending suit the amended new law would apply, there must be definite provisions to that effect. Every statute which implies that the provisions would apply to pending suits expressly provide for that. If there is no such provision, the inference would be that the Civil Court which was in seisin of the matter at a time when its jurisdiction over it could not be in question, would continue to have that jurisdiction in respect of that suit. In this particular case, sub-section (2) of Section 21 provides for the transfer of proceedings pending before the Bhag Chash Board, under the West Bengal Bargadars Act, 1950 to the Officer or Authority having jurisdiction over the area to which the proceedings relate is situate under the Land Reforms Act. That would show that the legislature was quite aware of the fact that pending proceedings might be affected by Section 21 and expressly restricted the application to proceedings pending before the Bhag Chash Board and not before the Civil Court. Therefore, even by implication, Section 21 would not divest the Civil Court of the jurisdiction it had in entertaining the present suit.

4. Mr. Mahato, learned Advocate appearing for the opposite party, submits that Section 3 of the Act would show that no other law which would be inconsistent with the provisions of this Act would have any effect. But Section 3 can have no application to the facts of this case at this stage. In this view of the matter the orders passed by the courts below must be set aside and the suit decided on merits.

5. At the same time, it is not clear as to whether the Bargadars Act of 1950 was applicable to Raghunathpur at the time the suit was instituted or whether there was any such Act which would bar the jurisdiction of the Civil Court at the time the suit was instituted. This is a point which will have to be investigated by the learned Munsif on getting back the records of the case.

6. The result, therefore, is that subject to the observations made above, the Rule is made absolute and the order of the learned Appellate Court that the Civil Court would have no jurisdiction to dispose of the pending suit is set aside and the suit is remanded back to the trial court to be heard on merits and also on the point referred to above.

7. Each party will bear its own costs in this Court.

8. Let the records go down as quickly as possible.

Order accordingly.

AIR 1972 CALCUTTA 105 (V 59 C 21)

P. B. MUKHARJI, C. J. AND B. C. MITRA, J.

Sitaram Jaipuria and others, Appellants v. Banwarilal Jaipuria, Respondent.

A. F. O. O. No. 91 of 1971, D/-17-9-1971, from judgment of S. K. Mukherjee, J., reported in 1971 Tax LR 978 (Cal).

(A) Civil P. C. (1908), Order 39, Rule 1 — Injunction pending suit — Application for — Main factors to be considered are question of balance of convenience and question of prima facie case. (Para 9)

(B) Civil P. C. (1908), Order 39, Rule 1 — Injunction — Balance of convenience — Where, injunction pending suit, if issued, is likely to cause irreparable loss to opposite party, while loss, if any, that may cause to plaintiff is agreed to be reimbursed, the balance of convenience lies in refusing injunction. 1971 Tax LR 978 (Cal), Reversed. (Paras 9, 77)

Where a share-holder brings suit challenging the legality of resolution sanctioning investments by a company in shares of other company undertaking a new industry and several steps to incorporate the new company are already taken and injunction if granted is likely to cause irreparable loss to the company and on the other hand the company undertakes to reimburse

loss, if any, that may cause to the plaintiff during pendency of the suit, the balance of convenience lies in refusing injunction pending suit.

(Paras 9, 77)

(C) Monopolies and Restrictive Trade Practices Act (1969), Section 22 — Applicability — Companies which are incorporated prior to commencement of the Act of 1969 do not come within ambit of Section 22. (X-Ref:— Companies Act (1956), Sections 34 (2), 149). (Case Law discussed:). 1971 Tax LR 978 (Cal), Reversed. (Paras 11, 16, 59)

Where a company is incorporated prior to commencement of the 1969 Act it is not a case of "any person or authority establishing any new undertaking after the commencement of the Act." Establishment of a new undertaking and commencement of business are prima facie different. Establishment of a new undertaking commences from the incorporation of the company. Its culmination may be the commencement of the business certificate.

(Paras 16, 59)

(D) Monopolies and Restrictive Trade Practices Act (1969), Section 22 — The section is intended for State intervention. 1971 Tax LR 978 (Cal), Reversed. (Para 17)

Monopolies are a matter of public concern under the Act. The State is primarily bound to see that there is no concentration of economic power so as to come within its mischief. The question under Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969, is primarily a question for the Central Government and thereafter by the Commission followed by report to the Government and it is not the primary duty of a Court to adjudicate on a point whether a company is interconnected or not within the meaning of Section 22. The section does not confer any power on a shareholder to challenge the establishment of a new undertaking on ground of infringement of Section 22. Moreover, the prohibition contained in Section 22 does not make the contract or the undertaking illegal prima facie. (Paras 17, 18)

(E) Companies Act (1956), Section 173 (2) — Applicability — Section 173 (2) does not imply that any and every lapse should be visited with the consequence of ultra vires doctrine. A special business only requires to find a place in the explanatory statement attached to the notice of General Meeting of Shareholders. 1971 Tax LR 978 (Cal), Reversed. (Paras 32, 58)

Any and every legal requirement need not be placed before the General Meeting of the General body of the Shareholders. It is to be presumed

that all legal requirements, before a venture is undertaken, is carried out properly. The explanatory statements should not be too strictly construed but should be given a liberal construction and the only requirement should be that its contents are clear to an ordinary person engaged in business.

(Paras 32, 63)

Where a company intends to invest its capital in a new undertaking and resolution to that effect is proposed before the General Body, it is not necessary to state in Explanatory Note attached to the notice of General meeting that legal requirements for opening new undertaking are satisfied.

(Paras 32, 42, 58 & 60)

(F) Companies Act (1956), Section 173 (2) — A company seeking approval of General Body of Shareholders for starting a new undertaking need not mention in the Explanatory Note attached to Notice that licence under Section 11 of the Industrial Development and Regulation Act is obtained. (X-Ref:— Industrial Development and Regulation Act (1969), Section 11).

(Paras 43, 78, 79)

(G) Monopolies and Restrictive Trade Practices Act (1969), Section 2 (g) (iii) — Exercise of control by a company over another company — Concept of "control" implies dominant and a dominated undertaking. 1971 Tax LR 978 (Cal), Reversed. (Para 67)

S. 2 (g) (iii) requires that the controlling undertaking must be in a position to dominate the affairs of the controlled undertaking either in respect of the management of its affairs, or in respect of its finance or with regard to the capital structure. In the absence of one or other of those features the element of control cannot come into the picture. The mere fact that there are same common Directors or that the Managing Director of one Company is a relative of the Managing Director of the other company or that a company has invested certain capital in another company do not by themselves lead to the inference that the relation of dominant and dominated undertakings exists. (Para 67)

(H) Companies Act (1956), Section 173 (2) — A company seeking approval of general body of shareholders for investing capital in new undertaking need not disclose to individual shareholders the details of financial arrangement with collaborators. (Para 80)

Cases Referred: Chronological Paras
(1971) AIR 1971 SC 2355 (V 58) =
(1970) 1 SCC 613, Mathura Prasad Bajoo Jaiswal v. Dossibai N. B. Jeejeebhoy

- (1971) 75 Cal WN 173, Richard Chow v. James Chow 9, 82
- (1970) 1970-2, Com LJ 200 = 41, Com Cas 377 (Bom), Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd. 41, 82
- (1970) Suit No. 105 of 1970 (Cal) 47
- (1969) 1969-2 QB 307, Samuel Montagu & Co. Ltd. v. Swiss Air Transport Co. Ltd. 39
- (1968) AIR 1968 SC 1358 (V 55) = (1968) 3 SCR 706, Jambu Rao Sattappa v. Neminath Appayya 19, 82
- (1968) AIR 1968 Cal 198 (V 55) = 38 Com Cas 558, In re Indo Burma Wood Products (P) Ltd. 53
- (1967) AIR 1967 SC 509 (V 54) = (1967) 1 SCR 761, Commr. of Wealth Tax, Madras v. Ramaraju Surgical Cotton Mills Ltd. 82
- (1967) AIR 1967 SC 595 (V 54) = (1967) 63 ITR 470, Standard Mills Co. Ltd. v. Commr. of Wealth Tax, Bombay 16
- (1967) AIR 1967 SC 1534 (V 54) = (1967) 65 ITR 651, Travancore Cochin Chemicals (P) Ltd. v. Commr. of Wealth Tax, Kerala 16, 82
- (1966) AIR 1966 Cal 232 (V 53), East India Commercial Co. (P) Ltd. v. Rayman Engineering Works Ltd. 35, 82
- (1966) 1966-2 Com LJ 208 (Cal), Nagaisuree Tea Co. Ltd. v. Ram Chandra Karnani 82
- (1966) AIR 1966 Mys 154 (V 53) = (1965) 1 Mys LJ 442, Neminath v. Jamboorao 19, 82
- (1966) 1966-2, QBD 306 = 1966-1 All ER 814, Samuel Montagu and Co. Ltd. v. Swiss Air Transport Co. Ltd. 61
- (1965) AIR 1965 SC 101 (V 52) = (1964) 5 SCR 239, Mangilal v. Sujan Chand 82
- (1965) AIR 1965 SC 1535 (V 52) = (1965) 2 SCR 720, Shanti Prasad Jain v. Kalinga Tubes Ltd. 41, 82
- (1965) 69 Cal WN 369 = (1965) 1 Com LJ 112, Shalagram Jhajarria v. National Co. Ltd. 82
- (1964) AIR 1964 Cal 73 (V 51) = 67 Cal WN 960, Narendra v. Institute of Engineers. 36
- (1963) AIR 1963 Orissa 189 (V 50) = (1964) 1 Com LJ 117, M/s. Kalinga Tubes Ltd. v. Shanti Prasad Jain 41, 82
- (1962) AIR 1962 Cal 127 (V 49) = 66 Cal WN 63, Lalita Rajya Lakshmi v. Indian Motor Co. 34, 41, 82
- (1961) 1961-1 QB 374 = 1961-1 All ER 417, Archolds (Freightage) Ltd. v. S. Spanglett Ltd. 19, 55
- (1960) 64 Cal WN 970 = (1961) 31 Com Cas 125, Biswanath Prasad Khaitan v. New Central Jute Mills Co. Ltd. 40, 82
- (1960) AIR 1960 Raj 49 (V 47) = 1960 Raj LW 132, Kishangarh Electric Supply Co. Ltd. v. United State of Rajasthan 82
- (1959) AIR 1959 All 276 (V 46), Mohan Lal v. Grain Chamber Ltd., Muzaffarnagar 82
- (1957) 1957-1 QB 267 = 1956-3 All ER 683, St. John Shipping Corporation v. Joseph Rank 19, 55
- (1955) AIR 1955 Cal 132 (V 42) = 58 Cal WN 715, Mahaliram Santhalia v. Fort Gloster Jute Manufacturing Co. Ltd. 9, 82
- (1953) 1953-1 WLR 402 = 97 SJ 134, Newman v. Francis 53
- (1952) AIR 1952 SC 362 (V 39) = 1952 SCR 1122, Smt. Hira Devi v. District Board, Shahjahanpur 82
- (1952) AIR 1952 Cal 645 (V 39) = 56 Cal WN 361, Bimal Singh v. Muir Mills Co. Ltd. 33, 57, 82
- (1949) 1949 AC 398 = 1949-1 All ER 544, Cutler v. Wandsworth Stadium Ltd. 19, 53, 82
- (1939) 1939 AC 277 = 1939-1 All ER 513, Vita Food Products v. Unus Shipping Co. 37, 61
- (1935) 1935-1 KB 75 = 104 LJ KB 153, Monk v. Warbey 82
- (1928) AIR 1928 PC 180 (V 15) = 55 Ind App 274, Parashuram Detaram v. Tata Industrial Bank Ltd. 34
- (1917) AIR 1917 PC 52 (V 4) = 1917 AC 607, Pacific Coast Coal Mines v. Arbutnot 38, 82
- (1906) 1906-2 Ch D 390 = 25 LJ Ch 682, In re Otto Electrical Manufacturing Co. 16, 82
- (1884) 13 QBD 109 = 53 LJ QB 459, Vallance v. Falle 53
- (1875) 1875-1 Ch D 13 = 45 LJ Ch 27, Mac Dougall v. Gardner 9, 61

S. C. Sen with R. C. Nag and Sunil Mukherjee, for Appellants; Prabir Sen with Ahin Choudhury, for Respondent.

P. B. MUKHARJI, C. J. :— This is an appeal from an interlocutory order of S. K. Mukherjee, J., dated the 16th March, 1971.

2. This was an application in a representative action by a shareholder for an injunction restraining the company, Swadeshi Cotton Mills Ltd. and its directors from holding any meeting pursuant to a notice dated September 14, 1970 or from passing any of the resolutions set out in the said notice, or from giving effect to the resolutions, if passed. This notice dated Sep. 14, 1970 was accompanied by an explanatory statement under S. 173 (2) of the Companies Act.

On the 12th Oct., 1970, the said resolution was unanimously passed by a general meeting held in pursuance of the said notice.

3. The notice and the explanatory statement are challenged in the petition on the three following grounds:

(a) Neither document disclosed whether permission has been obtained from the Central Government as required under the Monopolies and Restrictive Trade Practices Act for establishing the undertaking of Swadeshi Polytex Ltd. which, when established, would be an inter-connected undertaking of the respondent company.

(b) The said documents informed the members that the work of the said polyester fibre plant has commenced; no disclosure was made whether a licence has been obtained in respect thereof as required by Section 11 of the Industries Act.

(c) None of the terms and conditions of the collaboration agreement — financial, technical or otherwise — were disclosed.

4. The learned trial Judge held that, in his opinion the undertaking of Swadeshi Polytex Ltd. transpires to be an inter-connected undertaking of the respondent company to which Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 will apply. The learned Judge also held that the shareholder plaintiff had a legal right to bring an action against the company of which he is a shareholder, to restrain it from committing an illegal act under the Monopolies and Restrictive Trade Practices Act or from questioning the sufficiency or validity of the notice of the resolution.

5. The learned Judge also gave a meaning and interpretation of the word "inter-connected undertaking". He held that if a relative of the managing director of the company is the managing director of another company, their undertakings must be deemed to be inter-connected undertakings in the sense of the statute, even though the undertakings may have nothing to do with each other, even though their constitution or organs of control may be totally different. He said, "This may be bad logic or poor law, but it is good Monopolies and Restrictive Trade Practices Act." Therefore, he held that because Rajaram Jaipuria and Sitaram Jaipuria were interested and were related, therefore it became an inter-connected undertaking. Rajaram Jaipuria is the managing director of the respondent company and Sitaram Jaipuria is the managing director of Swadeshi Polytex Ltd. They are bro-

6. The learned Judge also came to a certain conclusion with regard to clause (b) of the Explanation of inter-connected undertakings in Section 2 (g) of the Monopolies and Restrictive Trade Practices Act, 1969, which reads as follows:

"Explanation— For purposes of Cl. (g) two or more undertakings shall be deemed to be inter-connected (b) if one or more individuals together with the relatives or firms in which such individuals or their relatives are partners jointly or severally own, manage or control the other".

On the interpretation of clause (b), the learned Judge said,

"No doubt, Cl. (b) is one of the glaring instances of bad drafting in an ill-drafted statute. The syntax is defective but nevertheless, the sense is clear. It means that two or more undertakings shall be deemed to be inter-connected, if one or more individuals who own, manage or control one undertaking, together with his or their relatives jointly or severally own, manage or control the other undertaking or other undertakings."

In fact, the learned Judge supplied the words "if one or more individuals who own, manage or control one undertaking" to the statute. The learned Judge made it clear,

"I desire to make it clear that I hold that new undertaking to be an inter-connected undertaking on the sole and solitary ground that the respective managing directors are relatives and for no other reason."

7. To complete the statement of facts, one more point has to be noted. The plaintiff in this case filed another suit in the High Court being Suit No. 105 of 1970. That suit was instituted on or about the 26th day of February, 1970 and a prior suit. In that suit, the prayer inter alia was a declaration that the notice dated the 29th January, 1970, with an explanatory note annexed thereto, was bad, inoperative and of no effect and for permanent injunction restraining the respondents from implementing or giving effect to any of the resolutions passed at the meeting. There, in that suit, Ghose, J., ordered on the 8th September, 1970:—

"There shall be an interim injunction restraining the respondent directors (company's directors) from acting on the resolution No. 1 passed at the general meeting held on the 27th February, 1970 until the same is confirmed and approved at a meeting properly notified. All other interim orders stand vacated."

The respondents called a properly notified meeting and the resolution has been unanimously passed, confirmed and approved.

8. S. K. Mukherjee, J., after having come to the aforesaid findings gave an order for injunction restraining the respondents or each of them from giving effect to the resolutions set out in the notice dated September 14, 1970. This is an appeal against that order.

9. As I see it, there are two main considerations in an application for injunction. One is a question of balance of convenience. The other is a question of *prima facie* case. The petitioner never attended any meeting. The company was incorporated on the 26th March, 1970. Prior to that, on the 29th July, 1969, there was a Letter of Intent issued in favour of Swadeshi Cotton Mills Ltd. Then on the 25th July, 1970, the Letter of Intent was transferred to Swadeshi Polytex Ltd. On the 9th July, 1970 there was the commencement of business certificate. On the 7th October, 1970 industrial licence was issued in favour of Swadeshi Polytex Ltd. The petitioner holds only 7 voting rights. Besides, the appellants and their directors have given an undertaking to make good all the losses should they fail in the appeal. Apparently on the basis of these grounds, there is little scope for granting an injunction. From that point of view, the learned Judge's order cannot be sustained. He has in fact virtually decided the suit. The suit is pending. It is a representative action. The advertisements have not yet been issued. From that point of view, if injunction is granted, the whole affair will have come to a standstill. Time for different statutory engagements will have expired and it will mean freezing of the many steps that have been taken for setting up of the Swadeshi Polytex Ltd. and which was already functioning. On the other hand, if there is no injunction, the applicant will hardly lose anything being completely guaranteed by the undertaking given to this Court by the Appellants. Therefore, on the balance of convenience, it does not seem to me to be at all a case for injunction specially in this matter. The balance of convenience is not in favour of granting the injunction asked for. See *Mahaliram Santhalia v. Fort Bloster Jute Manufacturing Co.*, AIR 1955 Cal 132. See also *Richard Chow v. James Chow*, (1971) 75 Cal WN 173. The celebrated observations in the judgment of James, L. J. in *MacDougall v. Gardiner*, (1875-1 Ch. D. 13 at page 23) may bear repetition:—

"Has a particular individual the right to have it for the purpose of using his power of eloquence to induce the others to listen to him and to take his view? That is an equity which I have never yet heard of in this Court, and I have never known it insisted upon before; that is to say, that this Court is to entertain a bill for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions *viva voce* at a meeting of the share-holders. If so, I do not know why we should not go further, and say, not only must the meeting be held, but the share-holders must stay there to listen to him and to be convinced by him. The truth is, that is only part of the machinery and means by which the internal management is carried on. The whole question comes back to a question of internal management; that is to say, whether the meeting ought or ought not to be held in a particular way, whether the directors ought or ought not to have sanctioned certain proceedings which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed. If there is some one managing the affairs of the company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed, the company are the proper persons to complain of that. It seems to me, therefore, that the thing is perfectly plain and obvious, and when the Master of the Rolls had the case before him he immediately pointed it out, and said, "You have the wrong plaintiff here — the plaintiff must be the company." From the first opening of this case before us, I have never had any doubt in my own mind that this was a bill which, if it was to be sustained at all, could only be sustained by the company."

10. The next question in an application for injunction is to find out where the *prima facie* case lies. It appears to me that the *prima facie* case is against the plaintiff. I will first examine Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969. It says:—

"No person or authority other than Government, shall after commencement of this Act, establish any new undertaking which when established would become an inter-connected undertaking or an undertaking to which clause (a) of Section 20 applies except under and in accordance with previous sanction of the Central Govt."

11. The learned Judge applied this section and held that the Swadeshi

Cotton Mills Ltd. and the Swadeshi Polytex Ltd. come within the ambit of Section 22. It seems to me that prima facie the crucial words of the section "after the commencement of this Act" have been ignored by the learned Judge. Swadeshi Polytex Ltd. was incorporated on the 26th March, 1970. The Letter of Intent from the Government was given on the 24th July, 1969. The transfer of the Letter of Intent to Swadeshi Polytex was made on the 20th January, 1970. The certificate for commencement of business was granted to Swadeshi Polytex Ltd. on or about the 9th July, 1970.

12. If the incorporation of the company is taken as the establishment of the undertaking, then that took place on the 27th March, 1970 long prior to the Act came into force. Therefore, it was not a case of "any person or authority shall after the commencement of this Act establish any new undertaking." The Act came into force on the 1st June, 1970. Then it is said that incorporation of the company is not the establishment of a new undertaking but the commencement of the business certificate dated the 9th July, 1970. In this case and at that time, the Monopolies and Restrictive Trade Practices Act, 1969, had come into force.

13. Section 34 of the Companies Act is quite explicit on this point. Section 34 (2) of the Companies Act states:

"From the date of the incorporation mentioned in the certificate of incorporation, such of the subscribers of the memorandum and other persons, as may from time to time be members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."

14. The significant features about Section 34 (2) of the Companies Act may be noted. From the very inception of the incorporation it not only becomes a body corporate but also "capable forthwith of exercising all the functions of an incorporated company" and also with "liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act." I can read these features only as establishing "company capable of exercising all the functions of an incorporated company." If this is not the establishment of an undertaking I do

not (know?) what is. With this establishment of business, it can buy lands it can build factories, it can collaborate with other concerns. In fact, all these have been undertaken by Swadeshi Polytex Ltd.

15. Section 149 of the Companies Act provides for the restrictions on commencement of business, namely, where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, it is provided that the company shall not commence its business or exercise any borrowing powers, unless certain things are done. Similarly, for a company having a share capital which has not issued a prospectus, the company shall not commence any business or exercise any borrowing powers, unless certain formalities are performed. Similarly again, Section 149 (2-A) provides for certain other restrictions for a company having a share capital whether or not it has issued a prospectus inviting the public to subscribe for its shares. When these requirements are satisfied then the Registrar shall certify that the company is entitled to commence business and the certificate shall be conclusive evidence that the company is so entitled as provided in Section 149 (3).

16. Now it is this certificate and this statutory provision which is contended by the learned Counsel for the respondent as the date of establishment of a new undertaking. Establishment of a new undertaking and commencement of business prima facie appears to me to be different. Establishment of a new undertaking commences from the incorporation of the company. Its culmination may be the commencement of the business certificate. Learned Counsel for the respondents have relied on a decision of the Supreme Court reported in Travancore-Cochin Chemicals (F) Ltd. v. Commr. of Wealth-Tax, Kerala (65 ITR 651) = (AIR 1967 SC 1534). There the Supreme Court had to consider a matter under the Wealth Tax Act under Section 45 (d) of the Wealth Tax Act. It was held in that case by the Supreme Court that the appellant was "established" within the meaning of the proviso to Section 45 (d) i December, 1953, or on January 1, 1955 and that there was a clear distinction between the word "registered" or "incorporated" and the "established". I think that there that interpretation was necessary and as Sikri J. pointed out at page 655 "if the legislature was thinking of incorporation of a company then we fail to understand why the word was not used instead of the word 'established'." Further, if we

look at clause (d); it excludes certain industrial undertakings from the benefit of Section 45; what are excluded are companies "formed by the splitting up, or the reconstruction of a business already in existence or by the transfer to a new business of any building, machinery or plant used in a business which was being previously carried on." Ordinarily the date of incorporation of a company has nothing to do with the transfer of a machinery or plant to it." That consideration is absent here. The learned Counsel for the respondents also relied on another Wealth Tax Act case, namely, *Standard Mills Co. Ltd. v. Commr. of Wealth Tax Bombay* reported in 63 ITR 470 = (AIR 1967 SC 595). Reference was also made to the observations of Buckley J. at page 393 in the case of *In re. Otto Electrical Manufacturing Co.* reported in (1906) 2 Ch. D. 390. But the learned Judge there had no occasion to contrast it with such statutory provisions as Section 34 (2) of the Companies Act. But those decisions of the Supreme Court are with respect to the Wealth Tax Act where different considerations apply. The point we are concerned with relates to the Monopolies and Restrictive Trade Practices Act, 1969. *Prima facie* it appears to me that establishment of a new undertaking and commencement of business should be construed in that light. But in any event, without deciding the point itself and without deciding the issue which will ultimately be tried in the suit, I am of the view *prima facie* that this does not come within the ambit of Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969.

17. There is a further important consideration on *prima facie* case. I believe *prima facie* that Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 is intended for State intervention. It is not intended for aggrieved share-holders. The Act states in the preamble — "An Act to provide that the operation of the economic system does not result in concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto." Monopolies, therefore, are a matter of public concern under the Act. The state is primarily bound to see that there is no concentration of economic power so as to come within its mischief. Therefore, this prohibition under Section 22 is intended for the State and not for disgruntled share-holders or a share-holder of .7 voting rights.

18. The reason is obvious. If a solitary share-holder is given this right, then the Court will have to come to a decision on Section 22 of the Act. But that decision is left with the Central Govt. in the first instance by the statute. If the Central Government is of the opinion that no such approval can be made without further enquiry, then under Section 22 (3-B) of the Act it may refer the application to the Commission for an enquiry, and the Commission may, after such hearing as it thinks fit, report to the Central Government thereon. Under Section 22 (3-C) of the Act, upon receipt of the report of the Commission, the Central Government may pass such orders with regard to the proposal for the establishment of a new undertaking as is contemplated under Section 22 of the Act as it may think fit. The whole scheme and procedure is through the Central Government and the Monopolies Commission in the first instance, and not through the Court.

19. Besides, there seems to be another great obstacle for the respondents. The prohibition contained in Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 does not make the contract or the undertaking illegal *prima facie*. There are many prohibitions in public statutes but they do not raise the question of illegality or *ultra vires* but whose breach is otherwise provided for in the statute itself. The scheme of the Monopolies and Restrictive Trade Practices Act, 1969 which has a series of sections on penalties and offences under Chapter 8 and Chapter 9 *prima facie* indicates that the establishment of a new undertaking which offends Section 22 of the Act and which is without the previous permission of the Central Government will be considered as offences under the said Act and will be visited by the penalties mentioned in the statute. See in this connection *Archbold's (Freightage) Ltd. v. S. Spanglett Ltd.*, 1961-1 QB 374 at pp. 389 to 393 per Lord Justice Devlin and also *St. John Shipping Corporation v. Joseph Rank* (1957) 1 QB 267. The principles mentioned in those two English cases appear to have been followed in *Neminath v. Jumboo Rao*, AIR 1966 Mys. 154 and upheld by the Supreme Court in AIR 1968 SC 1358. The decision in *Cutler v. Wandsworth Stadium Ltd.* in 1949 AC 398 and Lord Simmond's observations at page 407 may be seen.

20. Then again the question of valuation of assets is a very important question in this application. Section 22 of the Monopolies and Restrictive Trade

Practices Act, 1969 is not attracted to an undertaking unless its own assets or its own assets together with the assets of its inter-connected undertakings is not less than twenty crores of rupees. Therefore, the relevant point of time at which the valuation of its assets and the assets of the inter-connected undertakings has to be computed is a matter of great importance. The time taken by the learned Judge is 31st December 1969, that is to say, the last day of the financial year, but it has been contended that it should be the year 1968. But at that time there was no asset for Swadeshi Polytex Ltd. Besides, the learned Judge has introduced new words to give a meaning to the Explanation to 2 (g) of the Act. He has suggested that the words "who manage or control one undertaking" are to be introduced to the Explanation of 2 (g) of the Monopolies and Restrictive Trade Practices Act, 1969. Prima facie in an application for injunction I am against the plaintiff in so crucial a matter of interpretation.

21. Finally, on behalf of the respondents, it is said that under Section 172 of the Companies Act, every notice of a meeting of a company shall specify the place and the day and the hour of the meeting and shall contain a statement of business to be transacted thereat. The explanatory statement that is required to be annexed to the notice under Section 173 of the Companies Act is said by the appellant company not to disclose to the shareholders the fact whether the Monopolies and Restrictive Trade Practices Act, 1969 applies or whether any permission has been obtained.

22. Now on that point at the time when the present application was made, the company has not applied for any such permission under the Monopolies and Restrictive Trade Practices Act, 1969. The learned Counsel for the respondents argues that at any rate the explanatory statement should have stated whether the Monopolies and Restrictive Trade Practices Act applies or not should have been brought to the notice of the general body of the shareholders. It is difficult to understand the point which the learned Counsel for the respondents wanted to make. Is it to be stated in the explanatory statement to the notice that—"we invite an argument on the Monopolies Act and its applicability"? Surely that is not the purpose of an explanatory statement to the notice.

23. But there is a more fundamental obstacle on the part of the respondent in this regard. The notice is given in the following terms:—

"Notice is hereby given that a General Meeting of the members of the Swadeshi Cotton Mills Ltd. will be held at the Registered Office of the company at Swadeshi House, Civil Line, Kanpur, on Monday, 12th day of October, 1970 at 2.30 p.m. to consider and if thought fit to pass with or without modification the following resolutions as an Ordinary Resolution.

"Resolved that resolution No. 1 (set out hereunder) which had been unanimously passed as an Ordinary Resolution at a general meeting of the company held on the 27th February, 1970 at its registered office at Swadeshi House, Civil Line, Kanpur in pursuance of the notice dated the 29th January, 1970 be and is hereby confirmed and approved."

"Resolved that subject to the necessary approval of the Central Government being obtained pursuant to the provisions of Section 372 and all other applicable provisions, if any, of the Companies Act, 1956, the company hereby sanction the investment by it in the shares of Swadeshi Polytex Ltd., Kanpur, to the extent of the aggregate face value of rupees one crore by way of subscribing and/or purchasing to the extent of 10,00,000 Equity Shares of the value of Rs. 10/- each at par on such terms and conditions as the Board of Directors think fit notwithstanding the fact that the investment in the shares of the said Swadeshi Polytex Ltd. exceeds 10% of the subscribed capital of the said Swadeshi Polytex Ltd. and shall exceed 30% of the prescribed capital of this company, and the Board of Directors of the company be and are hereby authorised to do and/or cause to be done and/or execute and/or cause to be executed all such acts, deeds and things as they may think expedient for the purpose."

By order of the Board
For Swadeshi Cotton Mills Co. Ltd.
Secretary

24. With the notice the explanatory statement required by Section 173 was enclosed. The Notice itself gives due information that subject to the necessary approval of the Central Government and all other applicable provisions if any of the Companies Act, the company sanctions investment by Swadeshi Cotton Mills Ltd. in the shares of Swadeshi Polytex Ltd., Kanpur to the extent of aggregate face value of rupees one crore. The explanatory statement said that the share capital of the new company proposed to be issued was four crores and the proposed investment together with the existing investment in the shares of the incorporated company shall be in excess of 30% of the capital.

tal of the company. Hence under Section 372 of the Companies Act the approval of the company in General Meeting is sought. The explanatory statement made it clear that Sri S. Jaipuria was one of the persons proposed to be appointed as Managing Director of the new company of Swadeshi Polytex Ltd. and Shri Rajaram Jaipuria is proposed to be appointed as Managing Director of the company of Swadeshi Cotton Mills Ltd. Then there was a recital of certain civil proceedings, one of them being the present suit by the respondents being Suit No. 105 of 1970. In that suit an interim order was made which was also recited. Then in the correspondence itself it is stated that the general meeting of the members was duly held on the 27th February, 1970 and business of the meeting was taken and there was a resolution unanimously passed. Thereafter, follows a recital in Suit No. 105 of 1970 where the learned Judge by his interim order dated the 8th September, 1970 directed that:

"there shall be an injunction restraining the respondent Directors (Company Directors) from acting on the Resolutions passed at the General Meeting held on the 27th February, 1970 until the same is hereby confirmed or approved at a meeting properly notified. All other interim orders vacated."

25. This was duly passed at the General Meeting. Thereafter the present suit was filed being Suit No. 451 of 1970 by Banwarilal Jaipuria against the appellants. Before Mr. Justice Ghose the issue was whether the Letter of Intent has lapsed and it was on that ground that the order of injunction was made by the learned Judge.

26. In order to appreciate this point better, it will be necessary to refer to certain correspondence. On the 12th February, 1971 Swadeshi Polytex Ltd. wrote to the Secretary to the Government of India, Company Affairs, that that company has been registered for the establishment of polyester fibre unit and that it has been granted an industrial licence dated the 7th October, 1970. It drew the particular attention of the Government to the additional conditions in the licence where it is stated.

"Please note that the licence does not in any way constitute an authorisation under the Monopolies and Restrictive Trade Practices Act, 1969. Wherever applicable such permission or clearance as may be required under the provisions of this Act should be invariably obtained by the undertaking before instituting an effective step for implementing the licence."

In that letter Polytex Ltd. wrote that they understood that the provisions of the Monopolies and Restrictive Trade Practices Act will not apply to an undertaking which has taken steps towards substantial compliance with the terms of the Letter of Intent before the 1st June, 1970, being the date of the coming into operation of the Act. Then they proceeded to give in that letter particulars of the Letter of Intent, collaboration agreement, acquisition of lands, powers, import of machinery, application to the Controller of Capital Issue, project report and loan application and substantial amount of expenditure incurred prior to 1st June, 1970. To this there was a reply on the 6th March, 1971 stating inter alia "you will appreciate that the question of granting a clearance from the applicability of the provisions of Section 22 of the Monopolies and Restrictive Trade Practices Act will arise only if such provisions applicable to your undertaking." On the 12-4-1971 the Swadeshi Polytex Ltd. again wrote to the Deputy Secretary Government of India, giving the particulars that Rajaram Jaipuria Managing Director of Swadeshi Cotton Mills Ltd. and his brother Sitaram Jaipuria, M. P. are Directors and that having regard to the provisions of S. 2 (g) read with Explanation (b) Swadeshi Polytex Ltd. should be regarded, when established, as inter-connected undertaking with Swadeshi Cotton Mills Ltd. A reference was made also to Suit No. 451 of 1970 in that letter. The letter closes with the request that by way of abundant caution application was enclosed for approval under Section 22 of the Monopolies and Restrictive Trade Practices Act. Then on the 12th May, 1970 the Government replied to the letter of 12 February, 1970 saying that "I am directed to say that on the facts stated this department is of the view that the provisions of Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 will not apply to the establishment of the new undertaking for the manufacture of polyester fibre." Finally on the 20th May, 1971 they categorically wrote stating that "in view of the department's letter dated the 14th May, 1971 addressed to you the application under Section 22 is filed."

27. Now all that Section 22 of the Monopolies and Restrictive Trade Practices Act does is to provide that "No person or authority other than the Government shall after the commencement of this Act establish any new undertaking which when established would become an inter-connected undertaking to which clause (a) of Section 20 applies except in accordance

with the previous permission of the Central Government". But the Central Government itself does not think that Section 22 of the Act applies. That seems to me to be an end of the matter. There is no *prima facie* case for an injunction on that basis.

28. The learned Counsel for the respondents has placed a good deal of reliance on Section 173 of the Companies Act. Sub-section (2) of Section 173 reads as follows:—

"Where any item of business to be transacted at a meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business including in particular the nature of the concern or interest, if any, therein of every Director and Manager, if any."

29. At the time when notice of the meeting was given there was no application pending with the Government of India for permission under the Monopolies and Restrictive Trade Practices Act. Therefore, nothing was required to be stated in the explanatory statement but the explanatory statement did seek the permission of the General Meeting for sanctioning one crore rupees as investment of the money of Swadeshi Cotton Mills Ltd. in the shares of Swadeshi Polytex Ltd. under Section 372 of the Companies Act. Now sub-section (2) of Section 173 of the Companies Act requires "a statement setting out all material facts concerning each such item of business." All material facts as then available had been mentioned in the notice and the explanatory statements. Subsequently the Government of India has also stated that Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 does not apply. Therefore, it is not "material fact" to be disclosed. The fact that the Monopolies and Restrictive Trade Practices Act does not apply cannot be a material fact.

30. Looking at the problem it does not appear to me that *prima facie* Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 applies at all in this case, that the notice of the meeting is not at all tricky and that sufficient information had been given to the general body of shareholders that they were expected to accord sanction to the investment of one crore rupees of Swadeshi Cotton Mills Ltd. in Swadeshi Polytex Ltd.

31. The question under Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969, is primarily a question for the Central Government and thereafter by the Commission fol-

lowed by report to the Government and it is not the primary duty of a Court to adjudicate on a point whether a company is inter-connected or not within the meaning of Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969. Besides, I have already traced the history from the correspondence where the Government of India considers that Section 22 does not apply at all to the facts of this case.

32. Section 173 (2) of the Companies Act does not imply that any and every lapse should be visited with the consequence of ultra vires doctrine. A special business requires to find a place in the explanatory statement but it does not mean that any and every legal requirement should be placed before the General Meeting of the general body of the shareholders. It is to be presumed that all legal requirements, before a venture is undertaken, is carried out properly. For instance, there are various restrictions which require to be satisfied: for a factory, before it is intended to be put into operation, requires a factory licence, land, before it is purchased, requires registration, conveyance and permission in some cases of municipalities; foreign collaboration and import of materials requires permission under the Foreign Exchange Regulations Act and Import Control Act. It is not, in my view, necessary to state all that before the general body of shareholders. What is necessary, as for instance in this case, is to inform the general body of shareholders as a special business that Swadeshi Cotton Mills Ltd. is investing one crore rupees of its money in Swadeshi Polytex Ltd. and the requirement of Section 372 of the Companies Act has been satisfied.

33. I will now notice some of the decisions which have been cited by the Bar but most of them have no application to the facts of the present case. In the case of *Bimal Singh v. Muir Mills Co. Ltd.*, (AIR 1952 Cal 645) it was said that where there is a large body of shareholders who reside at great distances from the registered office of the company, the Court does not think it fair on the part of the company to leave the proposed articles at the registered office and give the shareholders notice of that fact. In a case like this the Court agreed with Mr. Palmer that printed copies of the proposed new articles should have been sent with the notice. In this case that was not done and the Court took the view that the notice did not disclose fully and frankly the facts upon which the shareholders were asked to vote. The facts here are entirely different.

34. In *Lalita Rajya Lakshmi v. Indian Motor Co.*, (AIR 1962 Cal 127) it was held that although it imposes by Section 173 (2) an obligation that there shall be annexed to the notice of the meeting a statement of the type and nature which is discussed in that judgment, the question is, does failure to comply with the details of Section 173 (2) of the Companies Act make it a case ipso facto of oppression in conducting the affairs of a company within the meaning of Section 397 (1) of the Companies Act which the Court was considering in that case. The Court there held at page 131 of that report:

"that does not mean that this failure to supply the fullest possible details in the explanatory note under Section 173 (2) of the Companies Act will be visited with an application under Section 397 as typifying such failure to be act of oppression within the meaning of Section 397."

It was also stated in that case at page 130.

The first answer on the facts follows from the proposition that if a shareholder is aware of the facts, it is not for him or her to complain of insufficiency of notice of a meeting. This principle was laid down by the Privy Council in the case of *Parashuram Detaram v. Tata Industrial Bank Ltd.*, 55 Ind App 274 = (AIR 1928 PC 180).

35. Then again when a Division Bench of this Court in *East India Commercial Co. (P) Ltd. v. Raymon Engineering Works Ltd.*, (AIR 1966 Cal 232) had to consider the question of "material facts" in Section 173 (2) of the Act, it was said that the solution of the problem as to whether all material facts were disclosed depends upon the facts of each case. It is, however, not the function of an explanatory statement to travel beyond the scope of the proposed resolution. Material facts have to be given but not detailed particulars.

36. There was some discussion in *Narendra v. Institute of Engineers*, 67 Cal WN 960 = (AIR 1964 Cal 73). It dealt with the question of difference in the character of a chartered company and a company formed by or under an act of Parliament.

37. In *Vita Food Products v. Unus Shipping Co. Ltd.*, (1939 AC 277) it was held that Section 3 of the New Foundland Carriage of Goods by Sea Act, 1932 which provides that every bill of lading "shall contain an express statement that it is to have effect subject to the provisions of the said rules as expressed in this Act" were directory and not mandatory and that failure to

obey the directions did not, therefore, make the contract illegal.

38. But where an Act made the adoption of the agreement in the prescribed manner as a condition of its validity, it was held that the resolution was ineffective owing to the absence of notice of the contents of the agreement and that the agreement and the acts done in pursuance of it were consequently ultra vires the company and incapable of being made valid by acquiescence on the part of the shareholders as in *Pacific Coast Coal Mines Ltd. v. Arbuthnot*, (1917 AC 607) = (AIR 1917 PC 52).

39. Then again in *Samuel Montagu & Co. Ltd. v. Swiss Air Transport Co. Ltd.*, (1969-2 QB 307) it was stated by Lord Denning M. R. and Samuel L. J. construing Article 8 (q) of the Warsaw Convention that it should not be given so rigid an interpretation as to hamper the conduct of business. It is desirable that Air Transport companies should be able to use on waybill to fit both international and also non-international carriage. I am quoting the observations of Denning M. R. at page 314 of that report:

"I do not think we should give a strict interpretation to Article 8 (q) in the Convention. We should not give it so rigid an interpretation as to hamper the conduct of business. I do not interpret the article as meaning that the waybill must contain the statement verbatim. It is sufficient if it contains a statement to the like effect. It follows that (q) is satisfied if the statement says that the carriage is subject to the rules so far as the same are applicable to the carriage."

40. The important point of this decision is that in construing the provisions like Section 173 (2) too rigid an interpretation should not be made as to "hamper the conduct of business". Section 173 (2) of the Companies Act means a notice and explanatory statement which should give notice of the essence and substance of the transaction intended to be passed at the meeting. It is a business document. It must be used in a commonsense business way. So long as that standard is satisfied this Court should not be astute to find legal and technical points to defeat the notice and the explanatory statement. Even applying the test laid down by Kekewich, J., that "the man I am protecting is not the dissentient but the absent shareholder" as applied in the decision of *Biswanath Prasad Khaitan v. New Central Jute Mills Co. Ltd.*, ((1960) 64 Cal WN 970), the instant case does not come within the meaning of that test.

41. Lastly, the case of Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd., (1970-2 Com LJ 200 (Bom)) was cited. This was a judgment of a single Judge. At pages 244-45 it was observed in that case "Reliance was also placed upon AIR 1962 Cal 127 in which the Privy Council's decision in Shamdasani's case was followed and upon M/s. Kalinga Tubes Ltd. v. Shanti Prasad Jain, (AIR 1963 Orissa 189) which was affirmed by the Supreme Court in Shanti Prasad Jain v. Kalinga Tubes Ltd. (AIR 1965 SC 1535). Relying upon these authorities it was sought to be contended that the plaintiffs having full knowledge of the facts which according to them were not disclosed in the explanatory statements, had no right to challenge the validity of the notices on this ground and were estopped from doing so. There is, however, no such plea in any of the affidavits in reply, and this question really does not arise for my consideration, but as this question was argued at some length and as the contesting defendants insisted that they could spell out such a plea from their affidavit-in-reply which they have not been able to do so — I will shortly deal with the same. In my opinion, none of these authorities support the contesting defendants. Each turns upon its own facts. The Privy Council decision in Shamdasani's case was under the Indian Companies Act, 1913 which did not contain any section corresponding to Section 173 (2) of the 1965 Act. Regulation 49 of Table A of Schedule 1 of the 1913 Act *inter alia* required that in case of special business, the general nature of that business should be set out in the notice. This regulation corresponds to Section 172 (1) of the 1956 Act, which requires every notice of a meeting to contain a statement of the business to be transacted thereat. The Privy Council did not have to decide the question of a mandatory statutory provision, non-compliance with which would invalidate the notice. The Privy Council held that there was nothing questionable about the notice."

42. On the question of balance of convenience and *prima facie* case, it does not appear to me to be a case for an injunction. We, therefore, set aside the judgment of the learned Judge and allow the appeal.

43. There is a cross objection on behalf of the respondents. They relate first to the Industrial licence and secondly to the non-disclosure of the financial arrangement. The learned Judge found against the respondents on these two points. We find, however, that the appellants never asked for

inspection of the financial and technical agreement and collaboration. The plea for non-disclosure of the terms and conditions of the agreement has been held by the learned Judge to be equally lacking in bona fide. Here inspection was offered but was not taken. There was, therefore, little left of this argument. On the point of industrial licence, it was argued by the learned counsel for the respondents that the notice and the explanatory statement should have disclosed that no licence under the Industrial Development and Regulation Act had been obtained for establishing Polytex undertaking. In fact, the licence was obtained on the 7th October, 1970. *Prima facie* it appears that the learned Judge was right in saying that all that Section 11 of the Industrial Development and Regulation Act requires is that a licence must be obtained before the undertaking is established. He also noticed that the words "previous permission" are not used in the relevant Section 11 (1) of the Act. It is true that the learned Judge held that until and unless undertaking is established, no question of licence under Section 11 (2) of the Industrial Development and Regulation Act, 1969 can arise. The learned Counsel for the respondents drew our attention to the proviso to that section which he construed to mean that after an undertaking is established there will be no occasion for a licence. But we do not think that the industrial licence need at all be in the explanatory notice in view of what I have said under Section 173 (2) of the Companies Act.

44. Various other points were argued by Mr. Samiran Sen, appearing on behalf of the appellants. One of them is a question of *res judicata* but it is unnecessary for us here to express an opinion on that point. His point was that the suit before Mr. Justice Ghose should have been amended to include the subject matter of the present suit. The Monopolies and Restrictive Trade Practices Act came into operation on the 1st June, 1970 and the hearing of the suit before Mr. Justice Ghose began and concluded in August, 1970. Therefore he says that it barred by constructive *res judicata*. But, as I say, it is unnecessary to decide this point in the present application in view of what we have already stated before.

45. For these reasons the appellants succeed and the cross objection fails. The appellants' costs certified for two counsel will be costs in the cause. I have seen the judgment of my learned brother and I agree with the order proposed.

B. C. MITRA, J.:— 46. The short point involved in this appeal is whether an order of Injunction restraining the appellants from giving effect to a resolution of a company, was rightly made. The respondent who is a shareholder of the 8th appellant brought a representative action, for self and other shareholders, for an Injunction restraining the 8th appellant and its Directors from holding any Meeting of the company pursuant to a Notice dated September 14, 1970 or from passing any of the resolutions set out in the Notice or from giving effect to the resolutions, if passed. An earlier Notice dated January 29, 1970 was issued on behalf of the 8th appellant for a General Meeting of the company to be held on February 27, 1970 to consider and if thought fit, to pass the following among other resolutions:—

"Resolution No. I — Resolved that subject to the necessary approval of the Central Government being obtained pursuant to the provision of Section 372 and all other applicable provisions, if any, of the Companies Act, 1956, the company hereby sanctions investment by it in the shares of the Swadeshi Polytex Ltd., Kanpur, to the extent of the aggregate face value of Rupees One Crore by way of subscribing and/or purchasing to the extent of 10,00,000 Equity Shares of the value of Rs. 10/- each at par on such terms and conditions, as the Board of Directors think fit notwithstanding the fact that the investment in the shares of the said Swadeshi Polytex Ltd. exceeds 10 per cent. of the subscribed capital of the said Swadeshi Polytex Ltd. shall exceed 30 per cent. of the subscribed capital of this company and the Board of Directors of the company be, and are hereby authorised to do and so far cause to be done all such acts, deeds or things as they may think expedient for the purpose." The explanatory statement annexed to the Notice was as follows:

"The company had received a Letter of Intent from the Government of India for establishment of a new undertaking for the manufacture of Polyester Fibre. As a considerable amount of capital will have to be raised, it was considerably expedient to promote a new company Accordingly, a company under the name and style of Swadeshi Polytex Co. Ltd. is being incorporated. Considering the future prospects and the profitability of the company, Swadeshi Polytex Ltd., it is considered desirable that this company should invest liberally in the shares of the said company. It is proposed to acquire Equity Shares to the

extent of the aggregate value of Rupees One Crore in the new company aforesaid."

47. On receipt of this Notice the respondent instituted a Suit in this Court (Suit No. 105 of 1970) (Cal) against the 8th Appellant and its Directors, for an Injunction restraining them from holding any Meeting pursuant to the said Notice and from passing the resolutions mentioned therein on the ground that the Notice did not disclose material facts. In this Suit, on an application by the respondent an ad interim order was made by Ghose, J., on February 26, 1970, restraining the 8th appellant and its Directors from giving effect to any resolution that might be passed pursuant to the said Notice. The resolutions set out in the Notice were passed at the Meeting of the company held on February 27, 1970.

48. On September 7, 1970, Ghosh J. disposed of the application for Injunction by making the following order:—

"There shall be an Injunction restraining the respondent-Directors from acting on the resolution No. 1, passed at the General Meeting held on the 27th of February, 1970, until the same is confirmed or approved at a Meeting properly notified".

Before proceeding any further I should note that this order has become final as between the parties. The Injunction, mentioned above, was issued on the ground that the explanatory statement did not disclose a material fact namely, that the offer contained in the Letter of Intent had lapsed on January 24, 1970, and was no longer in force when the Notice was issued.

49. In compliance with the order of Ghose, J., and with a view to terminate the effect of the Injunction, another Notice was issued on September 14, 1970 for a General Meeting of the 8th appellant to be held on October 12, 1970 to consider and if thought fit, to pass with or without modification the following resolution:—

"Resolved that Resolution No. I which has been unanimously passed as an ordinary resolution at the General Meeting of the company held on February 27, 1970 in pursuance of the Notice dated 29th January, 1970, be and is hereby confirmed and approved." Along with the Notice of the Meeting and the draft resolution, an explanatory statement was circulated to the Members and this statement was as follows:—

"The Letter of Intent which has been revalidated by the Central Government has been transferred by the Central Government to the name of

Swadeshi Polytex Ltd. and accordingly the plant is being put up by them at Gaziabad in collaboration with Messrs. Vickers Zimmer A. G. Frankfurt. Terms of collaboration have been approved by the Central Government and the work has already commenced. The plant is likely to go into production in early 1973."

On receipt of the said notice the respondent filed another representative suit against the appellants for a declaration that the said Notice dated September 14, 1970 and the explanatory statement annexed thereto, convening a General Meeting of the 8th appellant for the purpose of passing the resolution, were void and inoperative and for a permanent Injunction restraining the appellant from holding any Meeting pursuant to the said Notice or giving any effect to the resolution, if passed. The General Meeting of the company was duly held on October 12, 1970 and the resolution mentioned above, was unanimously passed.

50. In the second suit (that is the suit out of which this appeal arises) filed by the respondent, he made an application for an Injunction and on this application S. K. Mukherjee, J., made an order on March 16, 1971 granting an Injunction restraining the appellants and each of them from giving effect to the resolution set out in the Notice dated September 14, 1970. The order was made without prejudice to the rights of the appellants and the Members of the 8th appellant to pass a fresh resolution according to law in terms similar to the resolution which was the subject-matter of the application. Aggrieved by this order the appellant has preferred to this appeal.

51. The grounds of attack on the resolution passed on October 12, 1970 confirming the earlier resolution of the company passed on February 27, 1970 were entirely different from the grounds which formed the subject-matter of attack on the resolution passed on February 27, 1970. The new ground of attack canvassed by the respondent in the second application for Injunction was that neither the Notice dated September 14, 1970 nor the explanatory statement set out therein disclosed whether permission had been obtained from the Central Government as required under the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the Act) for establishing the undertaking of Swadeshi Polytex Ltd., which when established would be an inter-connected company of the 8th appellant. There were certain other grounds namely that no disclosure was made as to whether a

Licence had been obtained as required by Section 11 of the Industries (Development and Regulation) Act, and that the terms and conditions of the collaboration agreement were not disclosed.

52. Mr. S. C. Sen, counsel for the appellant, raised several points in support of this appeal. The first point raised by him was that the bar imposed by Section 22 read with Section 20 (a) (ii) of the act could not be invoked in this case as the total value of the assets of the inter-connected undertakings was less than Rupees 20 crores. The second point urged by him was that even assuming that there was violation or infringement of the provisions of the Act, the respondent as shareholder of the company could not rely on such violation as a ground for Injunction restraining the appellants from giving effect to the impugned resolution. The third point urged by counsel for the appellant was that the trial Court erred in construing the provisions of the Act inasmuch as it was held that if a relative of the Managing Director of a company was a Managing Director of another company, the two undertakings must be deemed to be inter-connected undertakings by reason of explanation (b) to Section 2 (g) of the Act. The last point urged by Mr. Sen was that the trial Court was in error in construing explanation (b) to Section 2 (g) by holding that it meant that two or more undertakings should be deemed to be inter-connected if one or more individuals who own or manage or control one undertaking together with his or their relatives jointly or severally owned, managed or controlled the other undertaking or undertakings. It was contended that in giving this meaning to the explanation the trial Court had read into it the words "who own, manage or control one undertaking" which it should not have done. The next point urged by counsel for the appellant was that the statute specifically provided for penalties for contravention of provisions of the same. These provisions have been made in Chapter VIII of the Act, and even assuming that Statutory provisions had been violated, no Injunction could be issued but the only remedy was imposition of a penalty as provided in Chapter VIII of the Act.

53. In support of these contentions Mr. S. C. Sen relied on several passages in Craies on Statute Law 6th Ed. pp. 231, 232, 234, 235, and 237. Reliance was placed on several English decisions Vallance v. Falle, (1884) 13 QBD 109, (Cutler v. Wandsworth Stadium Ltd.) 1949 AC 398, Newman v. Francis, (1953) 1, WLR 402 and in Re:

Indo-Burma Wood Products (P) Ltd.,
AIR 1968 Cal 198.

54. In developing the points formulated by him Counsel for the appellants argued that in computing the aggregate value of the shares of the holding company and its subsidiary, the value of the shares of the subsidiary company, held by the holding company, should be excluded. It was argued that if the two undertakings were treated as one for the purpose of valuation, the shares of the subsidiary company in the hands of the holding company, ought not to be taken into consideration in computing the assets of the two companies. In the Balance Sheet of the 8th appellant as at December 31, 1969, the value of the shares of the subsidiary held by the 8th appellant (holding company) has been shown at Rs. 1,69,56,121. If the value of the shares are left out, it was contended, as it ought to be left out, the aggregate value of the assets of the inter-connected undertaking would be less than Rs. 20 Crores and therefore, Section 22 of the Act would not be attracted. The trial Court, however, rejected this contention because in its opinion, the definition of 'value of assets' given in the Act, precluded this method of calculation of the assets of the inter-connected undertakings. For the purpose of this appeal we do not think we should go into the question of valuation of the assets of the holding company and the subsidiary company or the mode of calculating such assets. The suit is still pending and these questions have to be investigated in the suit itself. We, accordingly, refrain from expressing any views on the question of valuation of the assets of the undertakings.

55. The next point argued by Counsel for the appellant was that even assuming that the provisions of the Act had been violated, such violation would not make the contract for the purchase of shares of Swadeshi Polytex Ltd. illegal. It was argued that if the Statute prohibited the contract either expressly or impliedly, the contract would become illegal. But in this case there was no such absolute prohibition so as to make the contract for purchase of shares illegal. Reliance was placed by Counsel on Cheshire and Fifoot on the Law of Contract, 7th Ed. page 297. Reliance was also placed on (1961) 1 QB 374 and (1957) 1 QB 267. We do not think we need go into these questions, which should be left to be determined at the trial of the suit itself. The only question before us is whether in the events that have happened, and keeping in view the provisions in the Act the respondent had

prima facie, made out a case for an Injunction restraining the appellants from giving effect to the resolution passed at the General Meeting of the Company held on October 12, 1970.

56. The respondent's grievance is that by reason of the omission to supply the information in the explanatory statement about an application to the Central Government for permission under Section 22 of the Act, the shareholders attending the General Meeting was misled. In other words, if the shareholders were informed by a statement in the explanatory statement that no application had been made to the Central Government for permission contemplated by Section 22 of the Act, they would not have voted as they did, at the Meeting held on October 12, 1970. It appears to us that this contention has no merit. What is the effect of the omission on the part of the Directors of the 8th appellant? If an application, was in fact made, the Directors could have stated either that the application was pending or that it was refused by the Central Government, but that has not happened in this case. No application was made by the Directors of the 8th appellant for the permission contemplated by Section 22 of the Act at the time when the Notice and the explanatory statements were issued. In this situation what the Directors could have stated was that no application had been made to the Central Government for permission under Section 22 of the Act as they were advised not to make such application. I do not see how, a statement such as this, would have helped the shareholders either in supporting or opposing the resolution.

57. The next contention of Counsel for the appellant was that it was not necessary under Section 173 of the Companies Act 1956 to give all the details and particulars in matters covered by a proposed resolution. He argued that the approach to the question, whether an explanatory statement was adequate, should be a businessmen's approach and not the approach of an expert lawyer. In support of this contention reliance was placed on a Bench decision of this Court reported in AIR 1952 Cal 645. In that case the question was whether leave granted under a clause 12 of the Letters Patent should be revoked. Two of the Directors of a company retired and there was an agreement by certain parties to enter into a partnership for buying the majority shares of a company with a view to get the controlling interest therein. Pursuant to this agreement a large number of ordinary, and prefer-

ence shares were acquired by the partners. This was followed by incorporation of two new companies. The shares of these new companies were held by the partners in equal shares. A proposal was made to change the Articles of the parent company so as to give the entire control to the partners to the exclusion of the minority shareholders. For this purpose a Notice and a circular was issued for a Meeting of the company. In the Notice it was said that the changes in the Articles were necessary for the management of the company's affairs by a Managing Agent instead of the Managing Directors. A suit was filed alleging that the real object of the Meeting for the purpose of changing the Articles, namely, control of shares of the company by the partners, was suppressed. It was contended that the Notice was misleading. The real document was not sent to the shareholders along with the Notice and they were unable to form any opinion as to the real purpose of the Meeting. It was held that in such cases it was not right to keep the altered Articles at the Registered Office and merely inform the shareholders that they could have inspection of the proposed alteration and that copies of the new Articles should have been sent with the Notice. Mr. Sen sought to distinguish this case on the ground that fraud was attempted to be perpetrated upon the shareholders and there was suppression of the fact that what was really contemplated, was a change in the control of the company by a new group of shareholders.

58. It seems to us, however, that for the purpose of this appeal it is not necessary for us to go into the various questions raised by parties. The Notice dated September 14, 1970, for a General Meeting of the company to be held on October 12, 1970, was manifestly given pursuant to the order of Ghose, J., by which the Directors of the 8th appellant were restrained from giving effect to the resolutions passed at the General Meeting of Company held on February 27, 1970, until the resolution was confirmed at another General Meeting of the Company properly notified. The order of Ghose, J., was obtained by the respondent, and as noticed earlier that order became final as between the parties. All that the respondent had to do, in order to terminate the effect of the Injunction, was to call a General Meeting of the company after duly giving Notice for the same, and have the resolution passed on February 27, 1970, confirmed at this Meeting. The General Meeting of the Company held on October 12, 1970, was

held in accordance with the order of Ghose, J. It is to be noticed that no grievance was made by the respondent in the earlier suit or in the petition for Injunction about the alleged contravention of any of the provisions of the Act or about the failure on the part of the Directors of the 8th appellant to state in the explanatory statement relating to the Notice dated January 29, 1970, about infringement of any of the provisions of the Act, or about the omission to disclose in the explanatory statement if permission of the Central Government was obtained under Section 22 of the Act, nor was there any direction in the order of Ghose, J., to inform the shareholders of the company in the explanatory statement about an application made to the Central Government for permission under Section 22 of the Act or about the fate of any such application. In the light of the order made by Ghose, J., one can understand an attack on the resolution passed at the Meeting held on October 12, 1970, on the ground that the resolution was not duly notified as required by the order, or on the ground that the resolution was not duly confirmed at the Meeting. But these are not the grounds of attack by the respondent on the resolution passed on October 12, 1970. In our view it was not open to the respondent to attack the resolution passed at the General Meeting held on October 12, 1970, on any of the grounds on which he attacked them in the petition for injunction. The respondent had raised various objections to the resolution proposed to be passed at the Meeting to be held on February 27, 1970, and Ghose, J., after taking into consideration all these objections had passed an ad interim order for Injunction as mentioned above and the appellants were entitled under the terms of the order to take steps to terminate the effect of the injunction by having a resolution confirmed at another General Meeting. The respondent, in our view, is not entitled to attack the resolution passed at the Meeting held on October 12, 1970, on the ground of omission to state in the explanatory statement, if an application was made for permission of the Central Government under Section 22 of the Act or if such an application was made what was the fate of the same.

59. There is another point which seems to us to have a great bearing on this appeal. The bar imposed by Section 22 (1) of the Act is a bar on a person or authority from establishing any new undertaking after the commencement of the Act. It is only if a

person or authority seeks to establish an undertaking after the commencement of the Act, which undertaking, if established, would infringe the provisions of the Act, that the previous permission of the Central Government is to be obtained. The Act came into force on June 1, 1970. The new undertaking in this case namely, Swadeshi Polytex Ltd. was incorporated on March 21, 1970. The letter of Intent, issued by the Central Government in favour of the 8th appellant, was transferred to the new undertaking on May 20, 1970. It seems to us, therefore, that prima facie Swadeshi Polytex Ltd. was not an undertaking which was established after the commencement of the Act.

60. The next question is whether the information which was omitted in the explanatory statement namely whether an application was made to the Central Government under Section 22 of the Act and if so the fate of this application was a material information, the omission to furnish which would make the resolution, passed at the Meeting invalid or void. Sub-section (2) of Section 22 of the Act requires a person or authority intending to establish a new undertaking to make an application to the Central Government before taking any action for the establishment of such undertaking. Admittedly, in this case, nothing was stated in the explanatory statement about any application having been made to the Central Government as required by Section 22 (2) of the Act. As I have noticed earlier the Notice for the General Meeting of the Company was dated September 14, 1970, and the Meeting was to be held on October 12, 1970. At this Meeting the resolution, which was the subject matter of challenge in the earlier suit and with regard to which the Injunction was issued by Ghose, J., was unanimously passed. The resolution runs as follows:—

"Resolved that Resolution No. 1 which has been unanimously passed as an ordinary resolution at a General Meeting of the company held on February 27, 1970, in pursuance of the Notice dated 29th January, 1970, be and is hereby confirmed and approved." After this resolution was passed on October 12, 1970, the 8th appellant wrote to the Central Government on April 12, 1971, that it was advised that Chapter III, Part A of the Act which included Sections 20 to 26 of the Act, did not apply to the 8th appellant. The letter, however, concluded with a statement that by way of abundant caution an application for approval under Section 22 of the Act was enclosed therewith. This letter is to be found at

pages 384-385 of Part II of the Paper Book. Quite plainly no application was made before the Notice dated September 14, 1970, was issued and the General Meeting of October 12, 1970, held. It cannot, therefore, by any means, be said that an application for permission under Section 22 of the Act was suppressed, as no such application was, in fact made, before the Meeting of October 12, 1970, was held. In answer to the letter of the 8th appellant dated April 12, 1971, the Central Government wrote on May 14, 1971, to say that in the opinion of the Department of the Company Affairs, the provisions of Section 22 of the Act did not apply to the establishment of the new undertaking. The authority to grant permission under Section 22 is the Central Government, and that authority was of the view that no permission was necessary and no application for permission was, therefore, called for. In that view of the matter we are of the opinion that information about application for permission under Section 22 of the Act in the explanatory statement, was not a material information, the omission to state which would make the resolution void or illegal. In the view, that the Central Government took on the question of permission, there was no necessity, whatsoever, for an application for permission under Section 22 of the Act; and in omitting to make the application under Section 22 and in omitting to state in the explanatory statement that no application was made, the 8th appellant did not, in our view, act irregularly or in violation of or contrary to the provisions of the Act or the Companies Act, 1956. Information regarding an application for permission under Section 22 of the Act or information that no such application has been made is not in our view, a material information which should have been included in the explanatory statement or in the Notice of the Meeting. The absence of such information in the explanatory statement, does not make it or the resolution passed at the General Meeting confirming the resolution, which was passed at the General Meeting held on February 27, 1970, illegal or void. Nor does such omission, entitled the respondent to an Injunction restraining the appellants from giving effect to the resolutions passed at the General Meeting held on October 12, 1970. I shall revert to this question later in this judgment.

61. It was next contended by Counsel for the appellant that explanatory statements are not to be construed with excessive strictness and substantial compliance with the Articles

would be sufficient. In support of this proposition reliance was placed on Palmer's Company Law 21st Ed. p. 475. Reliance was also placed on Section 172 (3) of the Act in which it is provided that accidental omission to give notice to or non-receipt of notice by any member or other person to whom it should be given shall not invalidate the proceedings at a Meeting. Reliance was also placed on (1875) 1 Ch. D. 13 for the proposition that if a thing complained of is a thing which the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something is done which the majority are entitled to do legally, no useful purpose is served by litigation, the ultimate result of which is a Meeting of the company where the majority gets its wishes. Reliance was next placed on a decision of the Judicial Committee 1939 AC 277 for the proposition that omission to do something does not nullify the contract contained in a Bill of Lading, nor could such omission make the contract illegal. This decision was relied upon in support of the contention that even if it was held that the omission to make a statement that no application was made to the Central Government under Section 22 of the Act was material information, such omission did not make the explanatory statement illegal nor did it make the resolution, passed at the Meeting, invalid. The next case relied on was Samuel Montagu & Co. Ltd. v. Swiss Air Transport Co. Ltd., (1966) 2 QBD 306. In that case damages were claimed for loss of certain consignment of gold in transit. The defence was that Article 8 (ii) of the Convention signed at Warsaw, limited the liability to a certain sum. It was held that the Article in the Convention limiting liability, should not be so strictly construed as to hamper the conduct of business. Counsel for the appellant also referred to Palmer's Company Precedents 17th Edn. Part I pages 483-485 for the proposition that a Notice which is to state general nature of the business, should give Members fair Notice of the matters to be dealt with, and that such Notice should be sufficient Notice to enable a Member to decide whether to attend or not and that an insufficient or misleading Notice invalidates a resolution.

62. Relying on the various authorities mentioned above, Counsel for the appellant contended that even assuming that there was omission to furnish material information, that would not make the resolution invalid or il-

legal. He further submitted that the omission, assuming there was one, did not, in any manner, mislead the shareholders of the company. He also urged that the explanatory statements should not be too strictly construed, but should be given a liberal construction and the only requirement should be that its contents are clear to an ordinary person engaged in business.

63. It seems to us that there is a good deal of force and substance in the above contention of Counsel for the appellant. It is to be remembered that the General Meeting was called for the purpose of confirmation of a resolution passed by the company on February 27, 1970. The resolution passed on October 12, 1970 in terms of the order of Ghose, J., runs as follows:

"Resolved that a Resolution No. I which had been unanimously passed as an ordinary resolution at a General Meeting of the company held on February 27, 1970 in pursuance of the Notice dated the 29th January, 1970 be and is hereby confirmed and approved."

64. The object of the Meeting held on October 12, 1970, and the purpose of the resolution, passed at that Meeting, was to terminate the effect of the order of Injunction in compliance with the terms of that order. The only business to be transacted at the Meeting held pursuant to the Notice of September 14, 1970, was confirmation of the resolution passed at the earlier Meeting. It is also to be remembered that the challenge to the resolution passed at the Meeting held on February 27, 1970, was on the ground that a Letter of Intent, issued by the Central Government, had expired, and had not been revalidated and therefore, the new company could no longer be established. The Letter of Intent issued by the Central Government expired on January 24, 1970 and was not revalidated at the time when the Meeting was held. The explanatory statement, with regard to the second Meeting of the company held on October 12, 1970 cleared up those points and runs as follows:

"The Letter of Intent which has been revalidated by the Central Government has been transferred by the Central Government to the name of Sawdeshi Polytex Ltd. and accordingly, the plant is being put up by them at Gazlabad in collaboration with M/s. Vickers Zimmer A. G., Frankfurt. Terms of collaboration have been approved by the Central Government and the work has already commenced. The plant is likely to go into production in early 1973."

65. It will be clear from the explanatory statement quoted above that the cause of challenge to the earlier resolution and the explanatory statement was removed before the Meeting of October 12, 1970 was held and information about transfer and revalidation of the Letter of Intent was duly given to the shareholders. As matters stood before the Act came into operation, no exception of any kind could have been taken by the respondent or any other shareholder either to the resolution passed on October 12, 1970, or to the explanatory statement relating thereto. The Act came into operation on June 1, 1970, and the hearing of the respondent's application before Ghose, J., commenced on August 10, 1970.

66. Mr. Prabir Sen, Counsel for the respondent argued, that the new company, namely Swadeshi Polytex Ltd., would undoubtedly be an inter-connected undertaking as contemplated by Section 20 of the Act. In aid of this argument he relied upon the definition of "inter-connected undertakings" in Section 2 (g) of the Act. He argued that this case came within clause (d) of Section 2 (g) (iii) of the Act. It was contended that in this case, the 8th appellant, its Managing Director (by reason of his relationship with the Managing Director of the new company) and also the other Directors of the 8th appellant would undoubtedly exercise control over the new company. Control, it was argued, was not defined in the Act or in the Companies Act. Therefore, it was submitted, any kind of control whether de facto or de jure, would make the undertaking an inter-connected undertaking as contemplated by the Act. On this question the trial Court rejected the respondent's contention and the respondent has filed cross-objection against the judgment on that ground.

67. It is true that clause (d) of Section 2 (g) (iii) of the Act merely provides "if one exercises control over the other in any other manner." It is also true that the control as contemplated by the Act has not been defined in the Act itself but in construing a provision such as this, certain considerations must be borne in mind. In the first place, the concept of control implies a dominant and a dominated undertaking. In other words, the controlling undertaking must be in a position to dominate the affairs of the controlled undertaking either in respect of the management of its affairs, or in respect of its finance or with regard to the capital structure. In the absence of one or other of these features the

element of control cannot come into the picture. The mere fact that there are some common Directors or that the Managing Director of the 8th appellant is a relative of the Managing Director of the new company or that the 8th appellant is going to invest Rs. 1 Crore in the share capital of the new company, do not by themselves make the 8th appellant an undertaking controlling the undertaking of the new company.

68. Counsel for the respondent also relied upon Cl. (b) of the Explanation to S. 2 (g) (vii). He submitted that in this case, admittedly, the Managing Director of the 8th appellant was a relative of the Managing Director of the new company, and therefore, the new company Swadeshi Polytex Ltd. was an inter-connected undertaking of the 8th appellant. This contention, on behalf of the respondent, has been upheld by the trial Court. Counsel for the respondent further argued that the provisions in Section 20 and Section 22 of the Act were attracted in this case, inasmuch as, the total value of the assets of the 8th appellant together with the value of the assets of Swadeshi Mining and Manufacturing Co. Ltd., exceeded Rupees 20 Crores. He submitted that on the basis of the valuation of assets, the two companies should be treated as inter-connected undertakings, and therefore previous permission of the Central Govt. was needed.

69. The next contention of Counsel for the respondent was that the provisions in Chapter VIII comprising Sections 45 to 53 which provide for penalty for contravention of Section 22, did not bar a challenge by his client to the proposed resolution. He argued that Section 4 of the Act provided that the remedies provided by the Act should be held to be in addition to those provided in any other law for the time being in force. As a shareholder of the company, it was argued, the respondent had a right to challenge the validity of the explanatory statement and the resolution, under the Company Law, and this right was protected by Section 4 of the Act. Therefore, he argued, the provisions for imposition of penalty in Chapter VIII of the Act should be held to be a remedy provided by the Act in addition to other remedies available under any other law.

70. Dealing with the question whether the private rights of the respondent could be protected by invoking the provisions of the Act, which should be enforced by the Central Government only, to avoid concentration of econo-

mic power in the hands of a group of individuals it was argued, that if the individual and private rights of his client were injured or invaded, he was entitled to invoke the provisions of the Act to obtain remedy. In support of this contention, Counsel for the Appellant relied on Halsbury Third Edition Vol. 21, p. 347, Article 727 and Palmer's Company Law 21st Edition pp. 498-499.

71. It seems to us that the real and substantial issue in the application, out of which this appeal arises, has been lost sight of in the din and bustle created by the conflicting claims of the parties regarding the provisions of the Monopolies and Restrictive Trade Practices Act, 1969. The respondent claims that the provisions of the Act applied in this case, and that the new company, namely, Swadeshi Polytex Ltd., would be an inter-connected undertaking under the Act. The appellant, on the other hand, contend that the provisions in the Act have no application, for the reasons which I have discussed earlier. Viewed in the proper perspective these questions are not relevant for the purpose of this appeal. Nor was it relevant for the purpose of the application out of which this appeal arises. It is not for this Court to decide or determine, if the total value of the assets of the 8th appellant, and those of its subsidiary, amount to Rs. 20 crores or more. Nor is it for this Court to determine if Swadeshi Polytex Ltd., when established, would become an inter-connected undertaking of the 8th Appellant. As we read the provisions in the Act we are left in little doubt that those are questions for determination by the Central Government in the first instance, and by the Monopolies and Restrictive Trade Practices Commission, in cases where a deeper probe is called for. In clear and unambiguous words the Statute has left those matters for the decision of the Central Government and the Commission. So far as the issues, involved in this appeal, are concerned we do not see why this Court should embark upon a discussion of the provisions of the Statute regarding inter-connected companies and also upon an investigation if the 8th appellant is an inter-connected undertaking on the basis of materials in its Balance-sheet. Issues in this appeal, as I have noticed earlier lie in a very narrow compass and those issues have been lost sight of by the parties, the respondents contending that the provisions of the Act had been violated and the appellants trying to repel such contentions. The only issue, as we see it, is whether the explanatory statement in the Notice of

September 14, 1970, and the resolution passed on October 12, 1970, are illegal or invalid on the ground that material facts were not disclosed in the explanatory statement. That is the only ground of challenge to the explanatory statement and the resolution.

72. The letter by which the Central Government informed the 8th appellant that Section 22 of the Act did not apply to the establishment of the new undertaking, is dated May 14, 1971. The judgment of the trial Court was delivered on March 16, 1971. Quite plainly, therefore, the trial Court did not have the advantage of having before it the opinion of the Central Government relating to the applicability of Section 22 of the Act. The application by the 8th appellant to the Central Government for permission under Section 22 of the Act is dated April 12, 1971. The application itself was, therefore, made after the judgment was delivered by the trial court. Shortly before the judgment was delivered the 8th appellant wrote to the Central Government on February 12, 1971, to say that according to the reported opinion given by the Attorney-General the provisions of the Act did not apply to the 8th appellant. In this letter a request was also made that a clearance should be issued to the 8th appellant that the provisions of the Act did not apply to it. This letter was answered on behalf of the Central Government by N. K. Sengupta, Deputy Secretary, on March 26, 1971. In this letter a request was made that the basis on which the undertaking would be an inter-connected undertaking, might be intimated to the Central Government. It was added that the question of granting clearance from the applicability of Section 22 of the Act would arise only if such provisions were otherwise applicable to the undertaking. This letter, in its turn, was followed on April 12, 1971, by the 8th appellant's application for approval under Section 22 of the Act. On May 14, 1971, the Central Government wrote to the 8th appellant in answer to its letter of February 12, 1971, communicating to the 8th appellant the views of the Central Govt. that the provisions of the Act would not apply to the establishment of the new undertaking. On May 25, 1971, the Central Government replied to the 8th appellant's letter of April 12, 1971, along with which the application for permission was forwarded and stated that in view of the letter of May 14, 1971, addressed to the 8th appellant the application under Section 22 is filed. Quite clearly the views of the Central Government as expressed in the letters

of May 14, 1971, and May, 25, 1971, make it clear that in the opinion of the Central Government, Section 22 of the Act did not apply to the new undertaking proposed to be set up and no permission of the Central Government, as contemplated by Section 22 of the Act, was required. Counsel for the respondent contended that since the Central Government stated in its letter of May, 25, 1971, that the 8th appellant's application under Section 22 was filed, the application was not disposed of and was still pending. This contention on behalf of the respondent, is altogether without any merit. The views of the Central Government were clearly stated in the two letters mentioned above and the use of the word 'filed' in the letter dated May 25, 1971, did not keep the application pending before the Central Government.

73. As I noticed earlier the opinion of the Central Government, that no permission as required by Section 22 of the Act was needed, was given after the judgment was delivered by the trial Court. This Court is entitled to take note of subsequent events which could not be taken into consideration in the trial Court. The application for permission under Section 22 was made on April 12, 1971, long after the notice and the explanatory statement were issued on September 14, 1970. Therefore, all that could be stated in the explanatory statement, issued along with the notice of September 14, 1970, was that an application was not made by the 8th appellant for permission of the Central Government under Section 22 of the Act. This intimation, no doubt, was not given in the explanatory statement as the Directors of the 8th appellant took the view that Section 22 of the Act was not attracted, and therefore no application need be made to the Central Government for permission contemplated by that section. The Central Government, which is the authority for granting permission also came to the same conclusion that the new undertaking would not be an inter-connected undertaking and therefore, no permission was needed, as required by Section 22 of the Act. In these facts we are of the opinion that there is no escape from the conclusion that the information that no application was made to the Central Government under Section 22, was not a material information to be included in the explanatory statement.

74. A notice of a General Meeting of a company and an explanatory statement attached to such Notice can be condemned as tricky, if either of

them is likely to mislead the shareholders or if there is omission to state facts which would enable the shareholders to decide if they would attend the Meeting or not. A Notice and an explanatory statement can also be condemned if there is suppression of material facts. These principles are well settled and it is on the basis of such principles that it is to be determined if the impugned Notice and explanatory statement are illegal or invalid. Applying these well-settled tests, we cannot say that the Notice and the explanatory statement, in this case, were either tricky or misleading or that there was deliberate suppression of facts which ought to have been communicated to the shareholders to enable them to decide if they would attend the Meeting or not. The respondent who claims to be aggrieved by the Notices and the explanatory statements issued for the purpose of two General Meetings of the company, did not attend either of them. Keeping in mind, the various points now urged on his behalf, one would expect him to attend the Meeting and record his vote against the resolutions. But that is not what he did. He stayed away from both the meetings and then filed two suits challenging the validity of the resolutions as also of the Notices and the explanatory statement. All in all it seems to us that the grievances, which he is aiming are not the genuine grievances of an aggrieved shareholder but are the manifestation of a determination to block the efforts of the 8th appellant at expansion and diversification.

75. Turning now to the question of balance of convenience or inconvenience it is to be seen if the order for Injunction is justified. As will be presently seen nearly everything has been done for the purpose of carrying on the normal business of the new company, namely, Swadeshi Polytext Ltd. This company was incorporated on March 21, 1970, long afterwards on January 1, 1968, the 8th appellant applied for a licence under the Industries (Development & Regulation) Act, 1951. On July 24, 1969, the Central Government issued a letter of Intent to the 8th appellant in which the conditions of a licence under the Industries (Development & Regulation) Act, 1951, were communicated to the 8th Appellant. The Letter of Intent was valid for a term of six months from the date of issue but was renewed till October 24, 1970, and the renewed Letter of Intent was transferred to the new company. A collaboration agreement with a foreign concern namely, Vickers Zimmer A. G. West Germany, was entered into and the

agreement was submitted for approval of the Central Government on January 12, 1970. An application for consent of the Controller of Capital Issue for the issue of shares, was made on November 19, 1969. An application for import of machinery was duly filed on November 19, 1969. A plot of 80 acres of land at Gaziabad has been reserved for the purpose of the new undertaking and a letter of such reservation was issued by the Executive Engineer, U. P. State Industrial Corporation Limited on January 14, 1970, and a sum of Rupees 2,51,800/- was deposited for the said plot of land on February 17, 1970. Sanction for supply of power by the U. P. State Electricity Board was obtained on January 24, 1970. A certificate for commencement of business was issued to Swadeshi Polytex Limited on July, 9, 1970. An industrial licence under the Industries (Development & Regulation) Act, was issued to the new company on October 7, 1970. The foundation stone of the factory premises was laid by the President of India on October 12, 1970. According to the explanatory statement, issued with the Notice of September 14, 1970, the plant is likely to go into production in early 1973.

76. It is clear from the steps taken, that expeditious steps have been taken to enable the new company to commence production. Statutory sanctions and licence has been obtained, collaboration agreement arrived at and approved by the Central Government, land secured and construction of factory premises started. It is in these facts that it is to be seen if the ends of justice demand that the 8th appellant should be restrained from investing Rs. 1 crore in the share capital of Swadeshi Polytex Ltd. Is it just and proper that when nearly every possible step has been taken to enable the new company to commence production, the 8th appellant should at the instance of one single share-holder be restrained from making the investment? Even assuming that there is all the merit in the respondent's contention that the explanatory statement did not contain the information which it should have, can it be said in the facts of this case that ends of justice demand that an Injunction should be issued restraining the 8th appellant from making the investment? In our opinion, the answer to both these questions must be in the negative. Wisdom of the investment is a matter with which this Court is in no way concerned. That is a question of policy to be determined by the share-holders and they have in no uncertain terms expressed their opinion in the matter of making the investment.

77. Counsel for the respondent contended that in considering the question of balance of convenience, steps taken for the establishment of Swadeshi Polytex Ltd. should not be taken into consideration. He argued that the suit was not filed against Swadeshi Polytex Ltd., and the application was not made against that company for an Injunction and if such a suit was filed and such an application was made, steps taken for the establishment of Swadeshi Polytex Ltd. would have been material factors in considering the question of balance of convenience. But in this case, he argued, his client was seeking an Injunction restraining the 8th appellant from investing a large sum of money in the share capital of Swadeshi Polytex Ltd. We are unable to accept this contention of Counsel for the respondent. The 8th appellant was keen to invest a large sum of money in the share capital of the new company. Such an investment cannot earn any returns, unless the new company is enabled to carry on its business. From the resolutions passed at the Central Meetings of the 8th appellant, it is clear that it is ready and willing to make the investment. In determining the question whether an Injunction should be granted restraining the 8th appellant from giving effect to the resolutions authorizing the investment, steps taken for the establishment of Swadeshi Polytex Ltd., are, in our view, material and relevant in deciding the question of balance of convenience in favour or against the grant of an order of Injunction. In dealing with the question whether the 8th appellant should be allowed to invest Rs. 1 Crore in Swadeshi Polytex Ltd., steps taken for the establishment of the latter can, by no means, be said to be irrelevant or immaterial in deciding the question of balance of convenience for or against an order of Injunction regarding the investment. If the decision of this appeal rested only on the question of balance of convenience or inconvenience, we would have had no hesitation in saying that the balance of convenience is entirely against the issue of an order of Injunction restraining the appellant from making the investment. But the decision of this appeal depends upon the various other questions which I have discussed earlier in the judgment. Quite apart from my views on the other questions raised in this appeal, so far as balance of convenience is concerned, we are of the opinion that balance of convenience is entirely against an order of Injunction at this stage, restraining the 8th appellant from investing Rupees One Crore in the share capital of Swadeshi Polytex Ltd.

78. I will now proceed to deal with the cross-objection filed by the respondent. Two of the grounds of objection pressed before us were, firstly that the Learned Judge was wrong in holding that the question of a licence under Section 11 of the Industries (Development and Regulation) Act, was not a material fact to be stated in the explanatory statement. Dealing with this question, Counsel for the respondent, contended that it should have been disclosed in the explanatory statement that no licence had been obtained under the said Act for establishing the new company. Without going into the question if the new undertaking was established before the licence under Section 11 (1) of the said Act was obtained, and without again going into the question if the new undertaking could be established without such a licence, we are of the opinion that the explanatory statement cannot be condemned as invalid or illegal on the ground that it did not inform the share-holders that a licence under Section 11 (1) of the said Act was not obtained.

79. In dealing with this question of validity of an explanatory statement, the scope, purpose and object of Section 173 of the Companies Act, 1956, should not be lost sight of. The requirement of that section is that the share-holders should be informed truly of the nature of the business to be transacted at the General Meeting. The business before the General Meeting was confirmation of a resolution passed earlier authorizing investment of Rupees One Crore in Swadeshi Polytex Ltd. That being the only business before the General Meeting, the question whether a licence under Section 11 (1) of the said Act had been obtained, can, by no means, be said to be material information, which should have been furnished to the share-holders of the 8th appellant. In the first place, why should it be presumed that promoters and Directors of the new company are bent upon establishing the new undertaking in violation of all laws and regulations, enjoining licence and permission before the establishment of the new undertaking? Why, again, it should be presumed that the Directors of the 8th appellant have deliberately suppressed from the share-holders, material information which may influence their mind in confirming the earlier resolution? Neither in fact, nor in law are such presumptions justified. As appears from the materials, an application for licence under Section 11 (1) of the Act was duly made and a licence has been duly obtained. It is easy to overstate the requirement of Section 173 of the Companies Act,

1956. It is perhaps easier for a single share-holder to demand that every single step required for the establishment of a new undertaking must be communicated to the share-holders of an investing company. For instance, it might be said that the share-holders of the investing company should be told that a licence under the Factories Act had been obtained or that a licence under the local Municipal Law for carrying on business, has been obtained or again that the plans for erection of structure had been duly sanctioned by the local authority. But information about these matters can, by no means, be said to be material information which must be furnished to the share-holders in an explanatory statement and the omission to furnish which must invalidate the resolution passed at the General Meeting. In our opinion, there is no substance in this ground of the cross-objection.

80. The second ground of cross-objection pressed before us was that the learned Judge was wrong in holding that non-disclosure of the financial aspect of the collaboration agreement did not vitiate the impugned notice and the explanatory statement. This again in our view, is not a matter for inclusion in the notice or the explanatory statement. In the first place, intricate details of a financial arrangement with the collaborators are hardly likely to influence the views of the share-holders, in considering the question of investment in the new company. In the second place, there may be very good and cogent reasons for withholding information regarding financial arrangement, not excluding the question of commercial rivalry. It cannot and it should not be expected that a commercial undertaking of large dimensions would lay bare its financial strength or weakness for a review by the share-holders at large and thereafter by the Public. Lastly, the financial arrangement is an arrangement made between the new undertaking and various financing institutions. The company which is seeking to invest money in a new undertaking is neither likely to, nor is it expected to know the details of such financial arrangements made between the investee company and the financing institutions. Prima facie, those arrangements are between Swadeshi Polytex Ltd. and the financing institutions and disclosure of information relating to such arrangements would certainly be a breach of commercial propriety. The demand for a disclosure of financial arrangement is therefore a matter which the Court cannot approve of and cannot for that reason hold that failure to include the

particulars of the financial arrangement with the collaborators make the notice and the explanatory statement invalid or illegal.

81. For the reasons mentioned above the cross-objection raised by the respondent must fail.

82. Before concluding I should note several decisions on which Counsel for the parties relied. The grounds, on which my judgment in this appeal rests, make it unnecessary for me to deal with these decisions at length. Besides the decision relied on by Mr. S. C. Sen which have been already dealt with by me in this judgment, he relied upon the decisions reported in. 1949 AC 398, AIR 1959 All 276, AIR 1952 SC 362, AIR 1966 Mys 154, AIR 1968 SC 1358, AIR 1952 Cal 645, AIR 1962 Cal 127, AIR 1966 Cal 232, AIR 1965 SC 1535, AIR 1963 Orissa 189, (1960) 64 Cal WN 970, (1965) 69 Cal WN 369, (1966) 2 Com. LJ 208 (Cal), AIR 1955 Cal 132, (1971) 75 Cal WN 173. Mr. Prabir Sen relied upon, AIR 1965 SC 101, 65 ITR 651 = (AIR 1967 SC 1534), AIR 1967 SC 509, (1906) 2 Ch. D. 390, AIR 1960 Raj 49, (1935) 1 KB 75, (1970) 2 Com. LJ 200 (Bom), 1917 AC 607 = (AIR 1917 PS 52), (1970) 1 S. C. C. 613 = (AIR 1971 SC 2355).

83. I have carefully taken into consideration the grounds advanced on behalf of the respondent in support of the Injunction issued by the trial Court. In my view, the order for Injunction cannot be sustained in the facts of this case. This appeal therefore succeeds and is allowed. The judgment and order of the trial Court are set aside. Costs of this appeal will be costs in the cause. Certified for two Counsel.

84. I now turn to the order that ought to be made in this appeal. On April 7, 1971, an order was made by this Bench on the application of the appellant for admission of the appeal and stay of operation of the order under appeal. That order seems to us to be a model order for the purpose of Ad Interim protection of the rights of the parties until final determination of the suit. If I say it is a model order it is because the order has taken into consideration the contentions advanced by the parties and has given them the protection to which they are legitimately entitled. It seems to us that the order made by this Bench on April 7, 1971 with minor variations to which I will presently refer, ought to remain in force until final determination of the suit out of which this appeal arises.

85. Mr. S. C. Sen, Counsel for the appellant submitted that three of the Directors of the 8th appellant,

namely, Shri B. P. Khaitan, Shri R. Chaudhuri and Shri B. Malik, whom Mr. Sen described as outside Directors, should be released from the undertaking given by the Directors of the 8th appellant to this Court on April 7, 1971. Mr. Prabir Sen said that he had no objection to the release of these three Directors from the undertaking. Both Mr. S. C. Sen and Mr. Prabir Sen submitted that their clients would be content if the order made on April 7, 1971, is continued until final determination of the suit. Accordingly, we order that in the event of it being ultimately held that the investment to be made by the 8th appellant on the basis of the impugned resolution is illegal and in the event of the investment not being regularised in accordance with law within three months of the final determination of the suit, the Directors of the 8th appellant other than Shri B. P. Khaitan, Shri R. Chaudhuri and Shri B. Malik undertake to this Court through Counsel for the 8th appellant to have the shares of the 8th appellant sold and/or disposed of within four months from the date of final determination of the suit and further undertake to this Court to reimburse any loss that the 8th appellant may suffer by reason of sale of the shares pursuant to this order.

Appeal allowed.

AIR 1972 CALCUTTA 128 (V 59 C 22)

B. C. MITRA AND S. K.

MUKHERJEA, JJ.

Arun General Industries Ltd., Appellant v. Rishabh Manufacturers Private Ltd. and others, Respondents.

Appeal No. 58 of 1969: Suit No. 2695 of 1967, D/-9-1971.

(A) Civil Procedure Code (1908), Section 10 — Stay of suit — Same parties — The words 'same parties' mean the parties between whom the matter substantially in issue has arisen and has to be decided. Complete identity of either the subject-matter or the parties is not required. AIR 1957 Cal 727, Followed. (Case law discussed).

(Paras 9, 11 & 13)

It is enough if there is a substantial identity of the parties. Hence the existence of an additional party in the suit subsequently filed does not by itself make Section 10 inapplicable.

(Paras 9, 11)

Where the addition in the subsequent suit, of some defendants who are all directors of the plaintiff company in the earlier suit do not raise any sepa-

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rate and substantial issue as between them and the plaintiff in the subsequent suit, the addition of the defendants does not make the subsequent suit, any the less a suit between the same parties as in the earlier suit for the purpose of Section 10. (Paras 9 & 13)

(B) Civil Procedure Code (1908), Section 10.— Stay of suit — Matter directly and substantially in issue in the two suits must be the same. The subject-matter in dispute and matter in issue in the two suits need not, however, be identical in every particular. It is enough if the matters in controversy in the two suits are substantially the same. AIR 1953 Bom 117 and AIR 1957 Cal 727, Rel. on.

(Paras 17, 19, 20)

The matter for determination in the case of an application for stay under Section 10 is not what the basis of the claim in the two suits is, but what is the matter in issue in the two suits. The two different bases of claim, namely, one based on a contract and the other on a tort would not make the matters in issue in the two suits different merely on that ground. If a claim based on a contract in one suit, is sought to be avoided and repelled on the ground of fraudulent misrepresentation and a subsequent suit is filed claiming damages on the basis of a fraudulent misrepresentation with regard to the same contract, the issues nevertheless in the two suits would be substantially the same, even though the bases of the claim in the two suits are altogether different. (Para 20)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Cal 382 (V 53) = 70 Cal WN 375, Jugometal Trg Republike v. Rungta & Sons 21
 (1966) 70 Cal WN 670, Central Bank of India Ltd. v. Bhagwati Hosiery Mills Ltd. 22
 (1960) AIR 1960 Madh Pra 169 (V 47) = 1960 Jab LJ 61, Radhe Shyam Agarwal v. Kashinath Vaish 12
 (1957) AIR 1957 Cal 727 (V 44) = 61 Cal WN 559, Shorab Merwanji Modi v. Manasata Film Distributors 9, 18
 (1955) 1955-1 All ER 55 = 1955-1 WLR 9, Ward v. Lewis 10
 (1954) AIR 1954 SC 592 (V 41) = 1955 SCR 305, K. N. Guruswamy v. State of Mysore 12
 (1953) AIR 1953 Bom 117 (V 40) = 54 Bom LR 844, Jai Hind Iron Mart v. Tulsiram Bhagwan-Das 17
 (1950) AIR 1950 FC 83 (V 37) = 1949 FCR 849, Moolji Jaitha

- & Co. v. Khandesh Spinning and Weaving Mills Co. Ltd. 12
 (1948) AIR 1948 Nag 297 (V 35) 1948 All LJ 66, Umrao Singh v. Kunwar Man Singh 11
 (1943) AIR 1943 Bom 81 (V 30) = 45 Bom LR 41, Supdt. of Insurance v. Navabharat Insurance Co. Ltd. 12
 (1941) AIR 1941 Cal 434 (V 28) = ILR (1941) 1 Cal 373, Naskarpara Jute Mills Co. Ltd. v. Nirmal Kumar Jain 16
 (1940) AIR 1940 Mad 7 (V 27) = 1939-2 Mad LJ 290, Munuswami Mudaliar v. Darwaja Raghupathi 16
 (1935) AIR 1935 Cal 1 (V 22) = 38 Cal WN 818, Durgaprasad v. Kantichandra Mukherji 12
 (1935) AIR 1935 Lah 816 (V 22) = 160 Ind Cas 805, Smt. Nasiban Bi v. Smt. Iqbal Begum 16
 (1925) AIR 1925 Mad 574 (1) (V 12) = 48 Mad LJ 251, Kuberan Nambudri v. P. K. Koman Niar 16
 (1922) AIR 1922 Mad 304 (V 9) = 15 Mad LW 646, Kota Sreeramulu v. Kota Sreeramulu 16
 (1920) AIR 1920 All 70 (V 7) = 18 All LJ 145, Wahidunnissa Bibi v. Zamin Ali Shah 11
 (1920) AIR 1920 Bom 296 (V 7) = ILR 44 Bom 283, Mulchand Raichand v. Gill & Co. 10
 (1919) AIR 1919 Low Bur 10 (V 6) = 10 Low Bur Rul 154, Manmull Khemka v. Murlidhar Bagla 10
 (1917) AIR 1917 Cal 248 (V 4) = 24 Cal LJ 514, Bepin Behary v. Jogendra Chandra 16

Sankar Ghose, for Appellant.

B. C. MITRA, J.:— The appellant carried on a business and undertaking at Umaria, Madhya Pradesh, known as Arun Board and Paper Mills. On August 6, 1964, the respondent No. 7 entered into an agreement with the appellant under the terms of which the latter agreed to transfer its right, title and interest in the lease which the appellant had previously obtained from the Government of Madhya Pradesh on April 21, 1961. The consideration for the transfer was Rs. 1,25,000/- out of which the respondent No. 7 was to pay Rs. 25,000/- at the time of the agreement, another Rs. 25,000/- within sixty days after the issue of no objection certificate by the Government of Madhya Pradesh and the balance of Rs. 75,000/- in several stated instalments. In terms of this agreement the respondent No. 7 paid to the appellant Rs. 25,000/- on August 10, 1964, and he also nominated the respondent No. 1 as his nominee in whose name the lease was to be

transferred. The respondent No. 2 agreed to guarantee the due payment of the consideration money mentioned above. The appellant made over possession of the undertaking and the establishment to the respondent No. 1. According to the appellant it received from the Madhya Pradesh Government the no objection certificate in 1964 for the transfer of the lease to the respondent No. 1. The respondent No. 1 did not pay the balance of consideration money namely Rs. 1 lac and it is contending that the no objection certificate has not been issued by the Madhya Pradesh Government.

2. On October 9, 1967, the appellant filed a suit in the Court of the District Judge, Jabalpur against the respondents Nos. 1, 2 and 7 claiming a permanent injunction prohibiting these respondents from working the plant known as "Arun Board and Paper Mills" or any part thereof, for a decree for Rs. 1 lac with interest, a decree directing the said respondents to account for the profits received by them from the undertaking from the date of their taking possession, and in the alternative for a decree for payment of the balance consideration money with interest.

3. On December 1, 1967, the respondents Nos. 1 and 2 filed a suit in this Court against the appellant and the respondents Nos. 3, 4, 5 and 7. The claim in the Calcutta suit is that the appellant failed to fulfil its contract for transfer of the undertaking in terms of the agreement mentioned above, that the respondent No. 1 was always ready and willing to pay the balance of the consideration money, but the appellant failed to obtain the no objection certificate. It is alleged that for these reasons the consideration for the agreement for transfer wholly failed and the respondent No. 1 is entitled to refund of the sum of Rs. 25,000/- together with all benefits. There is a further claim of Rs. 3,33,690.44 by the respondent No. 1 in electrification work, purchase of modern machinery, additions and alterations to the same and also to buildings, sheds and structures. A sum of Rs. 1,00,000/- per annum is claimed on account of loss of profit and Rupees 49,500/- is claimed as representing the amount which the respondent No. 1 is liable to pay to the State Electricity Board for supply of electrical energy. There are other prayers for declaration that the guarantee is now void and cancellation of the same and other incidental reliefs. The writ of summons in this suit was served upon the appellant on or about January 17, 1968, and on February 23, 1968, the appellant made

an application for stay of the Calcutta suit under Section 10 of the Civil Procedure Code, on the ground that the subject-matter in the earlier instituted Jabalpur suit is same and/or substantially the same as in the later instituted Calcutta suit, and that the matters in issue in the Jabalpur suit are directly and substantially in issue of the Calcutta suit. On this application an order was made on April 29, 1968, staying the Calcutta suit for two years from the date of the order and also directing that the stay order would not prejudice the right of the respondent as plaintiff in the Calcutta suit to take all necessary steps in the mean time and also to make interlocutory applications if so advised. The order also provided that if the Jabalpur suit was not disposed of within a period of two years, the appellant would be at liberty to apply in the Calcutta suit for renewal or continuation of the stay for a further period on proper materials. This appeal is directed against this order. Before proceeding any further it is to be noted that both the appellant and the respondents Nos. 1 and 2 who have filed cross-objections are aggrieved by the order staying the suit for a term of two years.

4. Mr. Sankar Ghose counsel for the appellant contended that the subject-matter of the Jabalpur suit, which was the earlier instituted suit, was the same as the Calcutta suit. The addition of parties in the Calcutta suit, it was argued, who were not parties in the Jabalpur suit, would make no difference to the claim for stay of a suit under S. 10 of the Civil Procedure Code, as the matters in issue in the Jabalpur suit were the same as in the Calcutta suit. The appellant's claim in the Jabalpur suit is that an agreement was entered into for transfer of the appellant's right, title and interest of the buildings, sheds, structures, machinery, stores etc. for which Rs. 1,25,000/- was to be paid by the respondent No. 1. The consideration was to be paid in several stated instalments. It is alleged that the first instalment of Rs. 25,000/- was paid to the appellant, that the respondent No. 2 guaranteed the due payment of the amount payable to the appellant under the agreement, and that the appellant made over possession of the plant, machinery, building etc. to the respondent No. 1. It is next alleged that in 1964 the appellant obtained a 'No Objection' letter from the Government of Madhya Pradesh and forwarded the same to the respondents. It is claimed that the transferee shall not be entitled to start running the plant unless sanction for the transfer was obtained from the Government of Madhya Pra-

desh, and since a 'no objection' certificate was obtained the respondent started running and using the plant for the purpose of the business. The next allegation is that apart from the sum of Rs. 25,000/- no other sum had been paid to the appellant in terms of the agreement and that the appellant had always been ready and willing to perform its part of the contract, but the respondents had been trying to avoid fulfilment of their obligation under the same. In these facts the appellant claimed the balance of consideration namely Rs. 1,00,000/-. There is a claim for a permanent injunction restraining the defendant in the Jabbalpur suit from working the plant, and a prayer for accounts of profits received from running the plant from the date of taking possession by the respondent No. 1 up to the date of making over possession to the appellant and a decree for such sum as may be found due. In the alternative it is claimed that a decree may be passed for payment of the balance with interest.

5. The plaint in the Calcutta suit starts with a statement regarding representations made by two of the Directors of the appellant that the appellant was anxious to transfer its interest in the undertaking. It is next alleged that the respondent No. 2 intimated to the appellant that he was interested in acquiring the leasehold interest on behalf of a limited company which would be promoted. It is then stated that the representations were made on behalf of the appellant that the properties were free from encumbrances, that the appellant had full power and authority to enter into an agreement for transfer of the lease and that all provisions of law have been complied with in connection with the said agreement. The next statement in the plaint is about the written offer by the appellant dated August 6, 1964, for transfer of the leasehold interest. The terms of the offer are also set out in the plaint. It is thereafter stated that Rs. 25,000/- was paid to the appellant by cheque, and possession of a portion of the premises was given to the respondent No. 7 on August 14, 1964, on which date the respondent No. 1 was incorporated, and intimation was given by the respondent No. 7 that the respondent No. 1 was the nominee and the appellant was requested to transfer the lease to the respondent No. 1 as such nominee. The next allegation in the plaint is that on August 27, 1964, the respondent No. 2 gave to the appellant a letter of irrevocable guarantee for Rs. 1,00,000/-. It is alleged that the respondent No. 1 electrified the factory

and equipped the same with modern machinery, made additions, alterations and repairs to the machinery and buildings in order to be ready to run the factory as soon as the 'No Objection' letter was received by the appellant from the Government of Madhya Pradesh. The next material allegation in the plaint is that the respondent No. 1 came to know that the representations mentioned above were false and frivolous and were made with intent to deceive respondents Nos. 2 and 7. Thereafter particulars of the falsity of the representations have been set out in the plaint. It is next alleged that the respondents Nos. 3, 5 and 6 represented to the respondents Nos. 1 and 2 that securing of a 'No Objection' letter from the Government was a mere formality, that the same would be secured in a short time and that the respondent No. 1 could go ahead with the working of the factory. It is alleged that the respondent No. 1 proceeded to work the plant and invested large sums of money. It is then alleged that the appellants were unable to secure the 'No Objection' letter at all and that the respondents Nos. 1 and 2 would not have entered into the transaction nor paid Rs. 25,000 and would not have incurred various expenditure and the respondent No. 2 would not have furnished the guarantee but for the representations and assurances made to respondent No. 1. It is next alleged that by a letter dated November 30, 1966, the respondent No. 1 requested the appellant to fulfil the latter's part of the contract by December 15, 1966, and gave notice that time was to be treated as the essence of the contract. It is thereafter stated that the respondents Nos. 1 and 2 were ready and willing to perform their part of the contract and in part performance of the same payment was made to the appellant and partial possession of the leasehold properties was obtained by the respondent No. 1. It is next alleged that the respondents Nos. 1 and 2 were ready and willing to pay the balance of the amount and to fulfil the guarantee, and the terms of the contract but the appellant failed to perform its part and comply with the terms of the agreement. It is next alleged that the consideration of the agreement wholly failed and that the respondent No. 1 was entitled to refund of the sum of Rs. 25,000/-. The respondent No. 1 thereafter claims to be entitled to amounts it spent in electrifying, equipping with modern machinery and making additions and alterations to the factory. A claim is also made for Rs. 1,00,000/- per annum from December 16, 1966, till the end of the optional

period of the lease. The respondent No. 2 claims return of the letter of guarantee and a declaration that the same is not binding on him.

6. From the averment in the two plaints it is to be seen firstly if it can be said that the matter in issue in the Calcutta suit is directly and substantially in issue in the Jabalpur suit. Secondly it is to be seen if the two suits are between the same parties or between the parties under whom they or any of them claim.

7. There can hardly be any doubt that the dispute between the parties arises out of the agreement for transfer of a leasehold interest. There is no dispute about the contract itself or its terms. The dispute, such as it is, arises out of alleged performance or alleged failure to perform the obligations under the bargain. In the Calcutta suit not only the appellant but its Directors also have been impleaded as defendants. The charge against these Directors, as laid in the plaint, is that they made certain false representations. Can it be said that such a charge against these defendants is a subject-matter in issue in the suit? That is the first question which arises in this appeal. The representation made by respondent Nos. 3, 5 and 6 who are Directors of the appellant is alleged to have been made on behalf of the Directors themselves and on behalf of the appellant. How the Directors could make any representation on their own behalf when they were acting as Directors of a company is by no means clear. No part of the leasehold interest vested in the Directors themselves, and the agreement for transfer was made between the appellant company and the respondent No. 1. No case has been made out in plaint that the Directors of the appellant company had any interest in the leasehold properties other than as Directors of the company. When Directors acting as Directors make a representation on behalf of a company, and the party to whom the representation is made understands it to be such, such a representation cannot but be held to be a representation made by the Company. The rights and liabilities arising out of such representations are the rights and liabilities of the company and not of the Directors who made the representation. This is subject to one reservation that the Directors acted or purported to act within the powers conferred upon them by the Articles of Association of the company. No case has been made out in the plaint in the Calcutta suit that the Directors act-

ed beyond the power conferred upon them by the Articles of the Company so as to make them personally liable for the representations made by them.

8. There is another averment in the plaint in the Calcutta suit that the defendants Nos. 2 and 3 gave certain assurances, namely, that the properties were free from encumbrances, that the defendant company had full power and authority to enter into an agreement for transfer, and that all provisions of law had been complied with. These assurances were plainly given by them as Directors of and on behalf of the Company. For the assurances and representations given and made by the Directors of the appellant as its Directors, the respondent No. 1 can have no claim to any relief, even assuming it had suffered injury by reason of such assurances and representations. In my view the cause of action pleaded against the defendants Nos. 2, 3, 4 and 5, in the Calcutta suit such as it is, cannot be said to be any part of the subject-matter in issue in the suit. I make it clear that I should not be understood to say that these defendants have been impleaded in the suit mala fide or with an ulterior motive. We are not called upon to express any view on that question and we accordingly refrain from doing so. But in order to determine what is the subject-matter in issue in the Calcutta suit, it is necessary to examine the claim of the respondent No. 1 as laid in the Calcutta plaint. Shorn of verbiage and all other trappings and embellishments the matter in issue in the Calcutta suit is that the plaintiffs were ready and willing to perform their part of the contract, and to pay the balance of the amount and also to fulfil the terms of the agreement of transfer, but the defendant company failed and neglected to perform its part and comply with the terms of the agreement. It is by reason of this alleged failure on the part of the defendant No. 1 in the Calcutta suit that various reliefs have been claimed in that suit. I shall examine the matter in issue in the Jabalpur suit later. The plaint in the Calcutta suit appears to me to be somewhat curious. The allegations against the defendants Nos. 2, 3, 4 and 5 who are Directors of the defendant No. 1 (appellant in this appeal) is that they made false and fraudulent representations, and also gave false assurances with intent to deceive and induce the plaintiff No. 1 and the defendant No. 6 into the agreement. This is the charge made against the Directors in Paragraph 15 of the plaint. In paragraph 16 of the plaint it is alleged that three of the Directors namely defendants Nos. 2, 4 and 5 made cer-

tain representations to the plaintiffs in the Calcutta Suit. In paragraph 19 of the plaint it is alleged that the defendants fraudulently and intentionally misled the plaintiffs, and in paragraph 20 it is alleged that but for the false and fraudulent representations the plaintiffs would not have entered in the transaction nor paid Rs. 25,000/- and further that the plaintiffs would not have incurred various expenditures mentioned in paragraphs 14 and 17 of the plaint. Briefly speaking these are the charges against the Directors of the appellant and the basis of the claim as laid in the plaint. But what follows these averments relating to fraud, deceit and untrue representations seems to me to be extremely curious. In spite of the allegations that the respondent No. 1 was induced to enter into the agreement by fraudulent misrepresentation and deceitful intent, the respondent No. 1 did not repudiate the contract. But it is alleged in paragraph 21 of the plaint that on November 30, 1966, the respondent No. 1 requested the appellant to fulfil its part of the contract by December 15, 1966, and in paragraphs 23 and 24 of the plaint it is alleged that the respondents Nos. 1 and 2 (plaintiffs in the Calcutta suit) were at all material times ready and willing to perform their part of the contract and pay the balance of the amount due under the contract and fulfil all other terms in the agreement. While on the one hand the charge is that but for the fraudulent and deceitful misrepresentations of the Directors of the appellant, the respondents Nos. 1 and 2 would not have entered into the contract, the contract itself is being affirmed and readiness and willingness to perform the same is pleaded.

9. A scrutiny of the plaint in the Calcutta suit became necessary because of the contention of Mr. A. C. Bhabra, counsel for the respondents that Section 10 of the Civil Procedure Code has no application as the Calcutta suit is not between the same parties, who are parties in the Jabalpur suit. It was argued that the Directors of the appellant who are defendants Nos. 2, 3, 4 and 5 in the Calcutta suit are not parties in the Jabalpur suit, and therefore Section 10 of the Code had no application. To the extent that defendants Nos. 2, 3, 4 and 5 in the Calcutta suit are not parties in the Jabalpur suit this contention of counsel for the appellant is right. But the inquiry should not stop there. It has to be seen who are the parties between whom the matters in issue arise. The matter in issue in the Calcutta suit is the alleged failure or omission on the part of the appellant to perform its part of the contract. The

matter in issue in the Jabalpur suit is also the failure or omission on the part of the respondent No. 1 (defendant No. 1 in the Jabalpur Suit) to perform its part of the contract. Leaving aside the question of guarantee, the parties on whom obligations have been imposed under the agreement are the appellant and the respondent No. 1. The matter in issue in the Jabalpur suit is also the failure or omission on the part of the respondent No. 1 to perform its obligations under the contract. The questions as to who are to be treated as parties to a suit, or parties under whom they or any of them claim, have been the subject-matter of a number of decisions to which I now turn. The first case to be referred to is a Bench decision of this Court *Shorab Merwanji Modi v. Mansata Film Distributors*, AIR 1957 Cal 727. In that case an agreement for distribution of film was made in Bombay between a film producer of Bombay and a Calcutta distributor. The producer wrote a letter to the Distributor directing the latter to pay moneys payable to the producer to Kapurchand Ltd. Bombay. Disputes thereafter arose between the parties with regard to the pictures to be produced and distributed in consequence whereof one instalment due by the distributor to the producer was not paid. This was followed by termination of the agreement by the producer and forfeiture of moneys already paid by the distributor. Thereafter the producer filed a suit in the Bombay High Court on July 23, 1954, for recovery of an instalment of Rupees 60,000/- and various other reliefs. On August 12, 1954, the distributor instituted a suit on the Original Side of this Court against the producer adding Kapur Chand Ltd. as a party defendant. In this suit the distributor claimed a decree for Rs. 4,71,250/- of which Rs. 2,91,250/- was claimed as refund of money paid and Rs. 1,80,00/- as damages for loss of profit. In the Bombay suit the producer complained of breach of the terms of the agreement, pleaded termination of the same and prayed for a decree for the amount due or in the alternative damages. There was a denial of the allegation of misrepresentation made by the distributor in its letter. In the Calcutta suit the distributor alleged false and fraudulent representation vitiating the agreement and rendering it void and asked for refund of the moneys paid and also damages. The institution of the two suits was followed by an application by the producer in the Bombay suit for an injunction restraining the distributor from proceeding with the suit in Calcutta so long as the Bombay suit was not disposed of. On this

application the injunction prayed for was granted, but on appeal the injunction was dissolved. This again was followed by an application by the distributor who was the plaintiff in the Calcutta suit, for an injunction restraining the producer from proceeding with the Bombay suit, and the producer on his turn filed an application also, in the Calcutta suit for revocation of the leave under Clause 12 of the Letters Patent, and alternatively for a stay of the Calcutta suit under Section 10 of the Civil Procedure Code. Both these applications in the Calcutta suit, however, were dismissed by the trial Court. Dealing with the question of the additional party in the Calcutta suit namely Kapurchand Ltd., Chakravarti C. J. held that the existence of an additional party by itself did not make Section 10 inapplicable, and that although the section spoke of 'same parties' it had been held that 'same parties' meant the parties between whom the matter substantially in issue had arisen and had to be decided. He further held that complete identity of either the subject-matter or the parties was not required. With regard to the additional party in the Calcutta suit namely Kapur Chand Ltd., it was held that a joinder of this additional party raised no separate and substantial issue as between this additional party and the plaintiff, so as to make Section 10 inapplicable. I respectfully agree with the views of the Division Bench on the question of the additional party in the Calcutta suit. In the instant case now before us the addition of the Director-defendants of the appellant namely the defendants Nos. 2, 3, 4 and 5 does not raise any separate and substantial issue as between them and the respondents Nos. 1 and 2 who are the plaintiffs in the Calcutta suit. All in all it is clear to me that the addition of the Director-defendants in the Calcutta suit does not necessitate an investigation or inquiry into new matters for the purpose of granting relief to the plaintiffs in the Calcutta suit, assuming they are entitled to such.

10. Mr. Sankar Ghose learned counsel for the appellant contended and we think rightly, that the observations of Chakravarti C. J. clinched the matter and that in spite of the allegations of fraud, misrepresentation and false assurances against the defendants Nos. 2, 3, 4 and 5 in the Calcutta suit, the matter in issue in that suit is nothing other than the alleged breach of contract by the appellant. In these facts we are unable to hold that the addition of the Director-defendants in the Calcutta suit takes it out of the ambit of Section 10 of the Civil Procedure Code.

Mr. Ghose relied on the observations of Denning L. J. in *Ward v. Lewis*, (1955) 1 All ER 55, that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit tort adds nothing and the prior agreement merges in the tort. That was however an application for an amendment of statement of claim giving particulars of special damages. The question before the Court was if the amendment should be allowed to enable the plaintiff to claim special damages. The dictum of Denning L. J. has no application to the question with which we are concerned in this appeal. The question before us is whether the matter in issue in the Calcutta suit as framed, is also directly and substantially in issue in the Jabbalpur suit. As I have said earlier there is no pleading either in the Calcutta plaint or in the written statement in the Jabbalpur suit of repudiation of the contract by the respondents Nos. 1 and 2 on the ground of fraudulent misrepresentations and false assurances given by the Directors of the appellant and intent to deceive the respondents Nos. 1 and 2. Far from any pleading of repudiation of the contract on these grounds, the plaint in the Calcutta suit and the written statement in the Jabbalpur suit make it clear that the respondents Nos. 1 and 2 were affirming and accepting the contract and were charging the appellant and its Directors with breach of the contract. That in my view is the essence of the matter in issue in the Calcutta suit and also in the Jabbalpur suit. On the question of identity of a party reliance was placed by Mr. Ghose on a Bench decision of the Bombay High Court reported in ILR 44 Bom 283 = (AIR 1920 Bom 296) in which it was held that Section 10 of the Civil Procedure Code required a substantial identity in the matter of parties. Reference was also made to a Bench decision of the Lower Burma Chief Court reported in AIR 1919 Low Bur 10 in which it was held that the addition of a new party in a suit did not prevent the application of Section 10 of the Civil Procedure Code which required that the same party should be litigating in both the suits.

11. The next case relied upon by Mr. Ghose was a Bench decision of the Allahabad High Court reported in AIR 1920 All 70 in which it was held that addition of one party in a later suit was immaterial for the purpose of Section 10 of the Civil Procedure Code, and that if the hearing of a suit had to be postponed under Section 10, it should be postponed against all the parties including the added new party. Counsel for the appellant also relied upon a

Bench decision of the Nagpur High Court reported in AIR 1948 Nag 297. In that case it was held that for the purpose of application of Section 10 it was enough if there was substantial identity of parties and that complete identity of parties was not necessary.

12. Mr. A. C. Bhabra Counsel for the respondents sought to repel the contentions of the appellant's counsel firstly by referring to the word 'same' used in Section 10. He said that the same word used more than once in the same section must be given the same meaning. He argued that the word 'same' must be given its plain English meaning which it must be held to indicate the identical object. In support of this contention he relied on two decisions reported in AIR 1954 SC 592 and AIR 1943 Bom 81. Relying on the decision reported in AIR 1950 FC 83 counsel for the respondents argued that effect should be given to the language of the section. It was next argued that so far as parties were concerned, for the purpose of application of Section 10, there must be complete identity of parties and also of subject matter. In support of this contention counsel for the respondents relied on the decision reported in AIR 1960 Madh Pra 169. Reliance was also placed by counsel for the respondents on a Bench decision of this Court reported in AIR 1935 Cal 1. In that case the question of who are the same parties was considered. A partnership action was filed in Delhi by one of the partners of a Delhi firm and thereafter, a Receiver appointed in another partnership action in this Court filed a suit for dissolution of a partnership in which he made all the partners, including those of the Delhi firm, party-defendants. Dealing with the question whether the two suits were between the same parties under Section 10 of the Civil Procedure Code, it was held that although the Calcutta suit was by a Receiver, to all intents and purposes, the parties in the two suits were the same. To our mind this decision is against the contention of counsel for the respondents, because in so far as one of the suits was by a Receiver appointed by the Court, it could not be said to be a suit between the same parties, in the sense in which the word 'same' should be construed according to counsel for the respondents.

13. In our view the addition of the defendants Nos. 2, 3, 4 and 5 who are all Directors of the appellant (defendant No. 1 in the Calcutta suit) does not make the Calcutta suit any the less a suit between the same parties as in the Jabbalpur suit, for the purpose of

Section 10 of the Civil Procedure Code. The false and fraudulent representations alleged to have been made, and the assurance alleged to have been given by the defendants Nos. 2, 3, 4 and 5 in the Calcutta suit were all made and given by them as Directors of the appellant. There is nothing in the Calcutta plaint to suggest that there was an independent contractual relationship between these defendants and the plaintiffs in the Calcutta suit (respondents Nos. 1 and 2) in this appeal. The allegation of joint and several liability of the defendants in paragraph 26 of the plaint in the Calcutta suit cannot make us ignore the allegation in paragraph 24 of the plaint that the defendant No. 1 (appellant) is charged with a breach of contract and also of repudiation of the same. On the plaint as framed, and without anything more, there could hardly be any doubt that in order to give relief to the plaintiffs in the Calcutta suit the Court has to come to a conclusion whether there has been a breach and a repudiation of the contract by the defendant No. 1 in the Calcutta suit. In the written statement of the Jabbalpur suit it is alleged that the plaintiff in that suit (the appellant in this appeal) broke the contract and therefore the defendants in that suit were justified in not making payment to the plaintiff. If the Jabbalpur suit is decreed the issue of breach of contract and of repudiation of the same in the Calcutta suit will be barred by res judicata. If on the other hand the Jabbalpur suit is dismissed there will be little left in the appellant's defence in the Calcutta suit. Thus the main question resolves itself to this: Whether the contract has been broken and repudiated by the appellant and whether the appellant is entitled to the balance of the consideration money. The addition of the defendants Nos. 2, 3, 4 and 5 in the Calcutta suit, in our view, makes no difference to the determination of the principal matter in issue in the Calcutta suit. We must therefore hold that in effect and in substance, if not in form, the Calcutta suit is between the same parties as the Jabbalpur suit. There is therefore sufficient compliance with the requirement of Section 10 of the Civil Procedure Code that in order to attract the provisions of that section the two suits should be between the same parties or between parties under whom they or any of them claimed. This disposes of the question of parties in two suits one of which is sought to be stayed under Section 10 of the Code. I now proceed to deal with the question of the matters directly and substantially in issue in the two suits.

14. Earlier in this judgment I have analysed the plaint in the Calcutta suit and I now proceed to look into the scope of the Jabbalpur suit with reference to the allegations in the plaint and the written statement in that suit. That plaint starts with the agreement entered into between the parties on August 6, 1964, and then proceeds to record payment of Rs. 25,000/- by the appellant and nomination of the respondent No. 1 by the respondent No. 2 as the nominee in whose name the lease was to be transferred. Thereafter it is alleged that possession of the establishment was made over by the appellant to the respondent No. 1. The next material allegation is that the appellant received from the Madhya Pradesh Government the 'No Objection' letter for transfer of the lease by the appellant to the respondent No. 1. The appellant then contends that besides the sum of Rs. 25,000/- the respondent No. 1 made no other payment though the time for such payment expired. After pleading readiness and willingness to perform its part of the contract, the appellant claims the balance of Rs. 1,00,000/- with interest. There is a further claim for compensation for the structures. There are averments of false allegation by the respondents about the acceptance of an alleged surrender by the Madhya Pradesh Government of 99.36 acres of land. The reliefs claimed in the plaint are an injunction restraining the defendants in that suit from working the plaint, a decree for Rs. 1,00,000/- with interest, accounts of profits received and in the alternative a decree for payment of the balance money with interest. This in substance is the nature of the claim in the Jabbalpur suit. In the written statement in that suit filed jointly by the respondents Nos. 1, 7 and 2 (defendants Nos. 1, 2 and 3 in that suit) it is firstly alleged that the agreement was obtained on misrepresentation of facts. It is next alleged that the appellant failed and neglected to procure a "No Objection" letter from the Government of Madhya Pradesh. The next material allegation is that the appellant falsely and fraudulently represented to the defendants that 'No Objection' letter would be procured in terms of the agreement. The next allegation is about the concealment of the surrender of 99.36 acres of land and fraudulent inducement of respondent No. 1 to start running the plant and incur large expenses and that but for the fraudulent and false representation the respondent No. 1 would not have run the factory. These averments are followed by an allegation of breach of the contract by the appellant. In paragraph 11 of the written statement it

is again alleged that the respondent No. 1 would not have done construction, additions, alterations and improvements but for the fraudulent representations made by the appellant that it would obtain a 'No Objection' letter from the Madhya Pradesh Government. It is alleged that the defendants believed such fraudulent representations to be true. In paragraph 13 of the written statement it is alleged that the procurement of the 'No Objection' letter was a condition precedent and by reason of the appellant's failure to procure the same, the agreement was void or voidable at the option of the defendants, and that they had duly avoided the same. In paragraph 18 of the written statement the allegation is that the plaintiff has committed a breach of agreement and has failed to obtain the 'No Objection' letter, has broken the contract and the defendants have been discharged from completing the transaction. This in brief is the defence to the appellant's claim in the Jabbalpur suit.

15. It is clear to us that the substantial issue in the Jabbalpur suit is if the respondents Nos. 1, 2 and 7 are liable to the appellant for the balance of the consideration money, and secondly whether the alleged false and fraudulent representations were made by the appellant and thirdly if by virtue of such false and fraudulent representations the respondents Nos. 1, 2 and 7 have been exonerated from their liability for the balance of the consideration. As I noticed earlier these are substantially the issues in the Calcutta suit as well. It is true that the reliefs claimed in the two suits are different, as indeed they must be, but the issues in the two suits in our view are substantially the same. The alleged false and fraudulent representations made by the plaintiff in the Jabbalpur suit and its Directors in the Calcutta suit is the main plank on which the respondent No. 1 rests its claim to avoid liability for payment of the balance of consideration and also of its other obligations under the agreement. The next substantial issue in both the suits is the alleged surrender of a certain portion of land namely 99.36 acres and the third issue relates to the procurement of a 'No Objection' certificate from the Madhya Pradesh Government. To our mind these questions are common in both the suits and a decision on these questions in the Jabbalpur suit would certainly bar a determination of these questions in the Calcutta suit by virtue of *res judicata*.

16. Counsel for the respondents contended that in order to attract Section 10 of the Civil Procedure Code all

the issues involved in the two suits must be identical. In support of this proposition he relied on a Bench decision of this Court reported in 24 Cal LJ 514 = (AIR 1917 Cal 248). In that case a suit was filed for recovery of rent. This suit was resisted by the defendants on the ground that the defendants were already evicted from part of the land of which rent was claimed. This suit was decreed but the question whether the disputed plot of land was in the occupation of the plaintiff or the defendant was left open. An appeal was preferred against the decree and while the appeal was pending, another suit was filed for recovery of arrears of rent for a subsequent period. The defendants, in the second suit again raised the plea that they were unlawfully kept out of possession of a certain plot of land. Thus the title to the plot of land was in question in both the suits in the pending appeal and also in the subsequently instituted suit. The defendant applied for stay of the second suit under S. 10. It was held that the subject-matter in the second suit and the issues involved therein was the plaintiff's claim for rent for a different period and it was therefore held that the "matter in issue" did not cover the entire subject-matter in controversy between the parties and clearly the matter in issue in the second suit was the plaintiff's claim of rent for a period subsequent to that which was a subject-matter in the first suit and thereafter in the appeal therefrom. The question of title to the disputed plot of land did indeed arise in both suits but the substantial matter in issue was the plaintiff's right to rent for a different period. It was in these facts that it was held that the second suit could not be stayed under Section 10 of the Code. This decision, to our mind, is not of any assistance in the facts of this appeal. Reliance was next placed on another decision of this Court reported in AIR 1941 Cal 434. In that case a suit was filed in Calcutta for failure of the defendant to take delivery of certain hessian cloth and the claim was for difference between the contract price and market price. The defendant filed a suit at Arrah. The plaintiff in the Calcutta suit applied for an injunction restraining the defendant from proceeding with the Arrah suit, and the defendant in the Calcutta suit applied for stay of the Calcutta suit on the ground that the matters in issue in the two suits were the same. It was found, that the matter in issue in the Calcutta suit was not directly and substantially in issue in the Arrah suit and the parties were also not the same. In the Arrah suit it was claimed that the contract was void and

that the plaintiff in that suit was induced to agree to enter into a gaming and wagering contract for the purpose of sale of hessian cloth. It was further alleged that performance of such contract would not be demanded by either party, that no delivery would be given or asked for and the contract would be settled by payment of difference. It was in these facts that it was held that the matter in issue in the Calcutta suit was different from that in the Arrah suit, which was a suit for recovery of difference between the contract price and market price. The facts in this case are entirely different from the facts involved in the appeal now before us. Reliance was also placed on a decision of the Madras High Court reported in AIR 1925 Mad 574 (1) in which it was held that the object of Section 10 of the Code was to prevent a later suit relating to the same subject-matter, being tried before an earlier suit relating to the same subject-matter being tried and disposed of. It was also held that under that section it was necessary that the matter in issue must be directly and substantially in issue in both the suits. This decision, does not advance matters in any way as the learned Judge has merely stated what the section itself provides. The next case relied upon by counsel for the respondents was also a decision of the Madras High Court reported in AIR 1922 Mad 304. In that case the subject-matter of the two suits were entirely different inasmuch as one suit related to property situated at Secundrabad and in the other suit the properties involved were properties in British India. Secondly one of the suits had reference to properties belonging to one person and in another suit the properties belonged to two different persons. Thus not only the properties were different, but the title to those properties belonged to two different persons. It was in these facts that it was held that where some of the issues were common in two suits between the same parties Section 10 did not apply and there could be no stay of the subsequently instituted suit and that Section 10 had reference to the entire subject-matter in controversy between the parties. The judgment in that case must be taken to be confined to the facts involved in that case. Reliance was next placed on a Bench decision of the Lahore High Court reported in AIR 1935 Lah 816. In that case also it was found as a fact that the matter in issue in the two suits as also the parties were not the same. It was in fact found that the matter in issue before the Rawalpindi Court was not directly and substantially in issue in the previously instituted suit in the

Betul Court. The next case relied upon by counsel for the respondents was a decision of the Madras High Court reported in AIR 1940 Mad 7. In that case the two suits were for rent for entirely different periods, the later suit being a suit for rent for a subsequent period and it was for that reason that it was held that the matter in issue in the two suits was not the same.

17. The scope and extent of identity or similarity of the subject-matter in issue in two suits has received very careful judicial notice in two Bench decisions of the Bombay High Court and of this Court to which I will now refer. The Bombay decision is reported in AIR 1953 Bom 117. In that case the earlier suit was filed in this Court and the later suit was filed in the Bombay High Court. The plaintiff in the Bombay suit filed an application for injunction restraining the defendants in the Bombay suit from proceeding with the Calcutta suit. The defendants in the Bombay suit in their turn filed an application for stay of the Bombay suit. The Calcutta suit was filed on a contract for sale of 1898 tyres. It was held that the tyres were according to certain specifications and that the defendants in the Calcutta suit (plaintiffs in the Bombay suit) failed to take delivery of the tyres and therefore damages were claimed for non-acceptance. The defendants in the Calcutta suit thereafter filed the Bombay suit and contended that they had a contract to purchase only 1600 tyres and not 1898 tyres. The further contention of the Bombay plaintiffs was that the tyres were not according to specifications and that the tyres that were delivered were not according to contract quality. The Bombay plaintiff therefore claimed refund of the amount paid in respect of the price and also for damages for non-delivery. The question was whether the matter in issue in the Bombay suit was directly and substantially in issue in the Calcutta suit. It was held that Section 10 did not contemplate identity of issues in the two suits nor that the matter in issue in the two suits should be entirely the same or identical and that all that the section required was that the matter in issue in the two suits should be directly and substantially the same. It was also held that there should be identity of the subject-matter, and the field of controversy between the parties in the two suits must be the same, but the identity and the field of controversy contemplated need not be identical and same in every particular, but the identity and the field of controversy must be substantially the same. We respectfully agree with the views of

the Division Bench of the Bombay High Court and we think Chagla C. J. has correctly and appropriately laid down the extent of the identity of the subject-matter in the two suits. In the facts of this case we have no doubt that the field of controversy between the parties in the Jabbalpur suit and the suit in this Court is substantially the same and there is substantial identity in the subject-matter in the two suits.

18. I next proceed to deal with the Bench Decision of this Court, AIR 1957 Cal 727 (supra). I have already referred to this case in connection with the question of parties to the suits. I shall now proceed to deal with the question of issues involved in the two suits with which that decision was concerned. In that case an agreement was entered into at Bombay between the Film Producer Modi and a Film Distributor Mansata Film Distributor of Calcutta. By this agreement the producer appointed the Distributor as distributor of films in certain territories with regard to three films. Under the agreement the distributor was to pay to the producer a sum of money in certain instalments and was to receive as its remuneration commission at certain rates. Another agreement was entered into between the parties on the same terms and conditions with regard to a different territory. Two letters were written by the producer to the distributor, by which the former authorised the latter, to pay moneys payable to him to Kapur Chand Ltd., Bombay. Under the two agreements a sum of money was payable by the distributor to the producer and this sum was to be paid in certain instalments. After payment of some of the instalments the distributor raised a question regarding the class of films to be produced by the producer and referred to certain representations made by the latter. The producer denied any representations having been made regarding the quality of the films and stated that the films would be according to the contract quality. The distributor did not pay one instalment of Rs. 60,000/- which had fallen due and thereupon the producer terminated the agreements and notified forfeiture of moneys paid by the distributor. All this was followed by a suit by the producer against the distributor filed at the Bombay High Court on July 23, 1954, for recovery of the instalment of Rs. 60,000/- in the alternative damages and other reliefs.

19. This suit was followed by a suit by the distributor on August 12, 1964, in the Original Side of this Court against the producer and the said

Kapur Chand Ltd., in which the distributor claimed a decree for a certain sum of money including refund of all moneys paid under the agreement and a further sum for damages. Thereafter the producer applied in the Bombay Suit for an injunction restraining the distributor from proceeding with its Calcutta Suit so long as the Bombay Suit was not disposed of. This injunction was granted by the Bombay High Court and the producer preferred an appeal against that order and the appellate Court dissolved the injunction. In the written statement filed in the Bombay Suit the distributor alleged fraudulent misrepresentation on the part of the producer with regard to the agreement and the agreements were claimed to have been void and repudiated. It was also claimed that the distributor became entitled to recover from the producer all moneys advanced to him on a failure of consideration. Thereafter the distributor who was the plaintiff in the Calcutta suit applied for an injunction restraining the producer from proceeding with the Bombay suit and the producer on his part applied for a stay of the Calcutta suit under S. 10 of the Code. It was held that although the Bombay suit was a suit on the contract and the Calcutta suit was a suit in which a contract was impugned as void on the ground of fraudulent misrepresentation by which the contract was induced, the matter in issue in the two suits were substantially the same though different reliefs were claimed by the plaintiffs in the two suits. Dealing with the question of the nature of the two suits it was held that the fact that one was a suit under the agreement and the other was a suit dehors the agreements did not make a substantial identity of the subject-matter impossible. It was found that the basis of the defence in the Bombay suit and of the claim in the Calcutta suit were both fraudulent misrepresentation and if the defence of the fraudulent misrepresentation in the Bombay suit succeeded nothing would be left in the Calcutta suit and if the case of misrepresentation succeeded in Calcutta, the Bombay suit would be practically decided, the only inquiry remaining being an inquiry as to damages claimed in addition to a refund of the money paid. It was further held that if the defence failed in Bombay the basis of the claim in the Calcutta suit would be destroyed. Finally it was held that the principal matter in issue in the Calcutta suit was directly and substantially in issue in the Bombay suit which was a suit previously instituted and that an unnecessary duplication of proceeding with the possibility of conflicting decisions, would occur if the

Calcutta suit was not stayed. We respectfully agree with the views expressed by Chakravarti C. J. and we have no hesitation in holding that the issues in the Jabbalpur suit and also in the Calcutta suit are substantially the same.

20. A good deal of emphasis was laid by counsel for the respondents on the fact that the Jabbalpur suit was a suit on a contract while the Calcutta suit was a suit on tort, in so far as the plaintiffs in the Calcutta suit have sought to avoid the contract on the ground of fraudulent misrepresentation and false assurances. In my view the question that one suit is a suit on a contract and the other is a suit on tort is a matter of no relevance at all in considering the applicability of Section 10 of the Code. The matter for determination in the case of an application for stay under Section 10 of the Code is not what the basis of the claim in the two suits is but what is the matter in issue in the two suits. The claim in a suit may very well be a claim based on a contract, but the contract may be sought to be repudiated by the defendants on the ground of a tort namely fraudulent misrepresentation, which in its turn may be the basis of a claim of a second suit. The two different bases of claim namely one based on a contract and the other on a tort would not make the matters in issue in the two suits different merely on that ground. If a claim based on a contract in one suit, is sought to be avoided and repelled on the ground of fraudulent misrepresentation and a subsequent suit is filed claiming damages on the basis of a fraudulent misrepresentation with regard to the same contract, the issues nevertheless in the two suits would be substantially the same, even though the bases of the claim in the two suits are altogether different. Counsel for the respondents strenuously contended that the Jabbalpur suit was a suit for recovery of moneys due under a contract and the Calcutta suit was a suit based on the tort of fraudulent misrepresentation and false assurances. Therefore it was argued that the controversy and the matter in issue in the two suits were entirely different. In my view there is a clear fallacy in this contention. It is true that the plaintiff in the Jabbalpur suit has sued on a contract for recovery of the balance of consideration, and it is also true that the defendants in the Jabbalpur suit have raised as their defence in that suit the plea of fraud and false representation. But in the Calcutta suit although the plaintiffs' claim is based on fraudulent misrepresentation, false assurances and suppression of material facts, the plaintiffs have affirmed the

contract between the parties and have also pleaded their readiness and willingness to perform their part of the contract including their readiness to pay the balance of the consideration and to fulfil all other terms of the agreement. The field of controversy between the parties in the two suits is in our view substantially the same, if not completely identical. The matter in issue in the two suits is the appellant's right to recover the balance of consideration and the respondents' claim to repudiate the contract and avoid liability under the same on the ground of fraudulent misrepresentation and false assurances. In these facts it cannot but be held that the matter in issue in the Calcutta suit is substantially in issue in the Jabbalpur suit.

21. Reliance was placed by counsel for the appellant on a Bench decision of this Court reported in 70 Cal WN 375 = (AIR 1966 Cal 382). In that case there was an agreement to sell 10,000 tons of iron ore. Payment was to be made through letter of credit. Shipment of a certain consignment was made per SS. Ariadah and part of the letter of credit was utilised for payment. The balance of the goods was to be shipped per S. S. Edison Mariner. The seller informed the buyer that goods had been shipped and requested the latter to raise the amount of the letter of credit to cover the increased quantity shipped. The buyer sent a cable the purport of which was that the Bank had been instructed to raise the credit. There was some delay in shipment as the ship was moored midstream. From the buyer's cable the seller gathered that there was no objection to the delay in shipment of the ore. The seller later came to know that the buyer had instructed its bankers not to make payment if the documents were presented after the specified date. As the seller was not paid 95 per cent of the value of the goods in terms of the contract he filed a suit in the Admiralty Jurisdiction of this Court. This suit was filed against the owners, the master and the parties interested in S. S. Edison Mariner. After the suit was filed the ship was arrested in the port of Madras. The defendant entered appearance and deposited with the Registrar a certain sum of money as security for obtaining release of the vessel. This suit however was dismissed on amongst other grounds that the Admiralty Jurisdiction of this Court could not be invoked in the facts of that case. An appeal was preferred against the decree of dismissal. Shortly after this dismissal the seller filed another suit during the pendency of the appeal claiming the price of goods and various

other sums. The main claim of the seller against the buyer in the second suit arose in connection with the shipment per S. S. Edison Mariner and if the claim in the pending appeal was allowed, the claim left for adjudication in the second suit would have been limited only to a sum of Rs. 26,056.65 arising out of the shipment per S. S. Ariadah. The buyer applied for stay of the second suit under Section 10 of the Code. It was held that the main issue in the first suit was a claim for 95 per cent of the price of goods shipped per S. S. Edison Mariner and additional loading charges and that even if the buyer succeeded in his appeal the trial of the claim with regard to the goods shipped per S. S. Ariadah could not be avoided. It was therefore held that there was no substantial identity as regards the matter in issue in the two suits. In these facts it was held that the suit could not be stayed under Section 10 of the Code but an order was made for stay of the suit under Section 151 of the Code. It will be seen that the issues in the two suits were not substantially the same inasmuch as the trial of the second suit could not be avoided by reason of the claim for shipment of the goods per S. S. Ariadah. Counsel for the appellant relied upon this decision in support of his contention that even if Section 10 of the Civil Procedure Code could not be invoked in the facts of this case the suit should be stayed in exercise of the powers under Section 151 of the Civil Procedure Code. As we are of the opinion that parties in the two suits should be treated to be the same, notwithstanding the addition of the Directors of the appellant in the Calcutta suit, and as we are also of the opinion that the issues between the parties in the two suits are substantially the same, it is not necessary for us and we do not propose to go into the question of exercise of inherent power of the Court to stay a suit under Section 151 of the Code.

22. Counsel for the appellant had submitted that in any event the Court had the power to adjourn a suit to any date and that in the facts of this case an order for adjournment of the suit should be made until after the determination of the Jabbalpur suit. It appears that the Court below made an order in terms of prayer 'B' of the petition, which is a prayer for adjournment, or trial of the suit till the final determination of the Jabbalpur suit though the order of adjournment was limited to a period of two years. It was also argued that even if the order was an order of adjournment it would be an appealable order, as it was clo-

sely connected with the plea of res judicata. In support of this contention reliance was placed on a Bench decision of this Court reported in (1966) 70 Cal WN 870. Mr. Bhabra on the other hand contended that if it was an order for adjournment it was not an appealable order.

23. We do not think we need go into this question either. The first prayer in the petition is a prayer for stay of Suit No. 2965 of 1967 and all proceedings thereunder till the disposal of the Jabbalpur suit. Even assuming Mr. Bhabra is right that the order is an order for adjournment of the suit, it must be held to be a refusal of the order for stay of the suit in which case also the order would be an appealable order. In the view we have taken that Section 10 of the Code applies we need not go into the question of appealability of an order for adjournment.

24. It appears that although the learned Judge made an order in terms of prayer 'B' which as I said earlier is a prayer for adjournment or postponement of the suit till the final determination of the Jabbalpur suit, he has added that the stay will be limited for a period of two years from the date. It is not clear to us as to what the learned Judge had in view in making an order in terms of prayer 'B' of the petition and at the same time stating that the stay will be for a period of 2 years. We take it however from the observations made in the earlier portion of the judgment that although the term stay has been used in the operative part of the order, what the learned Judge meant was that the hearing of the suit should be adjourned or postponed. In the view we have taken in this appeal the opinion of the learned Judge that Section 10 of the Code does not apply cannot be sustained. For the reasons mentioned above this appeal must be allowed. The judgment and order of the Court below are set aside. There will be an order for stay of Suit No. 2965 of 1965 of this Court (Rishabh Manufacturers Private Limited v. Arun General Industries Limited) and all proceedings thereunder till the disposal of the suit pending in the Jabbalpur Court. The appellant will be entitled to the costs of this appeal.

25. Respondents Nos. 1 and 2 have preferred a cross-objection against the judgment and order on various grounds. The main ground of attack was that the learned Judge having held that Section 10 of the Code did not strictly apply should not have made the stay order at all, and that in any event an order for stay for two years should

not have been made. The order is dated April 29, 1968, and therefore the two years period has already expired. The ground of objection to this part of the order namely a stay for a period of two years has therefore disappeared because at present there is no stay of the Calcutta suit. In the view however we have taken, the cross-objection must be dismissed and we order accordingly.

S. K. MUKHERJEA, J.:— 26.

I agree.

Order accordingly.

AIR 1972 CALCUTTA 141 (V 59 C 23)

A. K. DE, J.

Esam Sk. and others Petitioners v. Sattar Mullick and others, Opposite Parties.

Civil Rule No. 1730 (S) of 1970, D/- 30-7-1971.

Civil Procedure Code (1908), Order 22, Rule 9 — Where delay in applying for substitution of the heirs of the sole respondent or for applying for setting aside abatement is not bona fide it cannot be excused. AIR 1925 Cal 684 (1) and AIR 1928 Mad 404, Referred.

(Para 3)

Cases Referred: Chronological Paras

(1928) AIR 1928 Mad 404 (V 15)

= 54 Mad LJ 234, Ramachan-

dran v. C. Sabapathy Mudaliar 3

(1925) AIR 1925 Cal 684 (1) (V 12)

= 29 Cal WN 472, Krishna Mo-

han Ghose v. Surapati Banerjee 3

S. P. Roy Choudhury, for Petitioners; Sukumar Mukherjee, for Opposite Parties.

ORDER:— This Rule has arisen on an application by the appellants and is for setting aside the abatement of the appeal as against the sole respondent. He died on 31-1-1968. The petitioner No. 1 was one of the defendants in Title Suit No. 366 of 1959 in the Third Court of Munsif at Alipore. That was another suit by the sole respondent of this appeal. The heirs of Rahaman, the sole respondent, applied for substitution in that suit in the Alipore Court with notice to the petitioner No. 1 and his Advocate. He, thus, had knowledge of the death of the sole respondent from 1968. The petitioners, however, have made this application in this Court on 19-5-1970 stating that the petitioner No. 1 was looking after the case for all the petitioners, that the petitioner No. 2 is an illiterate old village woman, that the petitioner No. 3 is a cultivator, that the petitioner No. 4 is an ordinary labourer

in a Jute Mill and the petitioner No. 5 is an ignorant house-wife living with her husband, that the petitioner No. 1 was under the impression that the sole respondent's heirs would themselves apply for substitution in this appeal as they did in their own Title Suit No. 366 of 1959 in the Alipore Munsif Court, that the petitioner No. 1 was a bullock-cart driver till four years back and had not been doing anything since then on account of blood pressure and that the petitioner No. 3 came to their Advocate in the High Court on 15-5-1970 to enquire as to what had become of their appeal admitted long before and enquired of him if the sole respondent's heirs have substituted themselves in the appeal, that he was then informed by his Advocate that they would have to apply for substitution and was asked to get the date of death and names of heirs of the respondent No. 1, that those informations were collected and he saw their Advocate again on 17-5-1970 and the petition was made ready on 18-5-1970 and filed on 19-5-1970. The prayer is opposed by the heirs of the sole respondent who stated that the petitioners, with full knowledge of the death of the respondent, did not apply for substitution wilfully within time and that the delay in filing the application should not be excused.

2. The application for substitution had not been filed within time. Nor the application for setting aside the abatement had been filed within time. The question is whether the petitioners are entitled to the condonation of the delay in filing the application under Section 5 of the Limitation Act, 1963. The petitioners will have to satisfy the Court that they were prevented by sufficient cause from making the application for substitution within time. The petitioners, in this case, had knowledge of the death of the respondent. They submit that they did not come to court in time as the petitioner No. 1, who was looking after the case of the petitioners, was under the impression that the heirs of the respondent would themselves apply for substitution as they did in their own suit in the Alipore Court. It is also submitted that the petitioner No. 1, because of his illness, had not been attending to his work from 1966 and that the other petitioners were ignorant and illiterate persons and that the delay was bona fide. It seems that the petitioner No. 1 and his Advocate were informed of the death of the sole respondent in 1968 when his heirs got themselves substituted in the suit in the Alipore Court. It had been stated in the affidavit of the opposite parties that the petitioner No. 3 was present at the

burial ground when the sole respondent was buried. The question is whether the petitioners' belief that the respondent's heirs would themselves apply for substitution is a sufficient cause to explain their delay in coming to court. These parties are litigating for some time past. There is more than one litigation between the parties. The petitioner No. 1 came to know of the respondent's death and noticed that substitution of his heirs was being made in another suit. It is only natural that he enquired of his lawyer and came to know that substitution of the heirs of the self-same person in their case would be necessary. It is also likely that he will come to know of the necessity of their application for substitution at that time. Three of the petitioners are male persons. It has been stated in the affidavit of the opposite parties that the petitioner No. 3 was also present at the burial ground and had knowledge of the death of the respondent. The petitioner No. 1, on his affidavit, had not been attending to his work for about four years, that is, from 1966. It is only likely that some one also on behalf of the appellants had taken charge of the matter from him and the matter did not remain unattended between 1966 and 1970. It is also likely that the petitioners, after having notice of the substitution of the respondent's heirs in their suit in Alipore Court, would contact their own lawyer in the High Court to find out if they would have to apply for substitution or not. I am not satisfied that the delay in this case by the petitioners in making the application is bona fide.

3. The learned Advocate appearing for the petitioners referred to the decisions in *Krishna Mohan Ghose v. Surapati Banerjee* (reported in 29 Cal WN 472) = (AIR 1925 Cal 634 (1)) and the case of *Ramachandran v. C. Sabapathy Mudaliar*, (reported in 54 Mad LJ 234 at p. 237) = (AIR 1928 Mad 404 at page 406) and submitted that delay, if bona fide, should be excused as sufficient cause within the meaning of Order 22, Rule 9 of the Code of Civil Procedure for setting aside the abatement. The question is whether on the facts of this case the principle of law laid down in those cases is applicable. I have already discussed the circumstances of the case and have concluded that the delay in this case was not bona fide. In that view of the matter, it cannot be said that the petitioners have made out the case that they were prevented by sufficient cause from applying for substitution of the heirs of the sole respondent within time or from applying for setting aside the abatement within time.

4. In the result, the Rule is discharged. There will be no order as to costs in this Rule.

Order accordingly.

AIR. 1972 CALCUTTA 143 (V 59 C 24)

AMRESH ROY AND A. K. DE, JJ.

Rabindra Nath Mukherjee, Appellant v. Abinash Chandra Chatterjee, Respondent.

A. F. O. O. No. 34 of 1971, D/- 7-5-1971.

(A) Guardians and Wards Act (1890), Section 10 (3) — Requirement as to attestation by two witnesses — Where an application for being appointed as guardian of the person and property of a minor is attested by one witness only and it is not shown that it was attested even by that witness the application is liable to be rejected in limine. (Point conceded). (Para 21)

(B) Guardians and Wards Act (1890), Section 11 — Procedure on admission of application — An application for being appointed as guardian of the person and property of a minor which is not in conformity with Section 10 (3) is not one that can be proceeded on under Section 11. (X-Ref.— Section 10 (3)). (Para 22)

(C) Guardians and Wards Act (1890), Section 12 — Power to make interlocutory order — Section 12 gives power to make interlocutory orders for the temporary custody and protection of the person and property of the minor. It does not include power to injunct against Search — Warrant issued by Magistrate under Section 100, Criminal Procedure Code (X-Ref.— Criminal P. C. (1898), S. 100). (Para 23)

D. N. Lahiri, for Appellant; Sakti Prosad Mukherjee, for Respondent.

AMRESH ROY, J.— This appeal has been preferred under Section 47 of Guardians and Wards Act by Rabindra Nath Mukherjee against an order made under Section 7 of that Act rejecting his prayer to be appointed guardian of the person and property of minor Gautam Chatterjee who is his daughter's son. The parents of the minor are alive. Father of the boy who was joined as opposite party in the petition and is Respondent in this Court opposed the prayer of the petitioner appellant.

2. The parties are governed by Dayabhag Hindu Law, and under that law undisputably father is the natural guardian of the person and property of minor son. That law still prevails under Section 12 of Hindu Minority and Guar-

dianship Act, 1956. Appellant's claim to be appointed guardian in preference to the father of the boy who by their personal law is the natural guardian of the person and property of the minor is based on the history of the boy's life who is now about 12 years old, being born in 1959.

3. It is the admitted case of both parties that soon after the boy was born, he was brought to the house of his maternal grandfather and was brought up there and has been living there. Reason for that transposition of locus of the child at his early age has not been clearly stated by the appellant either in his application or in his deposition. But he has stated that it was at a time when the child was only 1 1/2 months' old, and since then neither the father nor the mother of the boy has taken any interest in the affairs of the child. The boy was brought up as a son in the family of his maternal grandfather who was a teacher in a Primary School. He was educated in that School and having done well he has passed the preliminary stage and is now in a Higher Secondary School where he is a student of Class VIII.

4. On the side of applicant emphasis has been put on the part of the story that since that early age of the boy the father of boy has not taken any interest in his affairs and has not paid any money for upbringing and education of the boy. None of the parents has even come to see the boy, so much so that even at his age of 11 years the boy does not know even his father and mother. In the Court during his deposition, the boy said that he did not recognise his parents.

5. The necessity for making the application for being appointed guardian arose according to the applicant because recently the father of the boy for meeting expenses of marriage of his eldest daughter by a deceased wife had solicited his father-in-law for a loan of Rupees 5,000/- but the applicant did not oblige the son-in-law. That enraged the son-in-law and he filed a complaint in the Magistrate's Court alleging wrongful confinement of the minor child. The Magistrate ordered a Search Warrant to issue for the boy. To prevent the boy from being taken by that Search Warrant, the maternal grandfather made the application under Guardian and Wards Act and had the proceedings in the Magistrate's Court stayed.

6. On the side of the Respondent the reason for leaving the boy at his early age with his maternal grandparents was that at the time when the child was born his parents were in

Delhi where his father had been transferred in his service in the department of Military Accounts of Government of India. Soon before the birth of their child, a young son of his maternal grand-mother had died. The mother of this infant son was then living at her father's place with the child and she found her mother disconsolate due to grief of her son's death. To help the elderly lady in her grief, the daughter on compassionate grounds left her newly born son with her mother before she went back to Delhi with her husband. The boy was brought up by his maternal grand-mother and has been living there since he was put in that care. According to their case the parents of the boy did come to see the boy whenever they came to Calcutta and also paid expenses for his upbringing and education. After he was transferred from Delhi and joined office in Calcutta in 1960, the father and also the mother of the boy wanted to take the boy to their household. But either due to sentimental reasons and superstitious psychology of the grand parents and other members of the boy's maternal family or due to other material reasons, they refused to allow the boy to go to his parents and also prevented the parents from getting access to the boy or even to see him. That culminated in the complaint lodged by the father of the boy in Criminal Court to obtain a Search Warrant for rescue of the boy for production before the Magistrate. That proceeding however has remained stayed since present application under the Guardians and Wards Act was filed.

7. While those are the bare outlines of respective cases of the parties. In the application for appointment of guardian which was filed on 14th March 1970 the applicant, as the basis of his claim to be appointed as guardian, stated that "the boy's parents never exercised any parental rights for these long 11 years. The neglect of the minor by the parents is a mental cruelty to the boy" and also that "the father lost the preferential right on account of his not exercising the parental rights for 11 years and not even keeping any information about the boy, not looking to his interest at all for these long years and for his neglect of the minor."

8. As a reason for appointment of guardian in that application mention was made of "a Criminal Case against the petitioner under Section 341 I. P. C. to force the petitioner to give up custody to the father" and it was stated "The petitioner files the application for the welfare of minor and against the forcible removal of the boy....."

9. The proceeding that commenced on that application was numbered as

Act VIII Case No. 26 of 1970 in the Court of the District Judge. Objection petition was filed on 24th April 1970. It characterised the first party's petition as "motivated and not maintainable" and after traversing the allegations prayed not only for dismissal of the first party's petition but also prayed for an "order that the boy be returned to the guardianship of the opposite party" and grant such other relief or reliefs as Court may deem fit.

10. The case appears to have been transferred to Second Court of Additional District Judge and trial commenced in July 1970 in that Court by examination of witnesses. On the petitioner's side were examined the petitioner himself and the minor Gautam Chatterjee. On the other side the mother and the father of the minor deposed on oath. Besides that oral testimonies, only other material before the learned trial Judge was that on the very first day of the trial he ascertained from the boy his wish and he wanted to remain with his maternal grandfather. Unfortunately there is no record of what questions were asked and answers elicited thereby at that interview of the boy with the learned Judge. Deposition of the minor as petitioner's witness No. 2 is set out in the whole as it appears in the Record:—

"The deposition of Witness No. 2 for the petitioner aged about 12 years, taken on oath or solemn affirmation before me Shri A. K. Coari A. D. J of Act VIII 26/70/ this 15th day of June 1970.

My name is Goutam Chatterjee (Minor). My father's/husband's name is Rabindra Nath Mukherjee. I am by religion H. My Home is at Mouza Kashimpur Police Station Baraset Dist. 24-Parganas. I reside at present in Mouza Do Police Station District Do where I am student.

I consider my father the man with whom I live. I do not know the name of my real father.

I have always lived in Rabin Babu's house. I am in Class VI. This man (pointing to Abinash Chatterjee) never came before me and this woman Pointing to (Sandhya) never came before me.

I saw this man during Criminal case for the first time.

I am unwilling to live with this man To Court: I have come with my father Rabindra, and I do as he says.

Sd/- A. K. Coari
15-7-1970.

Goutam Chatterjee
Read over explained and admitted to be correct.

Sd/- A. K. Coari
15-7-1970.

11. The learned Additional District Judge in his judgment delivered on 23rd July, 1970 held that the petitioner stated falsehoods in his petition and lied in his deposition on oath on almost all material points of fact including the story of a request for loan. He also held that the boy has been tutored to speak against his own parents and his mind is being poisoned against the parents and only person who can do so is the present petitioner. On that ground he was unable to accept the petitioner as a fit person to be appointed as the guardian of a minor of tender years.

12. The learned Judge also held that financially the father of the boy is better off than the petitioner, and in the circumstances of the case the father of the boy had not forfeited his right to be guardian of the boy and he had not neglected to look after the welfare of the boy.

13. The petition was rejected with costs.

14. Against that order of the learned Additional District Judge present appeal has been preferred on behalf of the petitioner Rabindra Nath Mukherjee. Memorandum of Appeal was presented on 23rd July 1970 and the appeal was admitted for hearing under O. 41, Rule 11 Civil Procedure Code on 25-9-1970. On the same day an application for ad interim injunction was made in this Court supported by an affidavit sworn to by the petitioner Rabindra Nath Mukherjee on 3rd August, 1970. In that application it was stated in paragraph 5: "That all on a sudden as your petitioner did not comply with the demand of the boy's father to give him loan of Rs. 5,000/- he has filed an application for search warrant against the boy and to take him into his custody and managed to get an order of search warrant." In paragraph 12 thereof it was stated: "The minor is now lying in the custody of your petitioner and if he is removed from the said custody by the opposite party, his mind and health will be seriously affected. The opposite party is trying to remove the said minor from your petitioners' custody by means of search warrant. Unless the opposite party is restrained by an order of injunction from removing the minor from the custody of your petitioner by means of search warrant or otherwise, the welfare of the minor will be seriously prejudiced." Prayer in that petition was

"to issue a Rule calling upon the opposite party to show cause why he should not be restrained by an order of injunction from removing the minor (Gautam Chatterjee) from the custody of the petitioner by any means whatsoever pending the disposal of the appeal by this Hon'ble Court and upon hearing the cause shown, if any, or otherwise make the Rule."

15. A Rule was directed to issue in these terms:

"Let a Rule issue calling upon the opposite party to show cause why pending the disposal of F. M. A. T. 2347/70 preferred before this Court should not be restrained by an order of injunction in the manner as referred to in the petition or why such other or further order or orders should not be made as to this Court may seem fit and proper.

Ad interim injunction is granted pending the disposal of the Rule.

The Rule is made returnable eight weeks after the reopening of the Court after the long vacation."

16. By effect of ad interim order made in those terms, by the Division Bench (A. K. Sinha and R. B. Banerjee, JJ.) the proceedings in the Magistrate's Court including execution of the Search Warrant remained stayed.

17. In those circumstances when the Rule came up for hearing, the Division Bench (P. N. Mukerjee and A. Mukerjee, JJ.) made the Rule absolute and gave directions to prepare paper book of the appeal on an agreed list of papers to be filed by learned Advocates from the records if available or from copies of relevant papers to be supplied by the learned Advocates. Their Lordships also directed the appeal to be placed for hearing within three weeks from the date of that order made on 5th January, 1971. The records of the Court below were received on 28th January, 1971. Paper books were filed by the learned Advocate for appellant only on 15-2-1971 and those were served on the learned Advocates for the parties on 18-2-1971. Hearing of the appeal commenced before us on 24-2-1971.

18. At the hearing of the appeal, at the very outset we noticed that because of the directions given and the order made in the Rule for expedition, material documents have not been included in the paper book; not even the order-sheet of the Court below, though paper books were prepared in the office of the learned Advocate for the Appellant at a time when records of the Court below had already been received in this Court. It is unfortunate that it was allowed to happen that way and office of this Court accepted the paper books which had not even been compared with original records to give correct rendering of many documents including record of depositions of witnesses. We had therefore to refer to original records on all material points,

19. By doing so we find that the whole carriage of proceedings from the very inception has been not only perfunctory but also in violation of clear provisions of law to the detriment of justice and due process of law.

20. First, the application on which the proceedings commenced is not according to the provisions in Guardians and Wards Act. It is necessary to remember that power to make order appointing guardian is given by Section 7 of the Act. Then Section 8 provides the persons who are entitled to apply for order and enjoins that an order shall not be made except on an application. Section 9 provides the Courts having jurisdiction to entertain application. Section 10 provides:

"Section 10 (1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure for the signing and verification of a plaint, and stating, so far as can be ascertained

(a) the name, sex, religion, date of birth, and ordinary residence of the minor;

(b) where the minor is a female, whether she is married and, if so, the name and age of her husband;

(c) the nature, situation and approximate value of the property, if any, of the minor;

(d) the name and residence of the person having the custody or possession of the person or property of the minor;

(e) what near relations the minor has, and where they reside;

(f) whether a guardian of the person or property or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment;

(g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court and with what result;

(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;

(i) where the application is to appoint a guardian, the qualifications of the proposed guardian;

(j) where the application is to declare a person to be a guardian, the grounds on which that person claims;

(k) the causes which have led to the making of the application; and

(l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it shall be by the letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses."

21. The application that was filed in the Court of the District Judge at Alipore does not bear attestation by two persons. It purports to bear attestation by one person only. No evidence has been given that it is attested by that person even. That being so, the application deserved to be rejected in limine. This appeal must therefore fail for that defect in the application alone. When his attention was drawn to this defect, the learned Advocate for the Appellant could not find any answer to it and had to concede that appeal must be dismissed on that ground.

22. It is not a little astonishing that the defect so fundamental is appearing in an application filed through a lawyer and it was not even noticed either by the District Judge before fixing a day for hearing and directing notice enjoined by Section 11 of the Act which enjoins that such steps can be taken only if the Court is satisfied that there is ground for proceeding on the application. An application which is not in conformity with Section 10 (3) is not one that can be proceeded on under Section 11.

23. Yet the District Judge entertained that application by registering a case and proceeded to issue general and special notice by order dated 24-3-1970 and again on 30-3-1970 to issue notice on an application for an injunction in such a proceeding for granting in effect an injunction against a criminal proceeding and countermanding execution of a Search Warrant issued under Section 100 Criminal Procedure Code. It reveals lack of appreciation of the nature of such a Search Warrant which is a Magisterial power of the nature of a Writ of Habeas Corpus for production of the body of a minor before the Magistrate. To countermand such a process issued by a Criminal Court involves grave consequences that may befall not only on the ultimate justice in the case but also on the safety and welfare of the minor. It is astonishing that such an order was made by the District Judge with so much casualness that is appearing loudly in the order dated

30-3-1970 as it appears in the order sheet. Only redeeming feature in that order is that it does not by express words grant an interim injunction pending the hearing of the application for injunction as was prayed for. Section 12 of the Act gives power to make interlocutory orders for the temporary custody and protection of the person and property of the minor. It does not include power to injunct against Search Warrant issued by Magistrate.

24. Opposite party filed written objection to the prayer for injunction on 13-4-1970 and also filed written objection to the original application on 17-4-1970. But in none of those the defect by non-compliance with Section 10 (3) was specifically pleaded, though in both it was pleaded that "first party's petition is motivated and not maintainable."

25. On 8-5-1970 the District Judge made an order directing that injunction matter be heard along with the original case on the date fixed, and by the same order transferred the case to 2nd Court of Additional District Judge for disposal.

26. Before the learned Additional District Judge on the prayer made on behalf of opposite party an adjournment was granted and the case was fixed for hearing on 24-6-1970. Before that date however on 15-6-1970 the petitioner made another application for injunction mentioning therein that a Search Warrant u/s 100 Criminal Procedure Code had been issued by the S. D. O. Alipore in Misc. Case No. 807. Notice was directed to issue and ad interim injunction was directed to issue at once. To that prayer for injunction also an objection was filed on behalf of opposite party. By an order made on 17-6-1970, hearing of the injunction on matter was fixed for 22-6-1970.

27. Every one concerned, including the Additional District Judge and lawyers of both parties, appear to have forgotten or ignored the fact that injunction matter arising upon notice directed by District Judge had remained pending and was directed to be heard along with the original case. By such profound neglect of matters on record and utter lack of care, the learned Additional Judge heard arguments on injunction matter initiated in his Court on 22-6-1970 and disposed it of by an order of that date in the material part of which he said

"I would make the ex parte order of injunction absolute. The father be restrained till the disposal of the case not to take custody of the boy by a process of the Criminal Court. The hearing of this case be expedited."

28. In that order dated 22-6-1970, in its earlier part the learned Additional District Judge recorded

"The boy aged about 10/11 over whom this controversy is present in Court. I requested the learned lawyer of the O. P. to interview the boy in my chamber and after this the learned lawyer frankly submits that the boy does not want to go to his father."

29. That is the only indication in the record how the learned Additional District Judge ascertained the wishes of the boy by granting an interview of the boy with the lawyer for the opposite party in his chamber. The learned Judge does not appear to have talked with the boy directly nor did he obtain the boy's answer directly. If that is what the learned Judge has referred to in his judgment by saying "on the very first day I ascertained from the boy his wish," it is no more than a misnomer.

30. The whole record of deposition of Gautam Chatterjee has been quoted from the Record in this judgment. It shows that the boy was aged about 12 years and he was examined as Witness No. 2 for the petitioner. Oath was administered to him, but the learned Judge has not made any note in his order sheet as to the competence of the child witness to give evidence. He has not recorded any question and answer by which he could be satisfied about competence of this child witness to testify in Court, not even if he knows truth from falsehood or understands value of oath.

31. What is more, in the record of deposition though a question by Court and the answer thereto has been recorded, there is nothing to show that the witness was made available for cross-examination by or on behalf of the opposite party. It is not recorded that cross-examination was declined. That not only takes away the value of his testimony but also compels us to expunge it from record. Only available use that remains is what the learned Judge gathered from the demeanour of the boy when he was in the view of the Judge in Court.

32. The findings of the learned Judge based on testimony of petitioner and the demeanour of the boy is that at his present locus in the custody of the petitioner for 11 years, the boy has been taught to lie to the extent of not only giving false name of father, pretending ignorance of the name of his real father, disown and disclaim having known or even seen his father and mother. That disclaimer and pretension gather blacker hue when it was made at the face of both the parents and in

open Court. On these materials the finding of the Judge that petitioner is not a fit person to have custody far less to be appointed guardian, of the person of the boy is inevitable, reasonable and proper finding. On that ground also the order rejecting the petitioner's application is a proper and legal order and this appeal must fail.

33. The learned Judge has held against the allegation of neglect and cruelty on the part of the father of the boy that was pleaded in support of the petitioner's claim that the father had forfeited his preferential right to be guardian of his minor son. We agree that the facts revealed by evidence in the case instead of indicating in any way neglect or cruelty on the part of the father, very strongly indicate and establish as a fact that at the early age of the child his parents had very humanly and generously put the child in the custody of his maternal grandmother to relieve her of the grief due to sad demise of her young son. It is true that for some time the parents of the boy were away from Calcutta and were living in Delhi where the father was then posted in his service. But even during that time, the mother of the boy whenever she came to Calcutta went to see the child at her father's place. Even petitioner said in his testimony that relationship between the daughter and father was good. When however the father of the boy was transferred to Calcutta and he wanted to take the boy in his custody, due to irrational doting and depraved psychology the petitioner and other members of the family put up an obstructive attitude to the extent of refusing the parents to meet their son even. They perverted the young mind of the child by teaching him falsehoods, and by falsehoods also they poisoned the mind of the child to be antagonistic to his own mother and father. In his deposition the petitioner sought to seclude his own sins by inventing false stories of neglect and cruelty of his own daughter and son-in-law and pleading a dastardly lie that his son-in-law asked for a loan. We agree with the finding of the learned Judge on that point also.

34. During the hearing of the appeal before us, the boy Gautam Chatterjee accompanied by his maternal aunt was present in Court on 25-2-1971 in the forenoon. The mother of the boy Smt. Sandhya Chatterjee accompanied by her young daughter and son who are elder sister and brother of the boy Gautam were also sitting on the same long bench in the well of the Court. They were identified by the learned Advocates for the Appellants and Respondents. When

we noticed the constricted attitude of the boy under the influence of his maternal aunt to look away from the mother brother and sister who were trying to get close to the boy and to draw his attention, at least to catch his eyes, it was an unnatural and pathetic spectacle. With the active consent of the learned Advocates on both sides we retired to chamber and invited the boy, accompanied by his aunt there. Then we spoke to the boy alone in chamber after the aunt had gone back to Court. It appeared clear to us that the mental oppressions that the boy has suffered in his maternal grandfather's house during these years have resulted in physical effects also by affecting his nerves as his involuntary contusions of facial muscles during conversation and definite but small stuttering in speech revealed, though he has an intelligent alert and bright mental capacity. We noticed emaciation in body and learnt that he had suffered from typhoid fever some time ago. He needed nourishment. To put his mind on the level, we sent him out to see the Courts in this Building in company of Orderly. When he was brought back to the chamber, we offered him wholesome refreshments and Sandesh. He accepted with grace and partook of it avidly. That made clear to us that the boy is missing good food and nourishment that will be available to him in the household of his father who is financially better off than his maternal grandfather.

35. We also invited the boy's mother and sister in our chamber when the boy was there. The mother asked a few questions about his poor health. The boy answered. But he was constricted and hesitant in that conversation. He did not speak to his sister and told us that he did not know her. During that conversation in our Chamber we learned that a few days ago a maternal uncle of the boy was married in Calcutta, and there were celebrations where all relations came. The mother of the boy had gone to join the celebrations also. Everybody from the grandfather's house also came to that celebration. But Gautam was not brought there. Asked why, Gautam said there was no particular reason. It is clear to us that definite reason for that was to prevent the boy from meeting his mother even during those celebrations. We hold that to be in pursuance of inert but dastardly mental cruelty to which he has been subjected by his maternal grandfather, which on materials on record the learned Additional District Judge has found as a fact in his Judgment.

36. On consideration of all the reasons mentioned above we affirm the

order of the learned Additional District Judge rejecting the application. The appeal is dismissed with costs, hearing fee being assessed at 5 G. Ms.

A. K. DE, J.— 37. I agree.

Appeal dismissed.

AIR 1972 CALCUTTA 149 (V 59 C 25)

AMIYA KUMAR MUKHERJI, J.

Basanta Kumari Joardar and others, Petitioners v. Smt. Ila Mukherjee, Opposite Party.

Civil Revn. No. 3795 of 1967, D/- 15-3-1971.

(A) Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), Section 5 — Landlord not in possession of property at the time of execution of lease — Lease nonetheless comes into operation and lessee can maintain suit for eviction of thika tenant in his own right. AIR 1960 Cal 609, Referred. (X-Ref:— T. P. Act (1882), Section 105). (Para 4)

(B) Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), Section 5 — Registered lease for more than 12 years — No structure constructed or acquired by lessee on the land — Suit by lessee for eviction of thika tenant — Lessee cannot be thika tenant under Section 2 (5) and hence question of starting eviction proceeding by tenant of first degree against tenant of second degree does not arise. (Para 7)

(C) Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), Section 5 — Suit by lessee for eviction of thika tenant — Order of ejectment passed — Appeal against the order disposed of before coming into force of amended Act 29 of 1969 — Held, no protection of amended Act could be given against ejectment — Moreover grounds whereupon the order was passed were not deleted by Amending Act. (Paras 8, 9)

Cases Referred: Chronological Paras (1960) AIR 1960 Cal 609 (V 47)

Indraloke Studio Ltd. v. Santi Debi

Hemanta Krishna Mitra and Nirendra Krishna Mitra, for Petitioners; Atindra Mohan Das, for Opposite Party.

ORDER:— This Rule was obtained by the tenant and it is directed against an order of eviction of the petitioner passed by the appellate authority in a proceeding under Section 5 of the Calcutta Thika Tenancy Act.

2. The facts that lie in a short compass may be stated as follows:—

The predecessor-in-interest of the petitioner Lakshminarayan Joardar, took

settlement of a portion of Debuttar land situated at No. 17-A, Nimtolla Ghat Street, Calcutta, as a "thika tenant". The petitioners as heirs and legal representatives of the said Lakshminarayan, since deceased, have been continuing to enjoy the said tenancy under the landlord deity Shri Radhakrishna Jew. Sometime in 1965, the O. Party, Ila Mukherjee, started a proceeding under S. 5 of the Calcutta Thika Tenancy Act before the Thika Controller, Calcutta for eviction of the petitioner on the ground that she required the suit land for her own occupation and for the purpose of building thereon or otherwise developing the said land by its continuing letting to thika tenants. The said opposite party claimed her leasehold interest with respect to the suit land on the basis of a registered deed of lease obtained from the landlord deity. Both the tribunals below concurrently found that the opposite party required the suit land for erection of a building for her own use and occupation and passed an order of ejectment against the petitioner. The petitioner being aggrieved moved this Court on an application under Article 227 of the Constitution and obtained the present Rule.

3. Mr. Mitter, the learned Advocate for the petitioner, contended that as the original landlord deity was not in possession of the property when the lease with respect to the disputed property was executed in favour of the opposite party, the said lease would take effect from the date the lessor gets back the property. In the instant case as the petitioner was in possession of the property, therefore the lessee could not evict the petitioner in terms of the aforesaid lease. In support of his contention Mr. Mitter referred to a Bench decision of this Court *Indraloke Studio Ltd. v. Santi Debi*, reported in AIR 1960 Cal 609.

4. The argument advanced by Mr. Mitter seems to be interesting, but it has no foundation. Under Section 105 of the Transfer of Property Act, delivery of possession of property demised is not a condition precedent for coming into operation of a lease. Where, therefore, a lessee obtains under the deed of lease an interest in the property leased, he is entitled to sue for the possession of the same on his own right, if there is no other legal impediments.

5. The decision referred to by Mr. Mitter does not lay down any such proposition as urged by Mr. Mitter. In that case, there was an express covenant in the lease itself, that lease would commence on the date on the derequisition of the demised premises by the military authorities. Until derequisition, lessee's interest under the lease was a

contingent interest. Contingent interest is property and it is clearly transferable. P. N. Mukherjee J. held such a lease was perfectly valid and operative. It was not transfer of non-existent property in the eye of law. I am unable to follow how that decision would help Mr. Mitter's client.

6. Mr. Mitter next contended that the opposite party being a lessee under the original landlord deity, her possession was of a tenant of the first degree and as such she could not bring any ejectment proceeding against the petitioner a tenant of the second degree.

7. It appears that the opposite party took settlement of the entire Bus-tee premises No. 17-A Nimtolla Ghat Street, Calcutta, for a term of 51 years with an option to renew the lease for a further period of 21 years. Under Section 2 (5) of the Calcutta Thika Tenancy Act, to acquire a right of thika tenancy one must be a tenant of the land under another and on the land, one must have one's own structure either erected or acquired by purchase, succession or gift. The opposite party cannot be a thika tenant under the definition of Section 2 (5) of the Act as stated above, because, she has neither constructed any structure on the land nor acquired any structure standing on the land by purchase, succession or gift. Moreover, under proviso (b) to Section 2 (5) of the Calcutta Thika Tenancy Act, a thika tenant does not include a person who holds such land under another person under a registered lease, in which the duration of the lease is expressly stated to be for the period of not less than 12 years. It is not disputed that the opposite party's lease is for a period of more than 51 years. So, she cannot be called to be thika tenant under the Calcutta Thika Tenancy Act. Therefore, the question of starting a proceeding for eviction by a tenant of first degree against the second does not arise in the present case.

8. Lastly, Mr. Mitter contended that under the various ordinances of the Calcutta Thika Tenancy Act, there was a stay of ejectment proceedings from 1967 right upto the passing of the Act 29 of 1969 which came into force on 30th October 1969, so in any view of the case the petitioner ought to be given protection under the amended Act.

9. It appears that the petitioner's appeal before the appellate authority was disposed of on 29th of June, 1967, so the petitioner's appeal was not pending when the amended Act came into force. The petitioner could have taken recourse to Section 7-A corresponding to Section 8 of the Amending Act. More-

over, it is not the petitioner's case that the grounds upon which the order of ejectment had been passed, has since been deleted by the Amending Act. So this point also is of no substance.

10. In the result, this Rule fails and it is discharged. But there will be no order for costs.

Petition dismissed.

AIR 1972 CALCUTTA 150 (V 59 C 26)

CHITTATOSH MOOKERJEE, J.

Ganesh Chandra Dutta, Defendant, Appellant v. Chunilal Mondal and another, Plaintiffs-Respondents.

A. F. O. D. No. 931 of 1966, D/- 18-2-1971.

(A) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Sec. 20 — Decree passed by City Civil Court for recovery of possession is appealable. (X-Ref:— West Bengal Premises Tenancy Act (12 of 1956), Section 29 (6)). (X-Ref:— West Bengal City Civil Court Act (21 of 1953), Section 8 (1) (a)). AIR 1953 SC 357 and 1913 AC 546 and AIR 1948 PC 12, Followed.

(Para 6)

(B) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 17 (1) and (4) — Tenant fully complying with sub-section (1) is entitled to relief under sub-section (4).

(Para 14)

Cases Referred: Chronological Paras

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| (1960) 64 Cal WN 678, Jamuna Bala Dasi v. Monmatha Nath Banerjee | 7 |
| (1954) AIR 1954 Cal 163 (V 41) = 56 Cal WN 761, Mirabala Dasi v. Binapani Dassi | 8 |
| (1954) AIR 1954 Cal 220 (V 41) = 57 Cal WN 945, Dalhousie Traders Ltd. v. Mahammad Sadique | 8 |
| (1954) AIR 1954 Cal 247 (V 41) = 57 Cal WN 948, Sahadat Khan v. Mohammad Hossain | 8 |
| (1954) AIR 1954 Cal 506 (V 41) = 58 Cal WN 819, Newton Hickie v. Official Trustee of West Bengal | 10 |
| (1953) AIR 1953 SC 357 (V 40) = 1953 SCR 1028, National Sewing Thread Co. Ltd. v. James Chadwick and Bros. | 5 |
| (1948) AIR 1948 PC 12 (V 35) = 74 Ind App 264, Adikappa Chettiar v. Chandra Sekhara Thevar | 5 |
| (1913) 1913 AC 546 = 82 LJ KB 1197, National Telephone Co. Ltd. v. Post Master General | 5 |

Manindranath Ghose and Jamini Kumar Banerjee, for Appellant; Mukul Prokash Banerjee, for Respondents.

JUDGMENT:— The plaintiff-respondents brought a suit in the City Civil Court at Calcutta for ejectment against their tenant who is appellant before me for ejectment and recovery of khas possession of the premises described in the schedule to the plaint. The learned Judge, 5th Bench, City Civil Court at Calcutta has decreed the said suit in favour of the plaintiff-respondents and the defendant tenant has preferred this appeal.

2. Mr. Banerjee, the learned advocate for the respondents has submitted before me that this appeal is not maintainable in law. According to Mr. Banerjee the West Bengal Premises Tenancy Act, 1956, is a self-contained code and no appeal has been provided against a decree for recovery of khas possession of a premises passed by a court competent to entertain or try such a suit under Section 20 of the said Act.

3. In this connection Mr. Banerjee has also drawn my attention to the schedule of the West Bengal Premises Tenancy Act. Section 22 of the City Civil Court Act 1953 lays down that the enactments specified in the Second Schedule shall be amended to the extent and in the manner mentioned in the fourth column of the schedule. Originally in the second schedule the substituted sub-clauses (i) and (ii) and the proviso to Clause (1) of Schedule B of the West Bengal Premises Rent Control (Temporary Provisions) Act 1950 were set out. After the enactment of City Civil Court and the West Bengal Premises Tenancy Act 1957, the reference to the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 were deleted, and it was provided that where the premises are situate on land wholly within the ordinary original Civil Jurisdiction of the Calcutta High Court suit for recovery of possession of a premises would lie in the City Civil Court when the value of the suit or the value of the premises does not exceed Rs. 10,000/-. Where the value of the premises exceeds Rs. 10,000/- suit would lie to the High Court. Under Cl. 2 of the schedule to the West Bengal Premises Tenancy Act where the premises are situate on a land wholly or partly outside the ordinary original Civil Jurisdiction of the Calcutta High Court suit for recovery of possession would lie in the court other than the Calcutta High Court which would have had jurisdiction to try the suit if the West Bengal Premises Tenancy Act was not passed. It is unnecessary to refer to the provisos to

clause (1) of the schedule which deal with the suits pending in the City Civil Court and with suit, appeals and proceedings instituted in the Calcutta High Court or in the court of the Chief Judge of the Court of Small Causes and pending at the date of commencement of City Civil Court and West Bengal Premises Tenancy (Amendment) Act 1957.

4. In my view there is no scope for any argument that no appeal lies against a decree passed by the City Civil Court in a suit for recovery of possession of a premises governed by West Bengal Premises Tenancy Act. Section 6 of the City Civil Courts Act 1953, lays down that save as otherwise provided, the Code of Civil Procedure 1908, shall apply to all suits and proceedings under this Act, so far as it is consistent with the City Civil Court Act. Sec. 8 (1) (a) of the City Civil Court Act provides that an appeal shall lie to the High Court from every decree passed by the City Civil Court. Sub-section (6) of Section 29 of the West Bengal Premises Tenancy Act provides that the provisions of Code of Civil Procedure shall apply to all suits and proceedings referred to in Section 20 except suits and proceedings which lie to the High Court. Section 13 of the West Bengal Premises Tenancy Act also lays down that no order or decree for recovery of possession shall be made except on one or more of the grounds set out in the said Section. Therefore the said expression "decree" in the West Bengal Premises Tenancy Act has the same meaning as the "decree" as defined by Section 2 (2) of the Code of Civil Procedure. Under Section 96 of the Civil Procedure Code save as otherwise expressly provided in the body of the Code or by any other law for the time being in force an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear the appeals from the decision of such courts. There is nothing in the West Bengal Premises Tenancy Act limiting or affecting such right of appeal against a decree passed in a suit for recovery of possession. I have already stated that under Section 8 of the City Civil Court Act this court has been authorised to hear appeals from decrees and appealable orders of the City Civil Court.

5. Further the Supreme Court in *N. S. Thread and Co. v. James Chadwick and Brothers*, AIR 1953 SC 357 while considering the question whether an appeal lay under clause 15 of the Letters Patent of Bombay High Court against a decision given by single Judge of the High Court in an appeal preferred under Section 76 of the Trade Marks

Act 1940 considered a number of reported cases on the question and held that when an appeal lies to a court already established then that appeal must be regulated by the practice and procedure of that court. Mahajan, J. who delivered the judgment of the Supreme Court quoted with approval the observations of Viscount Haldane L. C. in *National Telephone Co. Ltd. v. Post Master General*, 1913 AC 546 that when a question is stated to be referred to a established Court without more imports that the ordinary incidents of the procedure of that court are to attach and also that in general right of appeal from its decision likewise attaches. The Privy Council in *Adaikappa Chettiar v. Chandra Sekhara Thevar*, 74 Ind App 264 = (AIR 1948 PC 12) similarly observed that where a legal right is in dispute and the ordinary courts of the country are seized of such disputes the courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies if authorised by such rules notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal.

6. On the authority of the said decisions I am bound to hold that when the City Civil Court in the exercise of its jurisdiction passes a decree for ejectment, the same is subject to an appeal.

7. In fact numerous appeals have been heard and disposed of by this Court against decrees passed in suits for a recovery of premises passed by the Civil Court. The decision in *Jamuna Bala's case*, (1960) 64 Cal WN 678 did not deal with the question whether an appeal at all lies. But the said decision dealt with the question of forum of such appeal. Therefore, it is unnecessary for me to deal with the said case.

8. This Court while considering the provisions of West Bengal Premises Rent Control (Temporary Provision) Act 1950 have held that the decree for ejectment from a premises governed by the said Act was a decree within the meaning of Section 2 (2) of the Code and the provisions of Civil Procedure Code would apply to such suits and appeals. It was held that a suit for recovery of possession under Section 16 of the Act of 1950 was a proceeding in a court of Judicature although the West Bengal Premises Rent Control (Temporary Provision) Act 1950 did not contain any provision similar to Section 29 (6) of the West Bengal Premises Tenancy Act. Reference may be made to the decisions reported in *Mirabala Dassi v. Binapani Dassi*, AIR 1954 Cal 163, *Dalhousie Traders Ltd. v. Mohammad Sadique* AIR 1954 Cal 220, *Sahadat Khan v. Mohammad Hossain* AIR 1954 Cal 347.

9. The fact that under the schedule under West Bengal Premises Tenancy Act as it stood before it was amended by the City Civil Court Act and the West Bengal Premises Tenancy (Amendment Act 1957) it was provided that the Chief Judge of the Court of Small Causes, Calcutta shall entertain and try a suit which is cognizable by him as the Court of district Judge under the Bengal, Agra and Assam Civil Courts Act 1887 was not relevant. A special jurisdiction had been conferred upon the Chief Judge and upon the other Judges of the said court to whom a suit may be transferred by the Chief Judge for trial. It was therefore necessary to expressly confer upon them the powers which are exercised by District Judges and Subordinate Judges under Bengal, Agra and Assam Civil Courts Act.

10. Chakrabarti C. J. and S. R. Dasgupta J. in *Newton Hickie v. Official Trustee of West Bengal*, 58 Cal WN 819 = (AIR 1954 Cal 506) considered the question whether the decision of the Court of Small Causes in two suits for ejectment from a premises governed by the West Bengal Premises Rent Control (Temporary Provision) Act 1950 was *Res Judicata* or not. Their Lordships held that the Court of Small Causes was not ordinarily competent to try ejectment suits against the tenants. But the Chief Judge of the court functioning as a District Judge and a Judge functioning as a Subordinate Judge were special creatures of the Rent Control Act exercising a specified jurisdiction. Therefore they were courts of a peculiar type.

11. But under Section 5 (2) of the City Civil Court Act 1953, subject to the provisions of sub-sections (3) and (4) the said court shall have jurisdiction and the High Court shall not have jurisdiction to try suits and proceedings of a civil nature not exceeding rupees fifty thousand.

12. I may note that even after the amendment of Section 5 of the City Civil Court Act raising its pecuniary jurisdiction, no corresponding amendment has as yet been made in the Second Schedule to the said Act or in the Schedule to the West Bengal Premises Tenancy Act.

13. Therefore omission of any reference to the Bengal, Agra and Assam Civil Courts Act in relation to the City Civil Court in the Schedule to the West Bengal Premises Tenancy Act 1956 was not material. Sections 20 and 21 deal with the forum of appeal from the courts constituted under the said Act. But right of appeal is also incident of a decree passed by a court established by the ordinary law and which is govern-

ed by the Civil Procedure Code. The City Civil Court is thus competent to try suits of civil nature upto Rupees 50,000/- subject to the exceptions mentioned in the Act and under Section 8 (1) of the Act the appeal lies to this court against the decrees and appealable orders of the said Court. Therefore this appeal is maintainable.

14. The plaintiff landlord alleged that the defendant tenant was a defaulter in payment of rent since May 1961. The learned Judge of the court below in his judgment under appeal has also found that the defendant was a defaulter in respect of the said period. Mr. Ghosh, learned advocate for the appellant has not disputed the said finding that the defendant was a defaulter as found by the court below. But he has drawn my attention to the fact that the appellant within one month from the date of the service of the summons of the ejectment suit had filed a petition in the trial court under Section 17 (1) of the West Bengal Premises Tenancy Act and had prayed for permission to deposit rent from May, 1961 to October 1963 along with interest. The learned Registrar City Civil Court by his order No. 3 dated 30th September, 1963 permitted him to deposit the same entirely at his risk. I find that the defendant who is appellant before me had deposited the said arrear rent and he also continued to deposit in the trial court month by month within the 15th day of each succeeding month an amount equivalent to rent. Therefore the defendant tenant having fully complied with Section 17 (1) of the West Bengal Premises Tenancy Act is entitled to relief under sub-section (4) of Section 17 of the West Bengal Premises Tenancy Act. In fact the learned advocate for the respondents has not disputed the said facts. The defendant tenant did not previously obtain relief under sub-section (4) of Section 17 of the Act and the proviso to sub-section (4) does not apply in the instant case. Accordingly I grant defendant relief under sub-section (4) of Section 17 of the Act.

15. In the above view I allow the appeal set aside the judgment and decree of the trial court and dismiss the plaintiffs' suit. The plaintiffs-respondents will get the cost of the trial court from the defendant appellant. There will be no order as to costs in this appeal.

Appeal allowed.

AIR 1972 CALCUTTA 153 (V 59 C 27)

AMARESH ROY AND A. K. DE, JJ.

Damodar Valley Corporation, Appellant v. Ikrah Nandi Coal Co., Respondent.

A. F. O. O. No. 80 of 1967, D/- 30-7-1971.

(A) Arbitration Act (1940), Section 2 (e) — Reference to arbitration — Validity.

Where a reference to arbitration of disputes arising out of a contract to supply coal has to be gathered from the correspondence between the parties in none of which there is a clear statement as to the matters that were referred to arbitration, the correspondence has to be taken along with the bills and deductions made therein on different heads which clearly show with exact definiteness the field of differences and scope of reference. Hence, the reference was not invalid on ground of indefiniteness.

(Para 17)

(B) Arbitration Act (1940), Section 30 (a) — Misconduct in proceeding or error apparent on face of record — Absence of signature of one of two arbitrators on some of the minutes of proceedings even though both of them were present throughout and signed the award — Award is not invalid on above grounds, as it cannot be said that there was no joint deliberation of arbitrators.

(Para 18)

(C) Arbitration Act (1940), Section 30 (a) — Misconduct or procedural defect — Statement of parties before arbitrators that they would not adduce any evidence on certain issues — Award of arbitrator giving findings on these issues on consideration of oral and documentary evidence on record — Award is not invalid for misconduct.

In the present case the documentary evidence referred to in the award were technical documents on the record of the arbitrators. They were mainly printed matters considered to be scientific treatises and not documents proved as evidence in the proceeding. The oral evidence referred to in the award was the evidence of witnesses examined by the parties on the remaining issues. In the examination of these witnesses the questions asked both in Examination-in-Chief and in cross-examination had bearing on other issues framed by the Arbitrators which overlapped each other, and also were asked to obtain explanations of materials in the printed booklets which were of the nature of scientific treatises.

Held that the arbitrators could not be held to be guilty of misconduct or mishandling the proceedings.

(Para 23)

(D) Arbitration Act (1940), Section 39 (vi) — Appeal against order refusing to set aside award — Scope of appeal is limited by Section 30 (a) — An award cannot be set aside or modified even when there is an error of law or fact unless the error is apparent on the face of the record. (X-Ref:— Section 30 (a)). AIR 1971 SC 696, Rel. on, Case law discussed. (Paras 24, 27 & 28)

(E) Arbitration Act (1940), Section 30 (a) — Misconduct — Contract stipulating payment of interest for delayed payments — Arbitrator instead of awarding interest according to stipulation awarding small sum of Rs. 650/- as compensation for long delay in paying Rs. 16058/- — Award is not vitiated by misconduct. (Para 31)

Cases Referred: Chronological Paras

- (1971) AIR 1971 SC 696 (V 58)
= (1971) 2 SCJ 443, M/s. Allen Berry & Co. Pvt. Ltd. v. Union of India 27
(1967) AIR 1967 SC 1032 (V 54)
= (1967) 1 SCR 324, Union of India v. Bungo Steel Furniture Private Ltd. 26
(1963) AIR 1963 SC 1677 (V 50)
= (1964) 3 SCR 410, Smt. Santa Devi v. Dharendra Nath Sen 30
(1963) AIR 1963 SC 1685 (V 50)
= (1964) 3 SCR 164, Union of India v. A. L. Rallia Ram 29
(1955) AIR 1955 SC 468 (V 42)
= 1955-2 SCR 48, Thawardas Pherumal v. Union of India 29
(1938) AIR 1938 PC 67 (V 25)
= 65 Ind App 66, Bengal Nagpur Rly. Co. Ltd. v. Ruttanji Ramji 30
(1923) AIR 1923 PC 66 (V 10)
= 50 Ind App 324, Champsey Bhara Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. 26
(1857) 3 CBNS 189 = 140 ER 712, Hodgkinson v. Fernie 25, 26
Tapodhan Krishna Rai Dastidar and Dhruva Kumar Mukherjee, for Appellant; Nani Coomer Chakrabarti and Mrs. Kanika Banerjee, for Respondent.

AMARESH ROY, J.— This appeal by Damodar Valley Corporation is directed against the judgment and order passed by a Subordinate Judge at Alipore dismissing the application made by the said Corporation under Sections 30 and 33 of Arbitration Act, 1940 praying for setting aside an Award or in the alternative modifying the same and if necessary for superseding the Arbitration Agreement between the said Corporation and the Respondent firm M/s. Ikrah Nandi Coal Co.

2. Material facts are that in April 1962 D. V. C. invited tenders for supply of 375000 Tonnes of Coal by road. Ikrah Nandi Coal Co. submitted tender

on 21-5-1962. After the parties obtained clarification on some points, on June 9, 1962 the Coal Co. submitted fresh tender on the basis of supply about 10,000 tonnes of Grade II R. O. M. Coal per month to be supplied by rail and on June 14, 1962 the D. V. C. placed order for supply of a quantity of coal by a letter of that date mentioning therein terms and conditions which included inter alia provisions for Transportation by Railway wagons and unloading of Coal wagons by D. V. C. by their Wagon Tippler and also provided for the method of sampling and analysis. In that letter of indent dated June 14, 1962 it was also provided in clause 10.

"All other terms and conditions and which have not been specified in this letter of indent, for the supply and delivery of coal to the D. V. C.'s Durgapur Thermal Power Station Storage Yard of Waria shall be as per D. V. C.'s Tender Specification PE-Spec-101."

3. The Tender Specification PE-Spec-101 mentioned in that clause is the original tender invited by D. V. C. in April 1962 and Clause 21 thereof contained the arbitration agreement in these terms;

Arbitration

"Except where otherwise provided in the Contract if at any time any question, dispute or difference whatsoever shall arise between the Corporation and the Contractor upon, or in relation to, or in connection with the Contract either party may forthwith give to the other notice in writing to the existence of such question, dispute or difference, and the same shall be referred to the adjudication of two arbitrators, one to be nominated by the Corporation and the other to be nominated by the Contractor, or in the case of the said arbitrators not agreeing, then to the Coal Controller, Govt. of India, and the award of the arbitrators, or in the event of their not agreeing, of the Coal Controller shall be final and binding on the parties and the provisions of the Indian Arbitration Act, 1940 and of the rules thereunder and any statutory modification thereof shall be deemed to apply to and be incorporated in this Contract.

"Upon every or any such reference, the costs of and incidental to the reference and award respectively shall be in the discretion of the arbitrators or of the Coal Controller, as the case may be, who may determine the amount thereof, or direct the same to be taxed as between Solicitor and Client, or as between party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid.

"Work under the contract shall be continued by the Contractor during the arbitration proceedings, unless otherwise directed in writing by the Corporation or unless the matter is such that the works cannot possibly be continued until the decision of the arbitrators or of the Coal Controller as the case may be is obtained and save as those which are otherwise expressly provided in the contract no payment due or payable by the Purchaser shall be withheld on account of such arbitration proceedings unless it is the subject-matter or one of the subject-matters thereof."

4. The order for supply of coal on those terms was accepted by the Coal Co. by their letter dated 16-6-1962 and several consignments of coal were supplied.

5. Soon thereafter correspondence ensued between the parties over drawing of samples. As early as on July 6, 1962 D. V. C. wrote to Coal Co. intimating inter alia that no representative from the side of the supplier had been posted at D. T. P. S. and on July 12, 1962 the Coal Co. wrote complaining about alleged incorrect practice of drawing samples. Many letters on that subject were exchanged between the parties, the Coal Co. insisting that their complaint be looked into and D. V. C. insisting that the procedure of sampling adopted was correct. By early dates in November 1962 the Coal Co. was requesting early payment of outstanding Bills and they continued to do so till February 1963. Then on March 7, 1963 the Coal Co. was informed that 4 Bills have been passed for payment and on March 11, 1963 a cheque for Rs. 68,140.77 was sent in payment of four Bills. The Coal Co. intimated receipt of the cheque by letter dated 19-3-1963 but raised dispute over deduction of Rs. 17,352.39 on those four Bills and desired to refer the said dispute to arbitration proposing the name of Shri S. N. Mullick as Arbitrator from their side. Towards end of March 1963 differences also arose regarding Coal Co.'s claim for Sales Tax and eligibility to get Declaration Form for the same.

6. On 15-5-1963 the Coal Co. gave notice to D. V. C. under clause 21 and nominated Shri S. N. Mullick as their nominee to be Arbitrator. By letter dated 20-8-1963 D. V. C. nominated Shri J. G. Kumarmangalam as Arbitrator.

7. Arbitrators on 12-10-1963 informed the parties that they have entered on the reference and directed the parties to file their respective written statements. Ikrah Nandi Coal Co. filed their written statement on 11th November 1963 and D. V. C. filed their Counter Statement on 17-1-1964. A rebut-

ting statement was filed by the Coal Co. on 11-2-1964.

8. Hearing commenced before the Arbitrators on 12-12-1964. Proceedings before the Arbitrators appear from the Minutes of those proceedings on the record, and relevant particularities thereof will be discussed when we deal with contentions raised in respect thereof. But we may mention here that on 18-12-1964 upon an application made by Ikrah Nandi Coal Co. the Subordinate Judge, first Court Alipore in Misc. Case No. 88/64 extended the time for making and publishing Award till 18-6-1965 and a certified copy of that order was filed before the Arbitrators on 23-12-1964. Parties filed their documents on 19-12-1964 and 26-12-1964. Thereafter the Arbitrators framed issues on 13-1-1965. The issues framed were in these terms:

1. Whether the method of drawing representative samples adopted by DVC of coal supplied by railway wagons by M/s. Ikrah Nandi Coal Co. was in conformity with the procedure laid down by the Indian Standards Institution or any other accepted conventional method.

2. (a) If the answer to the question No. 1 is in the negative, whether penalties deducted on the ground of alleged inferior quality and lower calorific value of such coal assessed by Damodar Valley Corporation as a result of the aforesaid sampling and analysis of coal is justified;

(b) If any, what interest the Ikrah Nandi Coal Co. is entitled to as a result of deduction of Rs. 17,352.39 paise by DVC from their bills over and above the payment of the said sum of Rupees 17,352.39 p. not paid by DVC.

3. (a) Whether the DVC failed to pay the bills of M/s. Ikrah Nandi Coal Co. against supply of (a) coal and (b) railway freight within time specified in the contract.

(b) If the answer is in the affirmative what amount of interest the Ikrah Nandi Coal Co. is entitled to receive for such failure from DVC.

4. Whether the Ikrah Nandi Coal Co. is entitled to any damages from DVC for the earlier determination of the contract, and if so what amount Ikrah Nandi Coal Co. is entitled to.

5. To what relief the parties are entitled to?

The next date of hearing will be intimated to the parties in due course.

9. In the Minute dated 22-5-1965 the Arbitrators recorded certain procedure to be followed regarding documents filed by respective parties and then said:

"After discussion regarding the first issue as framed by the Arbitrators,

namely, whether the method of drawing samples of coal supplied by Ikrah Nandi Coal Co. by rail was in conformity with the procedure laid down by the Indian Standards Institution or in accordance with any other accepted conventional method, it is noted that both parties would not lead any evidence.

The same position arises in the second issue which in any case is ancillary to the first issue.

The Solicitor for Ikrah Nandi Coal Co. stated that he would be leading evidence in regard to issues 3 (a), (b) and 4."

10. The Arbitrators then proceeded to examine witnesses and to hear arguments. They made and published the Award on 6-7-1965 and the Award together with depositions of witnesses and documents were filed in the Court of the Subordinate Judge on 8-7-1965. It was registered as T. S. No. 83 of 1965 in that Court.

11. Notice of filing of Award in the Court was received by D. V. C. on 12-7-1965, and application under Sections 30 and 33 of Arbitration Act was made on their behalf on 9-8-1965. That application was registered as Misc. Case No. 55 of 1965 in the Court of the Subordinate Judge. In that application various defects in conducting the proceedings before the Arbitrators were alleged and averments regarding merits of the contentions for the D. V. C. were made and then in paragraph 25 grounds were set out for contending that;

"Award dated the 12th June, 1965 is erroneous, illegal without jurisdiction, void, inoperative, of no effect whatsoever, not binding on your petitioner and ought to be set aside."

Prayer in the petition was;

"Your petitioner therefore humbly prays your Honour for an order that the said Award dated the 12th June, 1965 be set aside and in the alternative be varied and/or modified, and if necessary the said Arbitration agreement be superseded, costs of and incidental to this application be paid by the respondent to your petitioner and further suitable orders be made and necessary directions be given."

12. After notices were issued and the parties appeared before the learned Subordinate Judge and filed Affidavits the case was taken up for hearing on 4-6-1966. Arguments closed on 1-7-1966 and the learned Subordinate Judge delivered the judgment on 21-7-1966 dismissing the application under Sections 30 and 33 on contest with costs.

13. Before the learned Subordinate Judge the points that were urged on behalf of D. V. C. have been cata-

logued in the judgment appealed from this,—

1. Is the application not maintainable in view of the fact that it was not supported by affidavit at the outset? Should the petitioner be given the opportunity to remove the defect as prayed for?

2. Have the arbitrators misconducted themselves or the proceedings so as to merit an order setting aside the award?

3. Is there any error apparent on the face of the award? Does it offend the principles of natural justice?

4. Should the award be, even, partially modified or varied?

Should the arbitration agreement be superseded?

14. On all the points the learned Subordinate Judge held against the contentions urged on behalf of D. V. C. Before us in this appeal Mr. Tapadhir Rai Dastidar the learned Advocate for the appellant has limited his contentions only to some of those points and also urged some new points for contending that the Arbitrators have lapsed into legal misconduct. Misconduct of any other kind has not been alleged. His contentions were:—

(1) There was no valid reference to Arbitration and therefore the Award should be set aside.

(2) The minutes of the proceeding before the Arbitrators show that some of the minutes bear signature of only one of the two Arbitrators, so there has not been joint deliberation on some of the material points. That has amounted to misconduct of the proceedings and the Award should be superseded.

(3) Method of sampling whether it was correct or incorrect was not within the scope of arbitration, and therefore that part of the Award should be modified or varied.

(4) For their decision that method of sampling prevailing at the time, the Arbitrators have not taken into consideration other conventional methods but have gone by British Standard only, though they have given reasons for deciding that as the correct method. That is an error apparent on the face of the record and the Award should be set aside.

(5) Deductions made for inferior quality of coal and also for sales tax on those quantities have resulted in double deductions, which is an error on the face of the record and the Award should be modified to that extent.

(6) Rs. 650/- awarded by Arbitrators as compensation for wrongful detention of payment has been illegal and beyond the scope of reference, and that part of the award should be set aside or modified.

15. We will proceed to deal with these contentions one by one. For each of those it is necessary first to ascertain the nature of dispute between the parties that was referred to Arbitration. Primarily it was the dispute over the deductions made in the four bills on the ground of low quality of coal, ascertained by D. V. C. by sample and analysis of a method for drawing samples not from each wagon of coal supplied as they arrived, but by adopting a method of collecting samples from carrier belt after coal was discharged by Wagon Tippler.

16. We have already mentioned that after the contract for supply of coal by transporting in Railway Wagons was concluded between the parties in June 1962 and some consignments of coal were supplied, early in July, 1962 correspondence ensued between them regarding arrangements for drawing samples and by middle of July 1962 the Coal Co. was complaining about incorrect practice of drawing samples and D. V. C. was insisting that the procedure of sampling employed by them was correct. On the basis of analysis of samples so drawn, D. V. C. made deductions in four Bills on account of low quality of coal and intimation of those Bills with such deductions having been passed for payment was given to Coal Co. early in March 1963 and on March 11, 1963 a cheque was sent in payment of those four Bills. Each of the bills showed clearly the amounts deducted under each head. Immediately thereafter on March 19, 1963 Coal Co. raised dispute over deduction of Rs. 17,352.39 on those four Bills and desired to refer the said dispute to arbitration. Towards end of March 1963 differences also arose regarding Coal Co.'s claim for Sales Tax. Notice to D. V. C. for reference to arbitration was given on 15-5-1963 and in that letter Coal Co. nominated their arbitrator. D. V. C. nominated their arbitrator by letter dated 20-8-1963. Arbitrators entered on the reference on 12-10-1963.

17. Mr. Rai Dastidar referring to the correspondence over the disputes contended that there was no clear statement in any of those letters taken singly or collectively as to the matters that were referred to Arbitration. But those correspondence instead of being taken in their isolation, properly need be taken along with the four Bills and deductions made therein on different heads which were being disputed. Those Bills clearly show with exact definiteness the field of differences and scope of reference to arbitration. Mr. Rai Dastidar's first contention that there was not a

valid reference has no substance and must fail.

18. The second contention of Mr. Rai Dastidar that it should be held that there has been legal misconduct on the part of the two Arbitrators by their omission of joint deliberations on certain days of the arbitration proceeding appears to us to be equally unsubstantial. The contention is based on the feature that minutes on some days appear to have been signed not by both the arbitrators, but only by one of them. The minutes of the proceeding are no more than memorandum kept by the Arbitrators for their own aid. There is no provision in law that compels the Arbitrators to keep minutes of proceeding, nor to enjoin that minutes must be signed by all the arbitrators or even those be signed at all by any of the arbitrators. Correctness of the minutes were not disputed either before the arbitrators or before the learned Subordinate Judge or before us. What was contended is that because only one signature appears in the minute, therefore it should be inferred that the other arbitrator was not present during the proceedings of that particular day and so there has been omission of joint deliberations of the arbitrators on matters mentioned in the particular minute. Internal materials in those minutes themselves completely negative the contention. In each of those presence of both the Arbitrators has been expressly mentioned in the beginning of the minute and the contents also show that both the Arbitrators were present. The memorandum that the minutes are, may have been drawn up and signed by one of the two arbitrators on the particular day. Yet so long as the other arbitrator accepted the correctness of the memorandum and parties did not even dispute that correctness, it does not spell out any omission of joint deliberation of both the arbitrators. The Award has been signed by both. This contention does not appear to have been raised either before the Arbitrators or in the Court of the Subordinate Judge. It was raised for the first time during arguments before us. We hold that absence of signature of one or the other Arbitrators in some of the minutes does not constitute any misconduct in the proceeding nor any error apparent on the face of the record. The Award of the arbitrators has not suffered any defect on that score. The second contention of Mr. Rai Dastidar therefore fails.

19. The third contention of Mr. Rai Dastidar the learned Advocate for the Appellant before us was that under issues Nos. 1, 2 (a) and 2 (b) framed by

the arbitrators they have said in the Award.

"on the basis of the documents produced before us and the evidence laid before us we are satisfied that the method of drawing representative sum adopted by D. V. C. was not the correct method then existed as the Indian Standards specification prevalent at that time was to draw samples from the wagons before they were unloaded which was the practice followed by the D. V. C. also on earlier occasions."

This, according to Mr. Rai Dastidar, was outside the scope of the reference to arbitration because, he said correctness or incorrectness of method of sample was not within scope of arbitration and he also contended that in coming to that conclusion the arbitrators have not answered that part of the issue No. 1 which relates to any other accepted conventional method. In support of this contention Mr. Rai Dastidar not only emphasised the particular language employed in the frame of issue No. 1 by the arbitrators, but also referred to the minutes before the arbitrators dated 22nd May 1965, in which minute it has been recorded "after discussion regarding the first issue as framed by the arbitrators viz., whether the method of drawing samples of coal supplied by Ikrah Nandi Coal Co. by Rail was in conformity with the procedure laid down by the Indian Standards Institutions or in accordance with any other accepted conventional method. It is noted that both parties would not lead any evidence.

20. The same position arose in the second issue which in any case is ancillary to the first issue.

21. The Solicitor for Ikrah Nandi Coal Co. stated that he would be leading evidence in regard to issues 3 (a) (b) and 4.

22. Mr. Rai Dastider drew our attention to the record of deposition of witnesses before the Arbitrators for contending that although parties had agreed not to lead evidence on matters concerning issues Nos. 1 and 2, questions were asked and witnesses were allowed to give answers which were on those matters. For considering Mr. Rai Dastider's contention that this constitutes misconduct of the procedure or error apparent on the face of record we have also to keep in mind that Mr. Rai Dastider also contended that reliance by the arbitrators on the evidence for deciding issues No. 1, 2 (a) and 2 (b) itself constituted misconduct of the procedures because the parties before the arbitrators had agreed not to give evidence on those issues. Mr. Rai Dastider's contention regarding the scope of the arbit-

tration is completely answered by the notice under clause 21 of the specification No. P-Spec-101 given by Ikrah Nandi Coal Co. by their registered letter dated 15th May 1963 which constitutes letter of reference in the present case. Clause (a) of that notice is exactly what Mr. Rai Dastider says was not included in the reference to arbitration. The second branch of Mr. Rai Dastider's contention based on what the minute dated 22nd May contains is untenable because that minute itself shows that parties had filed documents bearing on the issues Nos. 1, 2 (a) and 2 (b). Thereafter what the parties agreed on was that no oral evidence will be adduced on those questions. The previous minutes also show that the arbitrators not only had before them documentary evidence bearing on those issues but they also decided to visit Waria Thermal Power Station and visited Durgapur Thermal Power Station on 22nd December 1964 and also they decided to compile a questionnaire in connection with their visit of the Durgapur Thermal Power Station at Waria to be forwarded to Damodar Valley Corporation, any answer in respect of which was directed to be submitted to the arbitrator within a fortnight from the date of the receipt of the questionnaire. Those were undoubtedly intended to be evidence. The D. V. C. however did not send any answer to the questionnaire. We may mention here that the learned Advocate for the respondent Nani Coommar Chakravarty also pointed out that in the records of the arbitrators, which were filed in the court of the Subordinate Judge and has been sent to this Court, there is a printed copy of Indian Standards Method for Sampling of Coal and Coke (tentative) reprinted 1956 and also a typed copy of proposed draft. Indian Standard Method of Sampling of Coal and Coke (Revisions of I. S. 436-953) which appear to have been sent by the Indian Mining Association to the Secretary Indian Mining Federation and other associations by their covering letter dated 27th September 1961 and also printed copy of Indian Standard Method of Sampling of Coal and Coke (Pt. I Sampling of Coal revised) which appears at No. I. S.: 436 (Part I)-1964. These are undoubtedly documentary evidence which the arbitrators had availed of and in view thereof the parties in their proper and reasonable attitude before the arbitrators agreed not to adduce oral evidence on such matters.

23. Mr. Rai Dastider during his reply tended so much so as to contend that the documents mentioned above do not bear the seal of the court of the Subordinate Judge at Alipore which

should raise a doubt if those documents formed part of the record of the arbitrators which were filed in the court of the Subordinate Judge and Mr. Chakravorty may not have been properly instructed for thinking that those treatises of the Indian Standards specification were really materials before the arbitrators. This doubt of Mr. Rai Dastider implies that the treatises we have mentioned above found their way in the file which is part of the record sent from the court of the Subordinate Judge to this Court by some questionable means. That in our view is as much uncharitable as it is unreasonable. We are satisfied that Mr. Rai Dastider has been very wrongly instructed to raise that contention. The documents mentioned above were produced before us from the file in which the other records of the arbitrators including the signed minutes of the arbitration bearing seal of the Court of the Subordinate Judge are included. Mr. Rai Dastider rightly noticed that the printed booklets and the type-written proposed draft do not bear the seal of the Court of the Subordinate Judge. The reason is obvious to us and should have been so to the learned Advocate. Those technical documents mainly printed matters were considered to be scientific treatises and not documents proved as evidence in the proceeding. That is why in the court of the Subordinate Judge the seal of the Court was not affixed on them. We are of the view that contention of Mr. Rai Dastider had no legs to stand upon and the learned Subordinate Judge is right in his finding that the arbitrators cannot be held guilty of misconduct or to outstrip the limit of reference by taking evidence in determining issues Nos. 1 and 2. (a) and 2 (b) contrary to their own direction on the basis of agreement between the parties. In the examination of witnesses the questions asked both in Examination-in-Chief and in cross-examination to which Mr. Rai Dastidar drew our attention have bearing on other issues framed by the Arbitrators, which overlapped each other, and also were asked to obtain explanations of materials in the printed booklets which were of the nature of scientific treatises. Those did not bring about any mishandling of the proceedings and therefore cannot be viewed as misconduct on the part of the Arbitrators.

24. The fourth contention raised before us by Mr. Rai Dastidar that the arbitrators for deciding on the method of sampling prevailing at the relevant time have not taken into consideration other conventional methods appears to us to be without substance because in the evidence adduced by the parties

both oral and documentary before the arbitrators, the other unconventional methods of sampling of coal loomed very large indeed and Mr. Rai Dastider has himself referred to those evidence in connection with his contention that those were taken in the record by procedural misconduct which we have dealt with in the previous point urged by Mr. Rai Dastider. This point urged by Mr. Rai Dastider and the remaining two other points, one regarding the deductions made for sales-tax and the other regarding award of Rs. 650/- for wrongful detention of payment are matters which are not within the scope of this Appeal. This being an appeal under Section 39 of the Arbitration Act its scope is limited by Section 30, clause (a) of which is only relevant for our purpose. The Section is quoted below:

"Section 30. An award shall not be set aside except on one or more of the following grounds, namely:—

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceeding have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid."

25. An error of law which can be made a ground for setting aside an Award of the Arbitrators, has been well settled by authoritative decisions since the middle of the last century. In an English decision of 1857 reported in *Hodgkinson v. Fernie*, (1857) 3 CB (NS) 189, 202 = 140 ER 712 Williams, J. said:

"The law has for many years been settled, and remains so at this day that where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions of both of law and of fact."

26. He however noted an exception, which he regretted and also doubted its propriety, yet considered it as 'firmly established'. That exception is "when a question of law necessarily arises on the face of the Award." Supreme Court cited that with approval in *Union of India v. Bungo Steel Furniture Pvt. Ltd.*, AIR 1967 SC 1032. Long before that, the observations of Williams, J. were characterised by Lord Dunedin in 50 Ind App 324 = (AIR 1923 PC 66) (*Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.*) as "the law on the subject (which) has never been more clearly stated" and the learned Lord said "Now the regret expressed by Williams, J. in (1857) 3 CB NS 189 = 140 ER 712 has been repeat-

ed by more than one learned Judge and it is certainly not to be desired that the exception should be in any way extended. In that judgment of Privy Council reported in 50 Ind App 324 = (AIR 1923 PC 66) Lord Dunedin said:

"An error of law on the face of the award means, in their Lordships' view, that you can find in the award or in a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

27. Without burdening this judgment with the plethora of decisions on the point we may at once refer to the recent decision of the Supreme Court in the case of *M/s. Allen Berry & Co. Pvt. Ltd. v. Union of India*, reported in AIR 1971 SC 696 (April issue). In that judgment the previous decisions have been fully discussed and their Lordships laid down:

"the Rule thus is that as the parties chose their own arbitrator to be the Judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore even when the arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake."

28. Applying those principles and law laid down by the Supreme Court in the above decision, in the present case we find here in the award that the arbitrators did not state any proposition of law when they based their decision on the view that method of sampling applied by D. V. C. was not the correct method. It may be an error of fact. We do not decide it either way, because it is not for the Court to sit in judgment over decision of the Arbitrators on a question of fact. Award cannot be set aside or modified even if there was an error of fact.

29. On the point of award of Rs. 650/- as compensation for wrongful detention of payment, Mr. Rai Dastidar has relied on the decision of the Supreme Court in the case of *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468 for contending that it has been without jurisdiction. He has also referred to a later decision in the case of *Union of India v. A. L. Rallia Ram*, reported in AIR 1963 SC 1685 in his support.

30. Mr. Chakravorty for the Respondents has pointed out that the Sup-

reme Court has taken a different view on that question in the case of *Smt. Santa Devi v. Dharendra Nath Sen*, reported in AIR 1963 SC 1677. He has also relied on the decision of the Privy Council in the case of *Bengal Nagpur Rly. Co. Ltd. v. Ruttanji Ramji*, reported in 65 Ind App 66 = (AIR 1938 PC 67).

31. In the present case in the contract between the parties there was a stipulation for interest for delayed payments. The Arbitrators in lieu of awarding interest according to that stipulation have awarded a small sum of Rs. 650/- as compensation for long delay in paying Rs. 16,058/- which was deducted in the four Bills in dispute. In our view that has not brought about any transgression of jurisdiction of the Arbitrators; and it does not amount to misconduct that would enable court to set aside or modify the Award even to that extent.

32. The Appeal therefore fails and is dismissed with costs.

A. K. DE, J.:— 33. I agree.
Appeal dismissed.

AIR 1972 CALCUTTA 160 (V 59 C 28)

A. K. MUKHERJEA AND SABYASACHI
MUKHARJI, JJ.

Indu Bhusan De and others, Appellants v. The State of West Bengal and others, Respondents.

A. F. O. O. No. 125 of 1970, D/- 28-7-1970.

(A) Calcutta City Civil Court Act (W. B. Act 21 of 1953), Sections 3 and 5 — As amended by W. B. Act (35 of 1969) — Notification D/- 14-11-1969 — Establishment of City Civil Court in 1953 and conferment of additional jurisdiction to that Court in 1969 are *intra vires* the State Legislature under Schedule 7 List II Entry 3 and List III Entry 13 of the Constitution — The main Act and the Amendment Act are *intra vires*.
(Paras 12, 15)

In pith and substance the amendment is a law relating to administration of justice, constitution and organization of courts, and as such it is within the legislative competence of the State Legislature, and it is not prohibited in view of the absence of the jurisdiction and powers of the High Court in Entry 78 of List I of 7th Schedule of the Constitution. The amendment can also be upheld on the ground that it is a law relating to Civil Procedure and is a valid piece of legislation being within the Entry 13 of List III of the 7th Schedule. No substantive rights of the persons, in

LO/LO/G33/71/KSB

respect of the law of carriage or law of navigation or law of shipping or law of promissory notes, have in any way been affected by the amendments made. What has been done is to provide a different method for enforcing some of these rights within the territory of this State. AIR 1957 Cal 534, Rel. on.

(Para 14)

(B) Constitution of India, Schedule 7 List II Entry 3 — Interpretation of — Power to establish additional Courts is included within the entry.

The expression, 'administration of Justice' taken with the expression 'constitution and organisation of all courts,' read in its ordinary significance would include the right or the authority to establish additional courts. AIR 1951 SC 69 Rel. on.

(Para 7)

(C) Constitution of India, Article 247 — Parliament has no authority to establish additional Courts for matters in State List. It has a limited authority under Article 247 for specified purposes viz., for administration of laws made by Parliament or existing laws with respect to matters in Union List — Resort to residuary power under Article 248 read with List I Entry 97 cannot be had for this purpose. (X-Ref:— Article 248, Schedule 7, List 1, Entry 97).

Resort to the residuary powers should be made as a last refuge, and only when all the categories of three lists are absolutely exhausted. Furthermore, where two constructions are possible, one which will avoid resort to the residuary power and the other which will make resort to the residuary power necessary, the former must be preferred. This must, however, be done without straining the language or without making the entries meaningless. Furthermore, if resort is made to the residuary power for the purpose of the authority to set up additional courts for laws in Union and State lists, then Article 247 would really become superfluous. AIR 1941 FC 47 and AIR 1947 FC 1, Rel. on.

(Para 7)

(D) Constitution of India, Pre. and Article 247 — Marginal notes in the Constitution unlike these in Acts of British Parliament are parts of the Constitution and Prima facie furnish some proof as to their meaning and purpose.

The use of the word 'certain' in the marginal note to Article 247 shows, that the power given to Parliament to establish additional courts is limited to only "certain" additional courts. AIR 1955 SC 661 Foll.

(Para 7)

(E) Constitution of India, Schedule 7 List III Entry 13 — Expression "Civil Procedure" — Interpretation of the expression "Civil Procedure" would signify

1972 Cal./11 IV G—25

the rules of machinery for administering justice in the courts of justice and cannot and do not signify the competence to set up the machinery itself.

(Para 11)

(F) Constitution of India, Article 246 — Constitutionality of Legislation — Test to determine whether statute is intra vires.

In determining whether a legislation is within the field of a competent legislature where its powers are circumscribed by enumerated list in a Constitution, it is necessary to find out the true nature of the legislation or in other words the pith and substance of the legislation and then to find out whether the legislation in its pith and substance is within one of the lists enumerated and given to that particular legislature. Since the entries in the different legislative lists are likely to overlap occasionally, it is usual to examine the pith and substance of the legislation with a view to determine to which entry the legislation can substantially be related to; a slight connection with another entry in another list will not matter. AIR 1947 PC 60 and AIR 1970 SC 999 Rel. on.

(Para 14)

(G) Limitation Act (1963), Section 1 — Law of Limitation applies to Calcutta City Civil Court.

The law of limitation is a law by the Union Parliament which is binding on all courts in India and as such naturally the City Civil Court would have to apply and follow the law of limitation in respect of the claims arising before it.

(Para 14)

(H) Calcutta City Civil Court Act (W. B. Act 21 of 1953) Schedule I, Entries 1 and 2 — Deletion of Entry 2 by the Amendment Act (35 of 1969) — Effect.

In view of the fact that Entry 2, in express terms stipulates that the suits and proceedings in Entry No. 2 shall be other than those triable in Entry 1, in deleting Entry 2 the State Legislature was not conferring Admiralty jurisdiction on the City Civil Court.

(Para 13)

(I) Constitution of India, Pre. — Constitutionality of Legislation — Lack of clarity in a legislative enactment is no justification for declaring it ultra vires.

(Para 13)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 999 (V 57)

= (1971) 1 SCR 195, Second

Gift Tax Officer, Mangalore v.

D. H. Hazareth

14

(1965) AIR 1965 Mys 76 (V 52)

Shivarudrappa v. Kapurchand

10

(1961) AIR 1961 Cal 545 (V 48)

= 65 Cal WN 920 (SB), Pra-

matha Nath Mitter v. Chief Justice of the High Court at Calcutta (1957) AIR 1957 Cal 534 (V 44) = 61 Cal WN 630, Amarendra Nath Roy Choudhury v. Bikash Chandra Ghose 1, 2, 9 (1955) AIR 1955 SC 661 (V 42) = (1955) 2 SCR 603, Bengal Immunity Co. Ltd. v. State of Bihar 7 (1951) AIR 1951 SC 69 (V 38) = 1951 SCR 51, State of Bombay v. Narottamdas 5, 6, 7 (1947) AIR 1947 PC 60 (V 34) = 74 Ind App 23, Prafulla Kumar Mukharjee v. Bank of Commerce Ltd., Khulna 14 (1947) AIR 1947 FC 1 (V 34) = 1946 FCR 67, Manikkasundara Bhattar v. R. S. Nayudu 7 (1945) AIR 1945 PC 98 (V 32) = 72 Ind App 91, Governor General v. Province of Madras 7 (1941) AIR 1941 FC 47 (V 28) = 1940 FCR 188, Subramanyan v. Muttuswamy 7 (1939) AIR 1939 FC 1 (V 26) = 1939 FCR 18, C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 7 21 Supreme Court of Canada Reports 446, In re County Courts of British Columbia 5 22 Cn. T. R. 690, R. v. Leningar 5

M. M. Sen, S. Sen and Saraf, for Appellants; Sachindra Ch. Das Gupta & Amal K. Basu Choudhury, for Respondents Nos. 1 and 2.

SABYASACHI MUKHARJEE, J.:

This is an appeal against the order and judgment of P. K. Banerji, J. dated 25th November, 1969 rejecting the petitioners' application under Article 226 of the Constitution without issuing a rule nisi. The petitioners are the three practising attorneys of this High Court, and in the petition there was a prayer for leave under Order 1, Rule 8 of the Code of Civil Procedure. During the hearing of this appeal, learned Advocate for the petitioners, abandoned the prayer for leave under Order 1, Rule 8 of the Code of Civil Procedure. The application has therefore been treated as an application by the three named petitioners in their individual capacity and not in their representative capacity. In the application the petitioners challenge the establishment of City Civil Court by the Calcutta City Civil Court Act, 1953 (West Bengal Act No. XXI of 1953) and the amendment of the said Act by the City Civil Court (Amendment) Act, 1969 being West Bengal Act XXXV of 1969 and notification made on the 4th November, 1969 relating thereto, as ultra vires the powers of the State Legislature. The application was moved be-

fore P. K. Banerji, J., who as mentioned hereinbefore declined to issue a rule nisi. P. K. Banerji, J., was of the opinion that the matter was covered by the decision of Sinha, J. (as his Lordship then was) in the case of Amrendra Nath Roy Chowdhury v. Bikash Chandra Ghose, 61 Cal WN 630 = (AIR 1957 Cal 534). The learned trial Judge was further of the opinion that the expression, 'constitution' in Item No. 3 of List II of Schedule VII of the Constitution of India was wide enough to empower the State Legislature to establish additional courts. The learned Judge further came to the conclusion that the petitioners being practising attorneys of this Court were guilty of delay in making this application. For these reasons, the learned Judge dismissed the application. Having heard the parties, we were clearly of the opinion, that the case made out in the petition is certainly an arguable prima facie case and petitioners were entitled to ask for the issuance of a rule nisi for the further consideration of the matter. But learned Advocates for both the petitioners and the respondents contended before us that we should not only consider whether there is an arguable prima facie case entitling the petitioners to a rule nisi but further examine the rival contentions of the parties on the points raised and give our decision on the merits of the contentions raised on behalf of the petitioners. As in this case the questions involved are essentially questions of law and there is hardly any scope for any elucidation of facts by giving the respondents opportunity of filing any affidavit in opposition and further in as much as the respondents have been served with the notice of the appeal and have appeared and made submissions before us and also in view of the importance of the points involved in this application, we have decided to examine the contentions urged on merits on behalf of the petitioners.

2. Learned Advocate for the petitioners contended before us that the establishment of the City Civil Court was beyond the competence of the State Legislature. It has been urged that the Parliament alone has the power and the authority under the Constitution to establish additional courts. Reliance was placed on the relevant entries in the different lists of the Schedule VII of the Constitution. It was also contended that in any event by the amendment of 1969 the State Legislature has purported to legislate on matters enumerated in List I and the amendment is ultra vires the powers of the State Legislature. It was contended by, learned Advocate for the petitioners, that the expression "establi-

shment" is different from the expression 'constitution'. Furthermore the difference, it was urged, would be apparent from the fact that our Constitution uses different expressions, "constitution" as well as "establishment" and they must be so construed as signifying different meanings. It was urged that the decision of Sinha, J., on which reliance was placed by P. K. Banerji, J., did not have occasion to consider the relevant provisions of the Constitution, as the very establishment of the City Civil Court was not challenged in the petition before Sinha, J., in the case of 61 Cal WN 630 = (AIR 1957 Cal 534) (supra).

3. The City Civil Court Act, 1953, being Act 21 of 1953, was passed by the West Bengal Legislature and the assent of the President was published in the Calcutta Gazette on the 1st of September, 1953. It is an Act to establish an additional Court for the City of Calcutta. The preamble of the Act states that whereas it is expedient to establish an additional Court for the City of Calcutta, the Act was being passed. Section 3 of the Act states that the State Government may, by notification, in the Official Gazette, establish Civil Court to be called the City Civil Court. The City Civil Court, it has been provided, would be a Court subordinate to and subject to the superintendence of the High Court within the meaning of the Letters Patent for the High Court and of the Code of Civil Procedure, 1908. Section 4 provides for the appointment of Judges. Section 5 of the Act states that the local limits of the jurisdiction of the City Civil Court shall be the City of Calcutta. Section 5 has undergone an amendment in 1969. Sub-section (2) of Section 5 originally provided that City Civil Court would have jurisdiction and the High Court would not have jurisdiction to try suits or proceedings of civil nature, not exceeding rupees ten thousand in value. Sub-sec. (3) gave City Civil Court jurisdiction and took away jurisdiction of the High Court in respect of the proceeding under the Guardians and Wards Act, 1890 and Part X of the Indian Succession Act, 1925, (XXXIX of 1925), in respect of succession certificates. Sub-section 4 states that the City Civil Court shall not have jurisdiction to try suits and of the description specified in the First Schedule. This Schedule has also undergone considerable amendments in 1969. Under sub-section 2 the value has been increased to rupees fifty thousand. We shall have to deal with the effect of the amendments later in this judgment. It was contended that as a result of these amendments the matters in respect of which jurisdiction has been conferred

upon the City Civil Court by the Act of the West Bengal Legislature are matters enumerated in List 1 of the 7th Schedule of the Constitution and as such the West Bengal State Legislature was incompetent to legislate upon these subjects. Sub-section (5) of Section 5 provides that all suits and proceedings which are not triable by the City Civil Court shall continue to be triable by the High Court or the Small Cause Court or any other Court, the tribunal or authority as the case may be as before the Act. Section 6 provides that the procedure to be followed in City Civil Court shall be as provided by the Code of Civil Procedure. Section 7 provides for the law to be administered by the City Civil Court. Section 8 provides for appeal. Originally Section 9 gave the High Court in exercise of its original civil jurisdiction, powers to remove suits or proceedings to itself, upon certain conditions. That section has been repealed by the amendment of 1969. Sections 10 to 16 deal with the set up of the City Civil Court. Section 17 gives the attorneys right to act and plead in City Civil Court. Section 18 deals with the seal. Section 19 provides for the rule making power. Section 20 stipulates that pending suits and proceedings would not be affected.

4. The first question, therefore, is whether the State Legislature was competent to establish additional Court in the City of Calcutta and pass the impugned legislation. It was contended on behalf of the appellants that there is no authority of the State Legislature to establish any additional court. Our attention was drawn to the enumerated entries in List II as well as List III of the Seventh Schedule. We shall refer specifically to certain entries later in this judgment. The main argument however has been on the effect of Article 247 of the Constitution. It was contended that Article 247 of the Constitution overrides all other provisions so far as the question of establishment of any additional court is concerned after coming into operation of the Constitution, Article 247 of the Constitution states as follows:—

"247. Power of Parliament to provide for the establishment of certain additional courts. Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List."

5. In this connection, learned advocate for the petitioners, also relied on

the residuary power of legislation in Article 248 of the Constitution read with Entry 97 of List I. In view of the provisions of Article 246 of the Constitution the authority and the power of the State Legislature to pass the impugned Act must be found within the ambit of List II and List III of the 7th Schedule of the Constitution. In the Indian Constitution the powers of the State Legislatures are enumerated powers. Therefore unless the authority of the State Legislature is found either from List II or List III of the 7th Schedule of the Constitution the impugned Act would be beyond the competence of the State Legislature. In this connection the first entry that we need consider is Entry 3 in List II which is to be followed effect:

"(3) Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts, except the Supreme Court."

Entry 65 of the said List deals with jurisdiction and powers of all Courts except Supreme Courts, with respect to matters in that list. Entry 13 of the Concurrent List, namely, List III of the 7th Schedule deals with Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of the Constitution, limitation and arbitration. Entry 77 of List I deals with the Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such courts) and the fees taken therein, and persons entitled to practise before the Supreme Court. Entry 78 of List I deals with Constitution and organisation (including vacation of the High Court, except the provisions as to officers and servants of High Courts, and persons entitled to practice before the High Courts. It is significant to note that while Entry 77 includes the jurisdiction and powers of the Supreme Court, Entry 78 does not include jurisdiction and powers of the High Courts. Entry 79 of List I deals with the extension of jurisdiction to and exclusion of the jurisdiction of the High Courts from any union territory. Entries 1 and 2 of List II of the Government of India Act, 1935 so far relevant for the present purpose ran as follows:

"1. the administration of justice, constitution and organisation of all Courts except the Federal Court....."

2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List....."

Learned Advocate for the petitioners, contended that Indian Constitution on

this aspect has evolved a new scheme and a new pattern and the State Legislatures have lost all powers of establishing any additional courts after coming into operation of the Constitution. Additional courts, it was contended, if they are to be established, must be done by the authority of the Union Parliament. The first argument on this aspect is Article 247 of the Constitution. Article 247 of the Constitution is a new provision. There was no provision similar to this in the Government of India Act, 1935 and there is also no similar provision either in the Constitution of the United States of America or that of Australia. But there is a provision, viz., Section 101 of the British North America Act, 1867, which provides for additional courts. Section 101 of the British North America Act, 1867 provides—

"The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the Constitution, Maintenance, and Organisation of a General Court of Appeal for Canada and for the Establishment of any additional courts for the better Administration of the Laws of Canada." In this connection however it has to be observed further that Section 92 of the British North America Act, 1867 deals with the exclusive power of the provincial Legislature and clause 14 of that section deals with the question of "The Administration of Justice in the Province," including "constitution, maintenance and organisation of the Provincial Courts." In interpreting this provision it has been held that the words "Constitution, maintenance and organisation of the Provincial Courts plainly include the powers to define the jurisdiction of such Courts territorially as well as in other respects. (See the decision of Re County Courts of British Columbia 21 Supreme Courts of Canada Reports, 446). This position was also noted in the judgment of B. K. Mukherjee, J. (as his Lordship then was) at pages 87, 88 and 89 of the report in the case of State of Bombay v. Narottamdas, AIR 1951 SC 69, a decision which we will have to examine in detail later. The right of the provincial legislatures to create new courts and, subject to Section 96 of the said Act, to appoint the judges who shall preside over them has been frequently exercised and has been affirmed in a number of cases. (See Clement's Canadian Constitution, Third Edition p. 512) Armour, C. J. in R. v. Leningar, 22 CnT. R. 690 observed:—

"A Court is a place where justice is judicially administered: Coke on Littleton, 58 a; and the Constitution of a Court, therefore necessarily includes its

jurisdiction and the granting by the British North America Act to the provincial legislatures of the power to constitute courts of civil and criminal jurisdiction necessarily included the power of giving jurisdiction to those Courts and impliedly included the power of enlarging, altering and diminishing the jurisdiction of those courts."

(See Clement's Canadian Constitutional Law Third Edition pp. 526, 527, 528).

Section 96 of the said Act provides that the Governor General shall appoint the judges of the Superior, District and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick. In several cases both in Canada and in the Privy Council, Section 101 of the British North America Act, 1867 in relation to Section 96 has come up for consideration but in view of the provision of Section 96 which are dissimilar to our Constitutional provisions, it may not be quite appropriate to draw any analogy or any support from the said decisions. Some of these decisions on the question relating to Section 101 can be found in the Canadian Constitutional Law, by Laskin, Third Edition p. 772-824 and Clement's Canadian Constitutional Law Third Edition pp. 520-527. Therefore, while it is difficult to draw any analogy from the interpretation of Section 101 of the British North America Act, 1867 in view of the other provisions of that Constitution, it can be stated, as noted by the Supreme Court, that the existence of the power given by Section 101 of the North America Act, does not in any way detract from clause 14 of Section 92 of the said Act. The significantly different provisions in Indian Constitution from Section 96 of the North America Act, 1867, make the Canadian experience on this question more apposite to the Indian Constitutional set up. The question, however, whether the State Legislatures have the right to set up additional Courts in India must be determined with reference to the provisions of the Indian Constitution. We have noted the relevant entries in the List II and List III of the 7th Schedule of the Constitution and the corresponding entries in the Government of India Act, 1935.

6. In the case of the AIR 1951 SC 69, the question that arose for the consideration of the Supreme Court was whether the Bombay City Civil Court Act was ultra vires, the Provisional Legislature by reason of its being encroachment by the Provincial Legislature upon the field of legislation reserved for the centre under List I of

Schedule 7 of the Government of India Act, 1935. It was held by the Supreme Court that the Act was intra vires the Bombay Legislature under Entry 1 of List II of the 7th Schedule of the Government of India Act, 1935. It was held that the legislative power conferred on the Provincial Legislature by Item I of List II had been conferred by use of language which was of the widest amplitude, namely administration of justice and constitution and organisation of all Courts. The aforesaid phrase employed included within its ambit legislative power in respect to jurisdiction and power of Courts established for the purpose of administration of justice. It was further held that the words appeared to be sufficient to confer upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice in the Province. Legislation on the subject of administration of justice and constitution of Courts of justice would be ineffective and incomplete unless and until the Courts established under it are clothed with the jurisdiction and power to hear and decide causes. Patanjali Sastri and Das, JJ. (as their Lordships then were) held that Entry 2 read with Entry I in List II clearly authorised the Provincial Legislature to make a law conferring on or taking away from a Court general jurisdiction and powers relating to or touching or concerning or for administration of justice. Fazl Ali, J. at pp. 73-74 of the report observed:—

"In my opinion, the correct view is to hold that it is not necessary to call into aid either Entry 4 of List III or any of the provisions of the Canadian Constitution in this case, and that the words "administration of justice; constitution and organization of Courts" are by themselves sufficient to empower the Provincial Legislature to invest a new Court with all the power which has been conferred upon it by the impugned Act. It is of course open to the Central Legislature to bar the jurisdiction of the new Court by a special enactment with regard to any of the matters in List I, but so long as such jurisdiction is not barred, the Court will have jurisdiction to try all suits and proceedings of civil nature as enacted in the Act in question. I think that if the Provincial Legislature had merely enhanced the pecuniary jurisdiction of any of the existing Civil Courts, there could have been no objection to that course. Why then should there be any objection when, instead of investing one of the existing Courts with power to try suits and proceedings of a civil nature not exceeding a certain amount,

the Legislature has created a new Court and invested it with the same power."

At page 78 of the report Patanjali Sastri J. (as his Lordship then was) observed:—

"After giving the matter my careful consideration, I am convinced that both the language of the provisions and the antecedent legislative practice support the conclusion that the Provincial Legislatures, which have the exclusive power of constituting and organising Courts and of providing for the administration of justice in their respective provinces, have also the power of investing the Courts with general jurisdiction". Mahajan J. (as his Lordship then was) at page 85 of the report observed:— (para 51) "I am, therefore, of the opinion that under Item 1 of List II the Provincial Legislature has complete competence not only to establish Courts for the administration of justice but to confer on them jurisdiction to hear all causes of a civil nature, and that this power is not curtailed or limited by power of legislation conferred on the two Legislatures under Items 53, 2 and 15 of the three lists."

At page 88 of the report Mukherjee, J. (as his Lordship then was) observed:

"It is to be noted that the right to set up Courts and to provide for the whole machinery of administration of justice has been given exclusively to the Provincial Legislature. Under Section 101, North America Act, the Parliament of Canada has a reserve of power to create additional Courts for better administration of the laws of Canada but the Indian Constitution Act of 1935 does not give any such power to the Central Legislature. Courts are to be established by the Provincial Legislature alone. The word "Court" certainly means a place where justice is judicially administered."

It has however to be observed that the last observation quoted above has to be examined in view of Article 247 of the Constitution which is more or less in similar terms with Section 101 of the North America Act, 1867. Das J. (as his Lordship then was) also came to the conclusion that the Provincial Legislatures have power to establish Courts under Entries 1 and 2 of the List II of the Seventh Schedule of the Government of India Act, 1935.

7. In the Constitution under Entry 3 of List II of 7th Schedule, all the concepts or expressions used in Entries 1 and 2 of List II of the Government of India Act, 1935 have been combined with certain modifications. It has further to be noted Entry 3 of List II of the Constitution excludes from the authority of the State Legislatures the

Constitution and organisation of the High Courts as well as the Supreme Court while Entries 1 and 2 of List II of the 7th Schedule of the Government of India Act, 1935 excluded only the Federal Court. In this connection it should be noted that Entry 77 of List I of 7th Schedule of the Constitution includes jurisdiction and powers of the Supreme Court while Entry 78 of that list does not include jurisdiction and powers of the High Courts. The expression "Administration of justice; constitution and organisation of all courts except Supreme Court and High Court" would include in its ordinary and natural meaning the authority to set up additional courts of justice in the states for the purposes of administering justice. The expressions were so construed by the Supreme Court in the case of AIR 1951 SC 69 (Supra) as noted above. The argument in this case is that Article 247, read with Article 248 and Entry 97 of List I of the Constitution has altered that position. We have set out before the provisions of Article 247. It gives Parliament authority to establish courts for better administration of either (a) laws made by Parliament or (b) any existing laws with respect to any matter enumerated in the Union List. Therefore, by the authority of this Article, Parliament has no authority to establish additional courts for matters in the State List. The authority given to the Parliament by Article 247 is a limited authority for specified purpose. In India unlike some other Constitutions, we do not have dual system of courts, namely, one hierarchy of courts administering the laws in the state list, one hierarchy of courts administering Union laws. Some Constitutions have that system. Therefore, the logical conclusion from the argument in support of the petitioners, is that the Union Parliament alone can set up additional Court for the better administration of matters in the Union List and if additional courts for the purpose of state laws are necessary they must be set up by the State Legislatures, because by virtue of Article 247 the Union Parliament will have no authority to set up additional courts for state laws. That would be a position repugnant to the whole scheme of the Indian Constitutional set up. In order to meet this obvious anomaly that would arise from the construction that apart from Article 247 there is no power to establish additional courts, learned advocate for the petitioners, contended that resort can be made to Article 248 of the Constitution read with Entry 97 in List I of the Seventh Schedule. Article 248 of the Constitution gives

residuary powers of legislation to the Parliament. It states that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent or the State List. Similarly Entry 97 of List I of the 7th Schedule includes any other matter not enumerated in Lists II or III including any Tax not mentioned in either of those lists. Learned advocate for the petitioners contended that Article 247 read with Article 248 and Entry 97 of List I, would enable the Parliament alone to establish any additional court for administering law both in the State and the Union list and it was suggested that if we make that construction then it would obviate the anomaly, noted before. Article 248 of the Constitution is a new provision. Section 104 of the Government of India Act, 1935 gave residuary powers of legislation in slightly different terms. Section 104 is in the following terms:—

"104 (1) The Governor General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

(2) In the discharge of his functions under this section the Governor-General shall act in his discretion."

It is however necessary to reiterate certain principles about the construction of the residuary powers of legislation. It appears that the aim of the Constitution like that of the Government of India Act, 1935, was to make the different lists as exhaustive as possible. It was observed by the Judicial Committee in the case of Governor-General v. Province of Madras, AIR 1945 PC 98 regarding the Government of India Act of 1935 that the lists were made so exhaustive as to leave little or nothing in the residuary field. Gwyer, C. J., observed in the case of *In re, C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, AIR 1939 FC 1,

"The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among the federal Constitutions in the length and the details of its Legislative Lists".

It has to be remembered that the Constitution has made the lists more ex-

haustive and elaborate than the Government of India Act, 1935. List I of the Constitution contains 97 entries against 59 entries in List I of the 1935 Act. List II of the Constitution contains 66 entries as against 54 entries in List II of the 1935 Act and List III of the Constitution, namely, the Concurrent List contains 47 entries while the corresponding list in 1935 Act contained 30 entries. Therefore, resort to the residuary powers should be made as a last refuge, and only when all the categories of three lists are absolutely exhausted. Furthermore where two constructions are possible, one which will avoid resort to the residuary power and the other which will make resort to the residuary power necessary, the former must be preferred. This must, however, be done without straining the language or without making the entries meaningless. (See the observations of the Federal Court in the cases of *Subramanyan v. Muttuswamy*, AIR 1941 FC 47 at page 55. *Manikkasundara Bhattar v. R. S. Nayudu*, 1946 FCR 67 = (AIR 1947 FC 1).) Furthermore, if resort is made to the residuary power for the purpose of the authority to set up additional courts for laws in Union and State lists, then Article 247 would really become superfluous. Bearing the above principles in mind, we are of the opinion that the expression, 'administration of justice' taken with the expression 'constitution and organisation of all courts', read in its ordinary significance would include the right or the authority to establish additional courts. Such a construction would not amount to straining the language of the Constitution, but would be only giving effect to the natural meaning of the expressions used. Such a construction also will be in consonance with the scheme of the Indian constitutional set up. Entry 3 gives that power to the State Legislatures. It is true, as learned advocate for the petitioners, contended that the Constitution has used the expressions "establishment", "constitution" "organisation", "jurisdiction" and "power". It is also true that where different expressions are used in a particular enactment, it may some time signify different connotations. But it has to be remembered that the enactment that we are construing in this case is the Constitution and not a mere law, but the organic instrument under which laws are made. We have noted before that in the Canadian Constitution, the expressions, "constitution and organisation of courts", have been construed to signify that authority to establish additional courts is with the Provincial Legislatures in spite of the fact that the Union Parliament

has the authority to establish Additional courts for certain purposes. We have also noticed that the Supreme Court has held that the expression "administration of justice, constitution and organisation of courts" in the relevant entry of the Government of India Act, 1935 authorised the State Legislature to establish a City Civil Court at Bombay. The power that has been given to the Union Parliament under Article 247 of the Constitution is a limited power for certain specified purposes and that power should not be so construed as to detract from the amplitude of the expressions "administration of justice constitution and organisation of all courts except Supreme Court and High Courts". Contrary construction would result in an anomaly of the Indian Constitution noted above and furthermore that anomaly can only be avoided by having resort to the residuary powers under Article 248 of the Constitution read with Entry 97 of the List I of the 7th Schedule of the Constitution by straining the language, and restricting the natural meaning of Entry 3 of List II, and would in effect make Article 247 a surplus provision. We have, therefore, come to the conclusion that Entry 3 of List II gives the State Legislature the power to set up additional court, that is to say, the City Civil Court of Calcutta. Learned Advocate for the petitioners contended that the marginal notes of Article 247 signify that Parliament alone has got the power of establishing additional courts. Learned advocate for the petitioners drew our attention to the decision of the Supreme Court in the case of *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661. Delivering the judgment of the Court the Acting Chief Justice observed that the marginal notes in the Indian Constitution unlike the marginal notes in Acts of the British Parliament, are parts of the Constitution and prima facie, furnishes some proof as to the meaning and purpose of the Article of the Constitution. In that context it is significant that the marginal note uses the expression "certain" before additional courts, not additional court simpliciter, or all additional courts. Prima facie, therefore, from the marginal notes it is apparent, that the power that the Parliament has been given with respect to additional courts is limited to only "certain" additional courts. Learned advocate for the petitioners also relied on the non-obstante clause in the Article. In this context it is necessary to remember that the Entry 3 in List II gives to the State Legislatures competence relating to administration of justice and constitution

and organisation of courts except the Supreme Court and the High Courts. Entry 77 of the List I gives Union Parliament competence over constitution, organisation, jurisdiction and powers of the Supreme Court, while Entry 78 of that list gives competence to the Union Parliament over constitution and organisation of the High Courts without giving competence over jurisdiction and powers of the High Courts. Therefore, in order to obviate the difficulty that the Union Parliament may have to face because of its lack of competence in List I and List III of the 7th Schedule of the Constitution in creating additional courts for the Union List that this power in Article 247 has been given to the Parliament and in order to avoid conflict with the three lists of the 7th Schedule the non-obstante clause has been inserted, and not for the purpose suggested by learned advocate for the petitioners. On this aspect as the question we must refer to a decision of the Special Bench of this Court, on which reliance was placed on behalf of the petitioners.

8. In the case of *Pramatha Nath Mitter v. Chief Justice of the High Court at Calcutta*, AIR 1961 Cal 545, it was observed by a Special Bench that Section 23-A of the High Court Judges (Conditions of Service) Act (1954), is ultra vires the Union Legislature and the presidential Order, viz., the Calcutta High Court (Vacation) Order, 1960, issued thereunder was also invalid. It was held that the Parliament had no power to legislate with respect to vacations which fell properly within the topic Administration of Justice under Entry 3, List II of the Seventh Schedule. It was observed that the expression "constitution and Organisation" as appearing in Entry 78 of List I are two concepts which are included in the concept of "Administration of Justice", but when these two matters are specifically mentioned in the Union List I it is reasonable to hold that the connotation of the expression "Administration of Justice" is restricted to that extent in Entry 3 of List II and the matters of constitution and organisation of the High Courts have been taken out of the legislative power of the State Legislature. The application under Article 226 of the Constitution in that case was dismissed by the Special Bench on the ground that the order was passed in New Delhi and the second respondent being also at New Delhi, the Calcutta High Court had no jurisdiction to entertain the petition.

Learned advocate for the petitioners relied on the observation that the mean-

ing of the expression "administration of justice" was different from the expression "Constitution and Organisation" in List I of Seventh Schedule of the Constitution in view of their separate uses. The Special Bench however was not concerned with the questions with which we are concerned, namely, whether the expression "administration of justice" read with "constitution and organisation of court" in Entry 3 of List II is wide enough to include the competence to set up additional courts, and whether the existence of a separate and limited power for the Union Parliament in any way detracts from the amplitude of the Entry 3 of List II. In that view of the matter it is not necessary for us to further examine the said decision in detail.

9. In the case of 61 Cal WN 630 = (AIR 1957 Cal 534) (Supra) Sinha, J., (as his Lordship then was), had to consider the validity of certain provisions of the present Act with which we are concerned. Though we find from the judgment that it was contended before the learned Judge that the City Civil Court Act, 1953 was not within the competence of West Bengal Legislature and as such ultra-vires and void, no reference in the argument was made to Art. 247 or Entry 97 of the List I. It was argued before the learned Judge that the provisions of the Act, in so far as they purport to take away or curtail or restrict or alter the jurisdiction of the High Court, were beyond the competence of the State Legislature. It was further argued that in constituting and organising the City Civil Court the State Legislature was in fact re-organising the High Court. The Act was also challenged as being discriminatory on the ground that it took away the beneficial advantages conferred on litigants of obtaining summary reliefs under Order 37 of the Code of Civil Procedure. Sinha, J., (as his Lordship then was), considered the Supreme Court judgment noted above. The learned Judge came to the conclusion that because of the difference of language in Entries 77 and 78 of List I the jurisdiction and powers of the High Court are within the ambit of the State Legislature. The learned Judge further came to the conclusion that Entry 3 of List II read with Entry 65 empowers the State Legislature to legislate on the jurisdiction and powers of all courts including the High Court in respect of administration of justice. The learned judge also came to the conclusion that in substance the impugned legislation was within the competence of the State Legislature and he upheld the validity of the Act. It has to be

observed however that by the amendment of 1969 several items which were excluded from the jurisdiction of the City Civil Court have now been taken away from the High Court and vested with the City Civil Court. The effect of the amendment would however be examined later in this judgment.

10. In the case of Shivarudrappa v. Kapurchand, AIR 1965 Mys 76, it was held that Parliament has no exclusive competence to enact Sections 19 and 29 (2) (c) of the Mysore Civil Courts Act. The provisions are within the legislative competence of State Legislature. It does not appear from the judgment that the question was considered from the aspect of Article 247 of the Constitution as was canvassed before us.

11. Learned Government Pleader submitted that the power of the State Legislature to establish additional court like the City Civil Court is also within the Entry 13 of List III of the Seventh Schedule. The expression "Civil Procedure" would signify the rules of machinery for administering justice in the courts of justice and cannot and do not signify the competence to set up the machinery itself. In any event, in the view we have taken, it is not necessary for us in this case to examine the question in any further detail.

12. We are of the opinion, therefore, that in view of the provisions of Entry 3 of List II of 7th Schedule the State Legislature has the competence to set up additional Court, viz., the City Civil Court of Calcutta. This is, in our opinion, in consonance with the Canadian experience, in conformity with the decision of the Supreme Court noted above, and in accordance with the natural and ordinary meaning of the expression "Administration of justice, Constitution and organisation of all courts". This view is also in harmony with Article 247 of the Constitution as we have read it.

13. The next contention that requires consideration in this case is, whether in providing sub-section (2) of Section 5 of the Act wherein it has been stipulated that the City Civil Court shall have jurisdiction and the High Court shall not have jurisdiction to try suits and proceedings of certain types upto the value of Rs. 50,000/-, and whether by the amendment of 1969 whereby Entries 2, 3, 4, 5, 6, 7, 9 and 11 have been deleted from the First Schedule of the Act with the result that the High Court shall not have jurisdiction to try suits in respect of these entries but the City Civil Court shall have jurisdiction to try such suits and proceedings upto a limit of Rs. 50,000/-,

the State Legislature has exceeded its power. It has been contended that in providing that suits and proceedings upto Rs. 50,000/- relating to and arising out of shipping or navigation (including in particular carriage by sea, ships, cargo, freight, collisions, salvage, average, maritime lien, bottomry, respondentia, wages or seamen or master, and disbursements) the State legislature was legislating in respect of Entries Nos. 24 and 25 of List I of the Seventh Schedule of the Constitution. It has been contended that in providing for similar suits and proceedings relating to or arising out of carriage by air, the Act infringes Entry 95 read with Entry 29 of List I of the 7th Schedule of the Constitution. It was urged that in providing for suits and proceedings arising out of or in connection with imports or exports of merchandise the Act is ultra vires, Entry No. 95 read with Entries Nos. 41 and 42 of List I of Schedule 7. Similar arguments regarding infringement of Entry 95 read with Entry 43, Entry 95 read with Entry 46, Entry No. 46 read with Entry 7, Entry 6 in List III of Schedule 7 in respects of other items which have deleted from the First Schedule of the Act of 1953, were made. It has to be observed that Entry No. 1 in the First Schedule of the Act is in respect of suits and proceedings triable by the High Court as a Court of Admiralty or Vice Admiralty, or as a Colonial Court of Admiralty. Entry No. 2 in the said Schedule was in respect of suits and proceedings relating to or arising out of shipping or navigation (including in particular carriage by sea, ships, cargo, freight and collisions, salvage, average, maritime lien, bottomry, respondentia, wages of seamen or master, and disbursements), not otherwise triable under Entry 1. These two entries were originally together included in the jurisdiction of the High Court. Now by the amendment the second entry has been taken away from the jurisdiction of the High Court. It is difficult to conceive what are the suits or proceedings that might arise in respect of maritime lien, bottomry or respondentia, wages of seamen or master, which are not triable under the Admiralty jurisdiction. We have not received any satisfactory answer to the question as to what were these suits and proceedings mentioned in Entry 1 of the First Schedule of the Act which are not triable under Entry 1 of that said Schedule. Indeed these are matters essentially connected with the exercise of the Admiralty jurisdiction. These are expressions to be found in Admiralty proceedings. In non-Admiralty proceeding what would be the meaning of these expressions, we

have not been told. In Halsbury's Laws of England, Vol. I, pages. 49, 53, 57, 59 63 and 65 these expressions have been indicated as expressions essentially connected with the exercise of jurisdiction by the Admiralty Court. It was contended that in deleting Entry 2 of the First Schedule, the amendment of 1969 was in fact vesting the City Civil Court with the Admiralty jurisdiction. It was contended that such an action was beyond the power and the competence of the State Legislature. But if it can be established that these items are triable by Admiralty jurisdiction then the City Civil Court would not have jurisdiction and as such no question can arise of the amendment vesting the City Civil Court with the Admiralty jurisdiction. It is true that in view of the language of these two entries the bifurcation and vesting of jurisdiction with two separate courts are confusing. This indeed would be unfortunate for the litigants and it would be difficult task for the lawyers and the Judges charged with the administration of this Act, to find out what are the suits and proceedings relating to or arising out of bottomry or respondentia which are not triable by the High Court as a Court of Admiralty or vice-Admiralty or as a colonial Court of Admiralty. Lack of clarity in legislative enactment, which is not a rarity in our modern legislation, is however not a justification for declaring an Act ultra vires. In view of the fact that Entry 2, in express terms stipulates that the suits and proceedings in Entry No. 2 shall be other than those triable in Entry 1, we are unable to accept the contention that in deleting the Entry 2 the State Legislature was conferring Admiralty jurisdiction on the City Civil Court.

14. The question, therefore, which requires consideration, is whether by the deletion of the suits and proceedings of the said several entries there has been any infringement of powers of the Union Parliament as mentioned in List I of the Seventh Schedule. In determining whether a legislation is within the field of a competent legislature where its powers are circumscribed by enumerated list in a Constitution, it is necessary to find out the true nature of the legislation or in other words as have been said in several decisions, the pith and substance of the legislation and then to find out whether the legislation in its pith and substance is within one of the lists enumerated and given to that particular legislature (See the observations of the Judicial Committee in the case of *Prafulla Kumar Mukharjee v. Bank of Commerce Ltd., Khulna*, 74 Ind App 23 - (AIR,

1947 PC 60). Since the entries in the different legislative lists are likely to overlap occasionally, it is usual to examine the pith and substance of the legislation with a view to determine to which entry the legislation can substantially be related to, a slight connection with another entry in another list will not matter. (See the observations of the Supreme Court in the case of Second Gift Tax Officer, Mangalore v. D. H. Hazareth, (AIR 1970 SC 999). We have held that the establishment of the City Civil Court by the State Legislature in 1953 was within the competence of the State Legislature in view of the Entry 3 of List II of the 7th Schedule of the Constitution. The question for consideration now is whether by the amendment of 1969, the conferment of certain additional jurisdiction to the City Civil Court in respect of suits and proceedings arising out of items enumerated in list I, was proper. We have noticed that Entry 77 of List I of the 7th Schedule contains jurisdiction and powers of the Supreme Court while Entry 78 of the said list does not contain jurisdiction and powers of the High Courts. Furthermore it has to be observed that Entry 13, in List III, i.e. the Concurrent List, also provides for Civil Procedure. We have held that said Entry 13 cannot confer jurisdiction to legislature to constitute any Court. It does not give the Legislatures authority to set up a machinery for Civil litigation but gives authority to Legislatures for providing rules for regulating the machinery. In pith and substance the amendment, is a law relating to administration of justice, constitution and organisation of courts, and as such it is within the legislative competence of the State Legislature, and it is not prohibited in view of the absence of the jurisdiction and powers of the High Court in Entry 78 of List I of 7th Schedule of the Constitution. Looking it from another point of view, in our opinion, the amendment can also be upheld on the ground that it is a law relating to Civil Procedure and is a valid piece of legislation being within the Entry 13 of List III of the Seventh Schedule. No substantive rights of the persons, in respect of the law of carriage or law of navigation or law of shipping or law of promissory notes, have in any way been affected by the amendments made. What has been done is to provide a different method for enforcing some of these rights within the territory of this state. That is the pith and substance of the City Civil Court (Amendment) Act, 1969. It was contended that the City Civil Court would be incompetent to apply the law

of limitation. We are unable to see the force of this contention. The law of limitation is a law by the Union Parliament which is binding on all courts in India and as such naturally the City Civil Court would have to apply and follow the law of limitation in respect of the claims arising before it.

15. In view we have taken, it must be held that the establishment of City Civil Court in 1953 and the conferment of certain additional jurisdiction to that Court in 1969, are within competence of the State Legislature. We have, therefore to hold that the Calcutta City Civil Court Act, 1953 (West Bengal Act XXI of 1953) and the City Civil Court (Amendment) Act, 1969, are intra vires the powers of the State Legislature.

16. The learned trial Judge has further held that the petitioners are guilty of laches. If we were able to accept the contentions of the petitioners and if the Act was ultra vires, the powers of the State Legislature then in view of the fact that the amendment was introduced in 1969, which to a very large extent curtailed the original jurisdiction of the High Court, we would not have refused to entertain this application on the aforesaid ground of delay. However, in the view we have taken, this point need not be pursued further.

17. Learned Government Pleader raised a point that the petitioners have not shown how they were affected and further he contended that as the attorneys have been given the right to practise in the City Civil Court, the petitioners have received benefits under the Act, as such they were not entitled to challenge the Act. It appears that the petitioners are practising attorneys of this High Court. If the Act was ultra vires, the petitioners would certainly be affected by the enforcement of an ultra vires Act in the pursuit of their profession. Furthermore there is no evidence that the petitioners have received any special benefit under the Act of 1953 or under the Amendment Act of 1969. We are, therefore, of the opinion that had it been possible for us to accept the contentions of the petitioners we would not have refused the application on the aforesaid contention of learned Government Pleader.

18. In the view, however, we have taken on the main questions in this application, this appeal must fail and is accordingly dismissed. The order dated 25th November, 1969 of P. K. Banerjee, J., dismissing the application under Article 226 of the Constitution is hereby confirmed. In the facts and cir-

cumstances of this case there will be no order as to costs.

ARUN K. MUKHERJEA, J.:— 19. I agree.

Appeal dismissed.

AIR 1972 CALCUTTA 172 (V 59 C. 29)

RAMENDRA MOHAN DATTA, J.

Biswapati Dey, Applicant v. Kennsington Stores and others, Respondents.

Suit No. 2017 of 1956, D/- 18-2-1971.

Limitation Act (1963), Article 136
— Execution of decree — Time required for obtaining certified copy of decree cannot be excluded for computing limitation. (X-Ref:— Calcutta High Court, Original Side Rules Ch. XVII, Rule 10).

Article 136 of the Limitation Act of 1963 has set a new deadline beyond which no application for execution of the decree can be made. The period of 12 years is long enough to execute a decree when it is enforceable and the intention of the legislature is quite apparent from the language used therein that the time to make the execution application is 12 years from the time when the decree or order becomes enforceable. (Para 15)

Chapter XVII, Rule 10 of the Original Side Rules of the Calcutta High Court come into play actually at the time of executing the decree through an execution application before the Original Side of Calcutta High Court and not before that although the decree might be enforceable on the day it is passed. That is the distinction between the said two expressions viz., "to execute" and "to enforce". Accordingly Chapter XVII Rule 10 cannot stand in the way of the language used in the third column of Article 136 of the Limitation Act of 1963. (Para 11)

Cases Referred: Chronological Paras

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|---|----|
| (1961) AIR 1961 Cal 155 (V 48) | |
| = 64 Cal WN 734, Bharat Chandra Bera v. Rajendra Nath Ghosh | 12 |
| (1958) AIR 1958 Cal 1 (V 45) | |
| = 61 Cal WN 494, Lala Baijnath Prosad v. Nursingdas Guzrati | 13 |
| (1950) AIR 1950 Cal 298 (V 37) | |
| Midnapore Zemindary Co. Ltd. v. Naba Kumar Singh Dudhoria | 12 |
| (1949) AIR 1949 Cal 113 (V 36) | |
| = 48 Cal WN 645, Jagannath Jugal Kishore v. Chimanlal Chowdhuri | 14 |

Mullick, for Decree-holder.

ORDER:— The short but important point involved in this execution application is about the meaning of the expression "when the decree or order be-

comes enforceable" as provided in the third column of Article 136 of the Limitation Act of 1963. By the said provision 12 years' time has been given for the execution of a decree. The said Article provides:

"136. For the Twelve When the decree execution of years. or order becomes any decree enforceable or (other than a decree granting a mandatorily injunction) or order of any civil Court.

where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought takes place; provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

2. On behalf of the decree-holder It is argued that the time to obtain the certified copy of the decree should be excluded in computing the period of 12 years mentioned in column two of the aforesaid Article and 12 years should start running from the date when the certified copy thereof is obtained from court. The point arises on the following facts:

3. On 30th November 1956 the decree herein was passed. Requisition to draw up the decree was put in on the very same date. Thereafter the draft decree was issued for approval and the same was settled and passed finally on 19th March, 1957. The decree was filed on 25th June, 1957. On behalf of the decree-holder stamps were put in on 10th August 1959 for obtaining the certified copy of the decree. The present tabular statement was taken out on 25th January 1969 accompanied by the certified copy.

4. The matter came up for hearing before Ghose, J. on 24th February, 1970 when the decree-holder was given liberty to use a further affidavit. It appears that since 9th March 1970 this application became ripe for hearing again.

but the same was adjourned from time to time at the request of the parties.

5. Although the date for obtaining the certified copy has not been furnished yet the point was considered on the basis that the same must have been supplied not earlier than 25th June 1957 when the decree was filed. It would appear that if I hold that the time to obtain the certified copy is to be excluded, in that event by computing the period of 12 years from 25th June 1957 the application would be within time but if I hold that the date of the decree is the relevant date when time has begun to run within the meaning of the expression "when the decree becomes enforceable" then in that event the application must be held to be barred by limitation.

6. If the language used in the third column is read as a whole, a clear meaning is found in respect of the expression "When the decree or order becomes enforceable". The word "enforceable" has been used in the context of such decrees or orders whose operations have been kept in abeyance by the language used in the said decrees or orders themselves. The intention of the Legislature in using the word "enforceable" must have been to clear up any confusion that might have arisen by using the expression "the date of the decree or order" which was used in the earlier Act. My attention has been drawn to the Objects and Reasons for framing the above article, as set out in the 4th Edition of A. I. R. Commentary on the Law of Limitation, Vol. II at p. 1870 as follows:

"Existing Article 182 has been a fruitful source of litigation and therefore the proposed Article 135 (now Article 136) in lieu thereof, provides that the maximum period of limitation for the execution of a decree or order of any civil court shall be 12 years from the date when the decree or order became enforceable (which is usually the date of the decree or order) or where the decree or subsequent order directs any payment of money or delivery of any property to be made at a certain date or at recurring periods from the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree or order. There is no reason why a decree should be kept alive for more than 12 years. Section 48 of the Civil Procedure Code, 1908, provides that a decree ceases to be enforceable after 12 years. In England also the time fixed for enforcing a judgment is 12 years. Where, however, the judgment-debtor has by fraud or force prevented the execu-

tion of a decree within the prescribed period, suitable provisions for extending the period are being made in Clause 16 (now Section 17) of the Bill on the lines of Section 48 (2) of the Code of Civil Procedure, 1908."

"Existing Article 183, which makes special provision for decrees and orders of Courts established by Royal charter, is no longer necessary."

"It is also provided that the period of 12 years will not apply to decrees granting perpetual injunction."

—S. O. R."

7. The intention of the legislature has been clearly expressed by the language used therein also, the intention being to give 12 years certain from the date when the decree or order would become enforceable. Normally the date when the decree becomes enforceable is the date of the decree but the third column also envisages cases where by the language of the decree itself the decree would be kept in abeyance for certain period or till the happening a certain event. Under such circumstances the decree would be enforceable when such period expires or when the event occurs.

8. In my opinion, there is no ambiguity in the language used in the third column and the words used therein should be read in their literal sense. The said third column cannot, in my opinion, warrant any other construction except in the way it has been read as above.

9. Mr. Mullick on behalf of the decree-holder contends that the decree does not become enforceable until the certified copy thereof is obtained from this Court because any execution application without such certified copy being annexed thereto would be dismissed in limine by the Calcutta High Court in its Original Side in view of Chapter XVII Rule 10 wherein it is, inter alia, provided:

"In all cases, the application shall be accompanied by a duly certified copy of the decree."

By the said Rule 10 of Chapter XVII of the Original Side Rules, the form of the application for execution of the decree has been prescribed and the application is required to be made in accordance with the said form. It has been decided in various cases that unless the execution application shall be accompanied by a certified copy of the decree then the same would be dismissed in limine. Accordingly, it is argued by Mr. Mullick that this time has got to be excluded in computing the period 12 years as provided under Article 136 of the Limitation Act of 1963 otherwise there will be lack of uniformity in respect of the said period of 12 years in

such applications for execution in different High Courts or between different Courts in the same High Court.

10. It is difficult to appreciate Mr. Mullick's argument. It is true, that whatever the reason might be, in this case the certified copy has been issued long after the requisition was given for drawing up the decree. But these rules have been framed relating to the formalities to be observed in the execution applications and are matters relating to the procedure to be followed. Had the intention of the legislature been such that the time to obtain the certified copy should be excluded then that would have found expression in the sections of the Limitation Act.

11. In any event, the time taken for obtaining the certified copy of the decree is not uniformly the same and normally the Court will not take such long time as has been taken in this case. There may be cases where in case of urgency the certified copy can be obtained at the earliest possible time and soon after the decree is passed say within two or three days. To put up such a plea that the department concerned must take considerable time to make the certified copy available has no basis. In any event, when the legislature granted such a long time as 12 years the legislature must have taken into consideration the fact that the decree holder might take some reasonable time to obtain the certified copy of the decree and such time would be deemed to be included within the period of 12 years. In my opinion Chap. XVII R. 10 of the Original Side Rules come into play actually at the time of executing the decree through an execution application before the Original Side of this Court and not before that although the decree might be enforceable on the day it is passed. That, in my opinion, is the distinction between the said two expressions viz., "to execute" and "to enforce". Accordingly Chapter XVII Rule 10 cannot stand in the way of the language used in the third column of Article 136 of the Limitation Act of 1963.

12. Mr. Mullick next argues that the delay caused by the Court in supplying the certified copy of the decree and the default committed thereby should not visit the decree holder and referred to the case of *Midnapore Zemindary Co. Ltd. v. Naba Kumar Singh Dudhuria*, AIR 1950 Cal 298 and to the case of *Bharat Chandra Bera v. Rajendra Nath Ghose*, AIR 1961 Cal 155. In my opinion, the principles referred to in the above cases cannot be applied to the facts of the case before me inasmuch as in supplying the certified copy of the

decree and in taking some time for it, the Court through its department does not commit any default or laches so as to create prejudice to the decree holder. Experience shows that mostly due to the laches on behalf of the parties that time is taken more than what it should be taken by the department. Otherwise if things proceed normally the Court or its department cannot take much time in supplying the certified copy of the decree.

13. My attention has been drawn to the case of *Lala Baijnath Prosad v. Nurisingdas Guzrati*, AIR 1958 Cal 1, where the Division Bench of this Court considered the meaning of the expression: "A person's right to enforce the decree" under Art. 183 of the Limitation Act of 1908. There also a point was taken that the time to take that the certified copy of the decree as required by Ch. XVII Rule 10 of the Original Side Rules of the High Court should be excluded. In rejecting the said contention, it was observed by the Bench that where the language of the decree was such that it was immediately executable the starting point of limitation under Article 183 would be the date of passing of the decree and not when the certified copy of the decree as required by Chap. XVII of Rule 10 of the Original Side Rules of the High Court would be obtained.

14. In the case of *Jagannath Jugal Kishore v. Chimanlal Chowdhuri*, AIR 1949 Cal 113 the expression "to execute" a decree under Article 182 of the Limitation Act of 1908.

15. In my opinion Article 136 of the Limitation Act of 1963 has set a new deadline beyond which no application for execution of the decree can be made. The period of 12 years is long enough to execute a decree when it is enforceable and the intention of the legislature is quite apparent from the language used therein that the time to make the execution application is 12 years from the time when the decree or order becomes enforceable.

16. In that view of the matter, the application for execution must be dismissed with cost and I make an order accordingly.

17. Certified for counsel.

Application dismissed.

AIR 1972 CALCUTTA 174 (V 59 C 30)
GHOSE, J.

Radha Kanto Chatterjee, Petitioner
v. The State of West Bengal and others,
Respondents.

Matter No. 570 of 1970, D/- 16-6-1971.

LO/AP/G38/71/BNP

Constitution of India, Article 14 — Order fixing employees, similarly circumstanced and enjoying similar scales of pay, in different scales of pay is discriminatory and violative of Art. 14.

(Para 14)

Cases Referred: Chronological Paras

(1969) 1969 Lab IC 1265 = 1969	
Serv LR 210 (Delhi), Union of	
India v. Shanti Swaroop	12
(1962) AIR 1962 SC 1139 (V 49) =	
44 ITR 532, Kishori Mohanlal	
Bakshi v. Union of India	13

Ghosh, for Petitioner.

ORDER :— This application has been made by the petitioner who is a cashier in the office of the respondent No. 2, Director of Industries, Government of West Bengal, inter alia, for the issue of a Writ in the nature of mandamus commanding the respondents Nos. 1 to 3 to withdraw or cancel the orders dt. June 16/20 and July 27, 1970 and refrain from giving any effect thereto and for commanding them to act according to law, inter alia, in fixing or revising the pay-scale and grade of the petitioner; and also for a Writ in the nature of mandamus commanding the respondents 1 to 3 to place and fix the petitioner in the grade or scale of pay of Rs. 300-450 or Rs. 250-400 as set forth in the annexures 'K' and 'M' to the petition. This application also seeks for the issue of a writ in the nature of Certiorari for quashing the appointment of the respondent No. 4 to the post of the cashier in the grade or scale of pay of Rs. 250-400/- under the respondent No. 3 in supersession of the petitioner.

2. On or about November 30, 1948, the petitioner after completing the probationary period of 2 years was confirmed in the post of cashier in the office of the respondent No. 2 in the scale of Rs. 80-5-105. In or about 1958 the petitioner's grade was enhanced to Rs. 105-5-210/-. The said grade was enhanced to Rs. 200-5-250 on March 1, 1959.

3. On December 12, 1960 the petitioner was charged with having misappropriated a cheque for Rs. 3388/- and was suspended on that ground. The petitioner was prosecuted on the aforesaid criminal charge before the Chief Presidency Magistrate, Calcutta and was acquitted on November 28, 1961. The petitioner was not allowed to join his duties thereafter. Departmental proceedings on the basis of the aforesaid charge was commenced against the petitioner on or about August 18, 1962. As a result of the said departmental proceedings the petitioner was dismissed from his service as such cashier on or about January 26, 1963. On or about

September 7, 1964, the petitioner instituted a suit being suit No. 1676 of 1964 in this Court against, inter alia, the State of West Bengal inter alia, for a declaration that he continued to be in the employ of the State of West Bengal.

4. By judgment and decree passed in the said suit on March 21, 1967, the petitioner was directed to be reinstated to the substantive post held by him with backlog of all his claims for salaries and other emoluments. On or about July 22, 1967 the petitioner was reinstated to the former substantive post held by him in the office of the respondent No. 2. In the meantime, with effect from April 1, 1961 or from the date of option to be exercised by an employee as contemplated in the said Rules West Bengal Services (Revision of Pay and Allowance) Rules, 1961 came into force. The said Rules revised the previous scales of pay of employees in the different categories under the State of West Bengal.

5. Prior to April 1, 1961, the petitioner was holding the substantive permanent post of cashier in the office of the respondent No. 2 and was in the grade of Rs. 200-5-250. By a letter dated July 27, 1967 the Deputy Director of Industries (Administration) asked the petitioner as to whether he would exercise his option under the said West Bengal Services (Revision of Pay and Allowance) Rules, 1961. The petitioner exercised his option under protest and was fixed in the revised scale of pay Rs. 200-300. The petitioner times without number, requested the respondent Nos. 1 to 3 to fix him in the grade of either Rs. 300-20-400-25-450 or Rs. 250-15-400, the scales of pay allowed to all other employees of the same grade to which the petitioner belonged in the same department as well as other departments of the respondent No. 1. The petitioner submitted memorandum even to the Governor of the State of West Bengal. But nothing was done by the authorities to redress the grievances of the petitioner. By a letter dated 16/20th June, 1970 the Secretary to the Department of Commerce and Industries informed the petitioner that the pay-scale of a particular post should not be considered at that stage and advised the petitioner to await the recommendations of the Pay Commission which had been holding deliberations at that time. By a letter dated June 24, 1970 the petitioner asked the Director of Industries for refixation of his pay as already prayed for but was again by a letter dated 27th July, 1970 asked to wait until the recommendations of the Pay Commission, was submitted.

6. The petitioner moved this Court in its Constitutional writ jurisdiction on September 28, 1970 when rule Nisi was issued in the matter. The petitioner challenges the Rule fixing his revised scale of pay as violative of the provisions of Article 14 on the ground as follows:

7. All employees in his department like the head clerk as well as in other departments who were in the same scale of pay and therefore in the same grade have been allotted scales of pay Rs. 300-450 or Rs. 250-400 but the pay of the petitioner has only been kept in the scale of Rs. 200-10-300. Thus the said rule fixing the said scale for the petitioner only is discriminatory, without any reasonable basis and is violative of the provisions of Article 14 of the Constitution.

8. Formerly there was no Directorate of Cottage and Small Scale Industries under the Government of West Bengal. The Department of Cottage and Small Scale Industries was a part of the Department of Industries. The cashier in the said new Department of the respondent No. 3 is entitled to the scale of Rs. 250-400. The said new department was made separate and distinct in June, 1966 only.

9. In paragraph 35 the petitioner has alleged as follows:—

"35. That your petitioner further states and contends that the said Rules are also equally bad, illegal, mala fide and void inasmuch as by the said Rules a clear path of hostile discrimination and/or differentiation between the self-same grade and/or scales of pay have been opened up under the self-same common employer by the instrumentation of uncontrolled and unguided discretionary power and/or executive whims and arbitrariness in the matter of application of the said Rules, and in particular, the said Rule XI (1) (b), touching upon the fixation of revised pay scale and/or structure. As for instance, the said items Nos. 1, 9 and 14 can be cited in this context, moreover, the said Rules are clearly bad, illegal and void because of violation of the provisions of Art. 14 of the Constitution of India inasmuch as in the self same grades and/or scales of pay 5 different classes have been set up and created by the selfsame employer e.g., items Nos. 1, 9 and 14, the enclosure to the said annexure 'I' and 2 Classes of Head Clerks, all of which were enjoying and posted in the self-same grades and/or scales of pay, similarly and identically situate and placed with your petitioner, as on the 31st March, 1961."

10. It appears from Annexure I to the petition filed herein that all

persons in the employ in different departments or offices of the State of West Bengal who were in the pay scale of Rs. 200-5-250 before revision have been allotted and placed in the revised pay scale of Rs. 250-15-400 without any exception save and except the petitioner in the instant case. The petitioner has stated in his petition that all the said employees were and are placed in similar circumstances. The State has not filed any affidavit in opposition to the petition even within the extended periods of time which were successively granted by this Court. Only on the last day of the hearing viz., on 11th June 1971 Mr. Chakraborty appearing on behalf of the State wanted to file an affidavit in opposition. Before that date this matter was part-heard once before me on 21st April, 1971. Even then the State did not want to file any affidavit. In that view of the matter I refused to grant any further indulgence to the State and refused to admit the affidavit sought to be filed by the State.

11. Thus there is no denial to the facts stated in the petition. In particular there is no denial of the fact as stated in the petition that the petitioner and all other employees belonging to the grade of Rs. 200-5-300 and Rs. 200-10-300 prior to April 1961 were placed in similar circumstances and had no difference in between them. It is true that the State has the power of classifying persons for legitimate purposes and on reasonable basis. But here there does not seem to me that any such differentiation exists in between the employees mentioned above enjoying the scales of pay of Rs. 200-5-300 or Rs. 200-10-300 formerly.

12. Mr. Ghosh appearing on behalf of the petitioner cited the decision of the Delhi High Court in *Union of India v. Shanti Swaroop*, 1969 Lap IC 1265 (1267) (Delhi). But the said case seems to have decided that Number Takers employed by the Railways in its different Divisions were given a scale which was better than one given to the Number Takers employed in the Delhi Division of the Railways. The Number Takers in the Delhi Division of the Railways became entitled to the revised pay scale from 1st January 1947 or 16th August 1947 as per option exercised by them under Rule 6 of the Railways Services (Revision of Pay) Rules 1947. The said Rules were framed under Section 241 (2) of the Government of India Act, 1935 and were of statutory character. The same were preserved by Article 313 of the Constitution as the law of the land and applicable to the employees governed by them. The benefits of the revised pay

scale under the said statutory Rules were sought to be denied to the Number Takers of the Delhi Division. The denial of the benefits of the said revised scale of pay was held to be discriminatory in the case of the Number Takers of the Delhi Division of the Railways and struck down. It should be noted that in the said case the rights and benefits conferred upon the said employees by the aforesaid Statutory Rules framed under Section 241 (2) of the Government of India Act, 1935 were enforced. In the instant case, also it appears that the applicant has been treated differently from other employees similarly circumstanced without any reasonable basis.

13. In the case of Kishori Mohanlal Bakshi v. Union of India, AIR 1962 SC 1139, it was contended on behalf of Class II Income-tax Officers that there was discrimination in between them and Class I Income-tax Officers in regard to their respective scales of pay even though both the Class I Income-tax officers and Class II Income-tax Officers had to do and in fact did the same kind of work. The said contention was repelled by the Supreme Court with the following observations:—

"The only other contention raised is that there is discrimination between Class I and Class II Officers inasmuch as though they do the same kind of work their pay scales are different. This it is said, violates Article 14 of the Constitution. If this contention had any validity, there could be no incremental scales of pay fixed dependent on the duration of an Officer's service. The abstract doctrine of equal pay for equal work has nothing to do with Art. 14. The contention that Article 14 of the Constitution has been violated, therefore, also fails."

14. But that observation, it seems, was based really on reference to difference in pay scale on the basis of difference in duration of service and does not, in my opinion, apply to the facts and circumstances of the instant case. In the instant case, the employees who were similarly circumstanced and enjoying similar scales of pay have been allotted and fixed in different scales of pay by the aforesaid order. The same seems to be discriminatory and violative of the principles of Art. 14 of the Constitution.

15. The other part of the application which challenges the appointment of respondent No. 4 as the cashier of respondent No. 3 must fail in my opinion. The said appointment was made in June, 1966. At that time the petitioner was removed (although held later as wrongfully removed) and was not

acting as the cashier under respondent No. 3. The appointment of respondent No. 4 who was junior to the petitioner at that time as cashier of respondent No. 3 did not militate against the provision of Article 16. The only right of a Government employee is to be considered for promotion. At the time when the respondent No. 4 was appointed as the cashier of respondent No. 3, the petitioner could not be considered for that appointment and the appointment of the respondent No. 4 was not vitiated for not considering the petitioner for that appointment at that time.

16. In the premises, this application must succeed. A writ in the nature of mandamus shall issue commanding the respondent Nos. 1 to 3 and each of them and their servants and agents to place and fix the petitioner in the grade or scale of pay of Rs. 250-15-400. The petitioner shall receive all arrears of pay and other emoluments on the basis of that scale with effect from 28th September, 1967. The Rule is made absolute to the extent as aforesaid. In the facts and circumstances of the case each party shall pay and bear his costs of and incidental to this application.

Application allowed.

AIR 1972 CALCUTTA 177 (V 59 C 31)

ARUN K. MUKHERJEA AND
M. M. DUTT, JJ.

Fatechand Mahesri and others, Appellants v. State of West Bengal and others. Respondents.

A. F. O. D. No. 953 of 1966, D/- 17-9-1971.

(A) West Bengal Estates Acquisition Act (1 of 1954), Ss. 14 (3), 6 — Intermediary — Joint Hindu family — Mitakshara — Joint family as tenure holder in respect of disputed property before vesting — Joint family (not each coparcener) is an "intermediary" under the Act — Joint Hindu family should, therefore, be treated as a single individual or a single unit for the purpose of retention of land and also for compensation under the Act — (X-Ref:— Hindu Law — Joint family — Partition). F. M. A. Nos. 6 and 7 of 1962, D/- 17-1-1969 (Cal) and F. M. A. No. 604 of 1964, D/- 20-1-69 (Cal), Foll. (Para 34)

The position of an execution purchaser cannot be equated with that of a coparcener after vesting of the coparcenary property. (1879) 6 Ind App 88 (PC) and (1877) 4 Ind App 247 (PC) and AIR 1953 SC 487, Ref. (Para 21)

The property in the hands of the Government remains to be coparcenary

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property, but in another form, that is, in the form of money. (Para 22)

The vesting of coparcenary property under the West Bengal Estates Acquisition Act cannot be regarded as effecting a partition of the coparcenary. (Para 29)

A joint Hindu family governed by the Mitakshara School of Hindu law is a 'person' under the definition of the term as given in Section 3 (42) of the General Clauses Act and a single coparcener out of the body of coparceners constituting the coparcenary cannot be held to be a person or a co-sharer tenant. (Para 30)

Under Section 6 of the Act, no provision has been made for retention of land by the coparceners governed by the mitakshara School of Hindu law. This points to the intention of the legislature that the legislature did not intend to treat each coparcener as an intermediary under the Act. Sub-section (3) of Section 14 clearly indicates that the intermediary for assessment of compensation must have a share in any estate or interest so that he may be treated separately for assessment of compensation. The share referred to in sub-section (3) means a defined share; as the coparcener cannot be said to have a defined share in the coparcenary property, he cannot be treated separately for the purpose of assessment of compensation under sub-section (3) of S. 14. (Para 31)

(B) Hindu Law — Joint family — Mitakshara — Partition.

Partition is a severance of joint status and all that is necessary to constitute partition is a definite and unequivocal indication of the intention of a member of a joint family to separate himself from the family and enjoy his share in severality. But this intention has to be communicated to the other members of the family. AIR 1964 SC 136, Ref. (Para 15)

Cases Referred: Chronological Paras

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| (1969) F. M. A. No. 604 of 1964, D/- 20-1-1969 (Cal), Subhakaran Dugar v. State of West Bengal | 17 |
| (1969) F. M. A. Nos. 6 and 7 of 1962, D/- 17-1-69 (Cal), Biswanath Misra v. Asstt. Settlement Officer | 17 |
| (1964) AIR 1964 SC 136 (V 51) = 1964-2 SCR 933, Raghavamma v. Chenchamma | 15 |
| (1953) AIR 1953 SC 487 (V 40) = 1954 SCR 177, Sidheswar Mukherjee v. Bhubneshwar Prasad | 20 |
| (1879) 6 Ind App 88 = ILR 5 Cal 148 (PC), Suraj Bansi Koer v. Sheo Proshad Singh | 18, 19 |
| (1877) 4 Ind App 247 = ILR 3 Cal 198 (PC), Deendyal Lal v. Jugdeep Narain Singh | 20 |

P. K. Roy and Nihar Ranjan Mujumdar, for Appellants; Hemendra Chandra Sen and B. C. Dutt, for Respondent No. 1.

M. M. DUTT, J.:— This appeal is at the instance of the plaintiffs and arises out of a suit for declaration of title, recovery of possession, permanent injunction and other consequential reliefs. The principal question involved in this appeal is whether each of the coparceners of a Mitakshara Joint Hindu family is an intermediary within the meaning of the West Bengal Estates Acquisition Act, 1953.

2. The plaintiff No. 1 Fatechand Mahesri is the father of the plaintiffs 2, 3 and 4. The plaintiffs Nos. 5 to 10 are the grandsons of the plaintiff No. 1 Fatechand. Plaintiffs Nos. 5 and 6 are the sons of the plaintiff No. 2 Sitaram, plaintiff Nos. 7 to 9 are the sons of plaintiff No. 3 Gouri Sarkar and the plaintiff No. 10 is the son of the plaintiff No. 4 Lakshmi Narayan.

3. The case of the plaintiffs was that the plaintiffs constituted a joint Hindu family governed by the Mitakshara School of Hindu Law. Fatechand Mahesri was the Karta of the said joint family. The properties described in Schedule 'A' of the plaint were the joint family properties acquired with the ancestral funds. It was alleged that the joint status of Fatechand and his three sons, namely, the plaintiffs Nos. 2, 3 and 4 was severed on and from April 10, 1946. In view of the said severance each of the plaintiffs Nos. 1 to 4 became entitled to 1/4th share in the schedule 'A' properties. Each of the plaintiffs Nos. 1 to 4, however, constituted separate joint family with his sons and continued to live jointly for some time. It was alleged that on April 1, 1955, the sons of Fatechand declared their intention to sever their joint status with their respective sons. There was, therefore, complete severance in status of the members of the joint family constituted by the plaintiffs.

4. After the West Bengal Estates Acquisition Act came into force the names of the plaintiffs were not recorded in the Revisional Record of Rights, according to their respective shares. Instead, the name of Fatechand Mahesri was recorded in respect of all the properties. The plaintiffs submitted returns in Form 'B' retaining the khas lands in their respective shares as mentioned in schedule 'B' to the plaint. The plaintiffs were about to retain the khas lands mentioned in 'B' schedule to the plaint in terms of the order dated October, 1959 of the Revenue Officer passed in a proceeding under Section 44 (2a) of

the Act. The Revenue Officer also directed opening of khandakhatians in the names of the plaintiffs in respect of the 'B' schedule lands but the Government did not give effect to the order of the Revenue Officer.

5. The plaintiffs claimed that each of the plaintiffs was an intermediary and each of them was entitled to get compensation in respect of the lands of 'A' schedule and that each of them was entitled to retain khas possession of the lands described in schedule 'B'.

6. The plaintiffs have claimed recovery of khas possession of the 'B' schedule lands as the State Government took possession of the said lands and granted licences to different persons. By an application for amendment the plaintiff's got the plaint amended by adding 227 persons as defendants in the suit. They were alleged to be the licensees of the State Government in respect of 'B' schedule lands.

7. The plaintiffs accordingly prayed for declaration of their title to the extent of their respective shares in respect of the lands in suit, a further declaration that the plaintiffs were intermediaries and were entitled to retain the 'B' schedule lands separately according to their claim and title to those lands as raiyats under the State of West Bengal, recovery of khas possession of the 'B' schedule lands and permanent injunction restraining the State of West Bengal from settling the lands of 'B' schedule to any other persons.

8. The suit was contested by the State of West Bengal. It was alleged that the lands mentioned in schedule 'A' were held and possessed by the plaintiff No. 1 and the plaintiff No. 2 as their personal properties and treated as such by them at all material times, that the other plaintiffs never had any right, title or interest in the land in suit and that they never claimed any interest therein before the lands were acquired by the Government as surplus land of the plaintiffs Nos. 1 and 2. It was denied that there was severance in the joint status of the plaintiffs on April 10, 1946, between the plaintiffs Nos. 1 to 4 or that there was any severance between the plaintiffs Nos. 2, 3 and 4 and their respective sons on April 1, 1955 as alleged in the plaint. It appears from the written statement of the defendant No. 1, the State of West Bengal that according to the defendant No. 1 the properties in suit belonged to the plaintiffs Nos. 1 and 2 and not to the joint Hindu family as claimed in the plaint. The defendant No. 1 denied any right of the plaintiffs Nos. 3 to 10 in the pro-

perties in suit and alleged that the plaintiffs Nos. 1 and 2 were allowed to retain land in accordance with the ceiling prescribed by the Act and that the rest of the land having vested in the State, the State took possession of the same. The defendant No. 1 denied the plaintiffs' claim for recovery of possession of the 'B' schedule land.

9. The defendant No. 1 filed an additional written statement. In the additional written statement it has been alleged that so long as the coparcenary exists, the coparcenary should be treated as one single intermediary for the purpose of retention of land irrespective of the number of members who may constitute the coparcenary.

10. The learned Subordinate Judge came to the findings that the suit properties standing in the name of the plaintiff No. 1 Fatechand, though originally might have been acquired as his separate properties yet those did subsequently lose that character and became the properties of the joint Hindu family by virtue of waiver of that separate right of the plaintiff No. 1. Therefore, the finding of the learned Subordinate Judge is that the suit properties were the coparcenary properties of the joint Hindu family consisting of the plaintiffs. The learned Subordinate Judge disbelieved the case of the plaintiffs that there was severance of the joint status or that the coparcenary came to an end either on April 10, 1946 or on April 1, 1955 as alleged by the plaintiffs. On the question whether each of the coparceners was an intermediary or not, the learned Subordinate Judge was of the view that the joint Hindu family should be treated as one unit for the purpose of retention of lands under Section 6 (1) or for the purpose of compensation in respect of the vested lands, under the Act. In that view of the matter, the learned Subordinate Judge dismissed the plaintiffs' suit. Hence this appeal by the plaintiffs.

11. Although the plaintiffs' case was that there had been severance of joint status between Fatechand Mahesri and his sons on April 10, 1946, and thereafter between the sons of Fatechand and their respective sons on April 1, 1955, Mr. Roy, learned Advocate appearing on behalf of the appellants submitted before us that on the materials on record it would be difficult to support the case of severance that was alleged to have taken place on April 1, 1955 between the sons and grandsons of Fatechand. He, however pressed the alleged partition that took place between Fatechand and his sons, the plaintiffs Nos. 2, 3 and 4.

12. It is well established rule of law that according to true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property that he — that particular member — has a certain definite share, one-third or one-fourth. Partition according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. But whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint immediately the shares are defined, and thenceforth the parties hold the property as tenants-in-common (See Mulla's Hindu Law, 13th Edition, Article 322 page 372).

13. In support of his contention Mr. Roy relied upon certain assessment orders passed by the Agriculture Income Tax Officer. These assessment orders are Exhibits 8 to 8 (c) and they relate to the assessment years 1944-45 to 1947-48. In all these assessment orders Fatechand Mahesri has been mentioned as the assessee. In column No. 6 under the item "share, partners/ members with the names and the shares" the names of Fatechand Mahesri and his three sons are mentioned and each one has been shown as having four annas share. In column No. 9 of the assessment order (Exhibit 8 it appears that the Agricultural Income-tax Officer accepted the contention of the assessee that the status of the assessee was that of a firm. From these entries in the assessment orders Mr. Roy contended that there was severance of the joint status between Fatechand Mahesri and his sons even in the year 1944. In any event, it was submitted that it was a clear intention on their part to separate inasmuch as they specified their shares in the joint property in the Agricultural Income Tax assessment proceedings. Attractive though the contention is, we regret that we are unable to accept the same. The plaintiffs have not filed the returns of their agricultural income for the assessment years in respect of which the assessment orders were passed. The plaintiffs have not also filed the Roker Book for the relevant year in which severance of the joint status or partition

was alleged to have taken place and also the Roker Books of the subsequent years showing recording of separate shares in the names of Fatechand Mehesri and his sons. None of the plaintiffs examined himself and no explanation was given why none of them was examined. On behalf of the plaintiffs one Chhaganlal Mahesri, the nephew of Fatechand was only examined. Chhaganlal stated in his evidence that the partition took place on April 10, 1946, between Fatechand and his three sons and he averred that in the Roker of all subsequent years the names of the said four persons were noted separately till 1956. As aforesaid, no such Roker was filed and no explanation has been given by Chhaganlal for the non-filing of any such Roker Books. Further, Chhaganlal stated that there was no separation of shares before April 10, 1946. In the plaint also the plaintiffs' case was that there was separation between Fatechand and his sons on April 10, 1946, but if the assessment orders are accepted to be evidence of separation then it must be held that separation between Fatechand and his sons had taken place at least in 1944.

14. The assessment orders do not contain the description of properties in respect of which the agricultural income was assessed on Fatechand and his three sons. It may be that the joint family had no other property excepting the properties in suit. But from that alone it cannot be inferred that the assessment orders relate to the properties in suit as contended by Mr. Roy. In the absence of any evidence on that point, it is very difficult to rely on the evidence of Chhaganlal about the partition alleged to have taken place on April 10, 1946, for, in the year 1959 Chhaganlal swore an affidavit in the writ petition before this Court on behalf of the plaintiffs wherein it was alleged that the plaintiffs were members of a joint Hindu family governed by the Mitakshara School of the Hindu Law.

15. Partition is a severance of joint status and all that is necessary to constitute partition is a definite and unequivocal indication of the intention of a member of a joint family to separate himself from the family and enjoy his share in severality. But this intention has to be communicated to the other members of the family. In *Raghavamma v. Chenchamma*, AIR 1964 SC 136, the Supreme Court has held that there should be an intention, indication or representation of such intention and that what form that manifestation should take would depend upon the circumstances of each case. The only documentary evidence on which the plaintiffs rely in support of their case that there had been a partition between

Fatechand and his sons, is the assessment orders. There is no evidence on record to show who filed the returns. It may be that Fatechand Mahesri whose name appears in all these assessment orders as the assessee filed the returns without the knowledge of his sons. He was the Karta of the joint family and it can very well be presumed that he filed the returns of agricultural income. There is no evidence that his sons were aware of the filing of these returns wherein the shares of Fatechand and his sons were mentioned as four annas each. As already stated, the Roker Books showing the shares of Fatechand and his sons have not been filed. Merely because in the assessment orders the shares of Fatechand and his sons were shown as four annas each, it cannot be held that there was a severance of joint status of Fatechand and his sons in accordance with law. We would, therefore, overrule the contention of Mr. Roy that there was separation between Fatechand and his sons.

16. The next question is whether each of the plaintiffs is an intermediary within the meaning of the West Bengal Estates Acquisition Act, 1953. The learned Subordinate Judge has not accepted the contention of the plaintiffs that each of the plaintiffs is an intermediary and that each one is entitled to retain lands as per ceiling prescribed by the Act. According to the learned Subordinate Judge, if the undivided family of the plaintiffs continued its status as such on the date of vesting of the estate under the Act, then the coparcenary consisting of all the members should be considered as a single individual and entitled to retain land up to the prescribed ceiling as a single individual or intermediary within the meaning of the Act. This view of the learned Subordinate Judge has been challenged by Mr. Roy.

17. Mr. Roy drew our attention to two unreported Bench decisions of this Court in Biswanath Misra v. Asst. Settlement Officer, F. M. A. Nos. 6 and 7 of 1962 disposed of on 17-1-1969 (Cal) (A. N. Ray and A. N. Sen, JJ.) and in Subhakaran Dugar v. State of West Bengal, F. M. A. No. 604 of 1964 disposed of on 20-1-1969 (Cal) (A. N. Ray and Bagchi, JJ.). The judgments in both the cases were delivered by A. N. Ray, J. (as his Lordship then was). In both these cases it has been held that a coparcener is not an intermediary within the meaning of the Act and that it is the collective body of individuals who constitute the coparcenary is regarded as an intermediary. Mr. Roy has, however, challenged the propriety of these two Bench decisions of this Court.

18. The first point that was urged by Mr. Roy is that partition or no partition each coparcener, that is each of the

plaintiffs, is an intermediary within the meaning of the West Bengal Estate Acquisition Act. According to him on the date of vesting under the Act, the interest of a coparcener in the coparcenary property becomes certain in the sense, that his share becomes defined as in the case of severance of joint status between the coparceners. As soon as the coparcenary property goes out of the joint family there is disruption of joint status in respect of that property and the share of each coparcener becomes defined. In support of his contention Mr. Roy relied upon the decision of the Privy Council in Suraj Bunsri Koer v. Sheo Proshad Singh, (1879) 6 Ind App 88 (PC). In that case, a suit was instituted by two minor sons of one Adit Sahai for setting aside a sale of joint ancestral property which had been sold in execution of a decree obtained against their deceased father on the ground that the debt was not one for which such property should be made liable. It was held by the Privy Council that the purchaser of undivided property sold in execution of a decree during the life of the debtor for his separate debt, acquires the debtor's interest in such property with the power of ascertaining and realising it by partition. According to their Lordships the proper decree to be passed was an order declaring that, by virtue of the execution sale to them, the purchasers acquired only the one undivided third share in the property with such power of ascertaining the extent of such third part or share by means of partition as Adit Sahai possessed in his lifetime. Mr. Roy strongly relied on the observation of the Privy Council that the purchasers acquired one undivided third share in the property. It was contended by Mr. Roy that as soon as the share of the purchasers was declared, the shares of the other coparceners in the property became defined and that effected a partition of the property and severance of the joint status of the coparceners in respect of that property.

19. The decision in Suraj Bunsri Koer's case, (1879) 6 Ind App 88 (PC) is based on equitable principle. According to the Mitakshara law as administered in Bombay and Madras, a coparcener can alienate his undivided interest in the coparcenary property, but in Bengal and United Provinces, a coparcener has no such right and the alienation will be invalid unless it is made with the consent of all other coparceners. In Suraj Bunsri Koer's case, Sir James Colville after referring to the Mitakshara law as administered in Bombay and Madras observed as follows:—

"There can be little doubt that all such alienations whether voluntary or compulsory, are inconsistent with the

strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition."

20. This equitable principle has been incorporated in the Hindu Law for the purpose of safeguarding the interest of a purchaser for value of an undivided share of a coparcener. So far as Bengal is concerned Sir James Colville, after referring to an earlier decision of the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh*, (1877) 4 Ind App 247 (PC) observed that by that decision

"the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution sale during the life of the debtor for his separate debt, does acquire his share in such property with the power of ascertaining and realizing it by a partition."

In *Sidheshwar v. Bhubneshwar*, AIR 1953 SC 487, Mukherjea, J. observed as follows:—

"The High Court has held that this claim of the plaintiff must fail. All that he purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour. In our opinion, this is the right view to take
* * * * *

It is apparent from the above observation of the Supreme Court in *Sidheshwar's* case that the contention of Mr. Roy that an attachment of the undivided share of a member of a Mitakshara joint family during his lifetime operates as a division of interest and causes a severance of status in respect of the property attached, does not find support.

21. Even, assuming that there is such a severance as contended by Mr. Roy, we are of the view that the position of an execution purchaser cannot be equated with that of a coparcener after vesting of the coparcenary property. As already stated the right of the purchaser is founded on equity, but there is no question of any equity in favour of a coparcener.

22. The next point that was argued by Mr. Roy is, that property in the hands of the Government as a result of vesting, loses the character of coparcenary property and consequently, the shares of

the coparceners have to be worked out. We are unable to accept this contention. In our view, the property in the hands of the Government remains to be coparcenary property, but in another form, that is, in the form of money. When Government takes possession of the coparcenary property as a result of vesting of the same under the West Bengal Estates Acquisition Act, the joint family consisting of the coparceners will be entitled to compensation. Thus the property is transformed into money as belonging to the coparcenary.

23. Next it was argued by Mr. Roy that a Joint Hindu family cannot be regarded as a single individual or a person within the meaning of the word 'person' in Section 3 (42) of the General Clauses Act, 1897. Under Section 3 (42) 'person' includes a company or association or body of individuals whether incorporated or not. In the two unreported Bench decisions of this Court referred to above, it has been held that a joint Hindu family is a person within the meaning of the definition of the term in the General Clauses Act.

24. The question whether joint Hindu family is a person or not arises in this way. In the instant case, the Hindu family was a tenure holder in respect of the disputed property. Section 2 (1) of the West Bengal Estates Acquisition Act, 1953, defines the term 'intermediary' as meaning a proprietor, tenure-holder, under tenure-holder or any other intermediary above a raiyat or a non-agricultural tenant and includes a service tenure-holder and, in relation to mines and minerals, includes a lessee and a sub-lessee. The term 'tenure-holder' has not been defined in the Act, but CL (p) of Section 2 provides that expression used in the Act and not otherwise defined having relation to the areas to which the Bengal Tenancy Act, 1855 applies, the same meaning as in that Act. In view of CL (p) the definition of the term 'tenure-holder' as given in the Bengal Tenancy Act will apply. Under sub-sec. (1) of S. 5 of the Bengal Tenancy Act 'tenure-holder' means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors-in-interest of persons who have acquired such a right. The question, therefore, is whether the joint Hindu family can be said to be a 'person' within the meaning of the Bengal Tenancy Act. There can be no doubt that joint Hindu family is a body of individuals and prima-facie, the definition of the term 'person' under the General Clauses Act applies to the joint Hindu family. It was, however, contend-

ed by Mr. Roy that each of the coparceners should be held to be a person, or in other words, each of the coparceners should be regarded as a tenure-holder in respect of the disputed property.

25. Sir Dinshanji Mullah in his *Principles of Hindu Law*, 13th Edition, Page 244, Art. 216 says as follows:—

"The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of the coparceners. According to true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share, one-third or one-fourth. His interest is a fluctuating interest capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share."

26. The title to the coparcenary property is one title and that is in the whole body of the coparceners. No coparcener can claim individual ownership in the coparcenary property. The title to the property belongs to the coparcenary consisting of the coparceners. Excepting that each coparcener has an undivided interest in the property which is also fluctuating, and none of the coparceners has any definite share in the coparcenary property. It is only when a partition takes place that the shares of the coparceners become defined and specific. So long partition does not take place the coparceners jointly own the property.

27. It was, however, submitted by Mr. Roy that a coparcener having an interest in the coparcenary property, the collective body of coparceners constituting the coparcenary cannot be said to be a 'person' within the meaning of the General Clauses Act. According to him in order to hold that a collective body of individuals is a person, none of the individuals forming that body should have any interest whatever in the property. Mr. Roy referred to the case of a school committee owning property and submitted that the unity of title as in the case of a coparcenary is not the same unity of title as in the case of the members of the school committee. He makes a distinction between the two cases, namely, in the case of a coparcenary each coparcener has an undivided interest although title to the property is in the whole body of coparceners, but in the case of the members of the school committee no individual member has any interest whatsoever. We are unable to accept the said contention based on the analogy referred to above. The nature of undivided inter-

est of a coparcener in the coparcenary property has been clearly stated in the above passage quoted from Mulla's *Hindu Law*. There is no authority for the proposition that the definition of the word 'person' in the General Clauses Act will have no application when each of the individuals forming the body of individuals has an undivided interest in the property. The members of the school committee do not hold the property for themselves or for their own interest. They are entrusted with the management of the institution and its properties. That analogy therefore, has no application to the facts and circumstances of the case. We are also unable to accept the contention of Mr. Roy that true unity of title contemplates that none of the individuals forming the group should have any interest. As no coparcener is owner of any specific share of the coparcenary property, and the title to the property being in the whole body of coparceners, we are of the view that there is true unity of title. When each individual of a body of individuals is owner in respect of a specific share in the property, there is no question of unity of title, and such a body of individuals is not a person within the meaning of the definition of the term in the General Clauses Act.

28. Mr. Roy submitted that the true test for ascertaining whether the joint Hindu family is a person or not would depend upon whether the landlord can sue all the coparceners jointly for the purpose of realising arrears of rent. Ordinarily, the Karta of the joint family looks after the affairs of the joint family. The Karta represents the joint family. It is true that the landlord can sue all the coparceners instead of suing the Karta for the purpose of realisation of arrears of rent, but in our view, the test is not that as contended by Mr. Roy. There is no distinction between the case when a Karta is sued as representing the joint family and all the coparceners are sued jointly by the landlord. The true test is whether each coparcener is liable to the landlord for payment of rent in respect of the coparcenary property in terms of Section 146-A (1) of the Bengal Tenancy Act which provides that all co-sharer tenants in a tenure or holding or their successors-in-interest are liable to the landlord jointly and severally for the rent payable to such landlord on account of the tenure or holding. The coparceners are joint tenants and not tenants-in-common. The landlord is not entitled to sue a coparcener for arrears of rent in respect of the coparcenary property. A coparcener is not a co-sharer tenant in respect of the tenure or holding. In the case of tenants each having a definite share in the tenancy, each is liable to the landlord for

payment of rent under Section 146-A (1) of the Bengal Tenancy Act, but in the case of a joint Hindu family the landlord has either to sue the whole body of the coparceners or to sue the Karta representing the joint family for arrears of rent, for, a coparcener not having any specific share is not individually liable. We are, therefore, unable to accept the test as proposed by Mr. Roy.

29. Lastly it was contended by Mr. Roy that indefiniteness of share of the coparceners could not be a criterion for vesting. According to him, although a coparcener has no definite share till partition takes place, he has undoubtedly an undefined share. There is uncertainty over a period, but at a particular point of time it is certain. It was submitted that on the date of vesting the share of each coparcener can be calculated and thus there will be no difficulty in ascertaining the shares of the coparceners. The shares of the coparceners become defined only on a partition taking place. The vesting of coparcenary property under the West Bengal Estates Acquisition Act cannot be regarded as effecting a partition of the coparcenary. There is, therefore, no scope for calculating or ascertaining the shares of the coparceners on the date of vesting.

30. In view of the aforesaid discussion, we hold that a joint Hindu family governed by the Mitakshara School of Hindu Law is a person under the definition of the term 'person' as given in Section 3 (42) of the General Clauses Act and that a single coparcener out of the body of coparceners constituting the coparcenary cannot be held to be a person or a co-sharer tenant. A coparcener is not an intermediary but it is the joint Hindu family constituting the coparcenary is the intermediary. The view which we take, namely, that a coparcener is not an intermediary finds support on a reference to some of the provisions of the West Bengal Estates Acquisition Act.

31. Under Section 6 of the West Bengal Estates Acquisition Act, provisions have been made for retention of land by a corporation or an institution established exclusively for a religious or a charitable purpose, co-operative societies, companies etc., but no provision has been made about the coparceners governed by the Mitakshara School of Hindu Law. This points to the intention of the legislature that the legislature did not intend to treat each coparcener as an intermediary under the Act. Under sub-section (3) of Section 14 of the Act, every intermediary who had a share in any estate or interest which has vested in the State under Section 5, shall be treated separately for assessment of compensation. Sub-section (3) clearly indicates that the intermediary

must have a share in any estate or interest so that he may be treated separately for assessment of compensation. In our view, the share referred to in sub-section (3) means a defined share. As the coparcener cannot be said to have a defined share in the coparcenary property he cannot be treated separately for the purpose of assessment of compensation under sub-section (3), or in other words a coparcener cannot be held to be an intermediary.

32. Sub-section (1) of S. 7 provides that arrears of land revenue, cesses, taxes and impositions due from any intermediary in respect of his share in any estate which vests in the State under Section 5 shall, after the date of vesting, continue to be recoverable from the intermediary under an order of the Collector by reduction of the amount of such arrears from the money which the intermediary is entitled to receive as compensation under the Act. If it is held that a coparcener is an intermediary, it will be difficult to give effect to Section 7 (i), for the simple reason that the arrears of land revenue, cesses, taxes etc., upto the date of vesting cannot be said to be due from a coparcener but undoubtedly it would be due from the joint family. For the same reason, the provision of Section 8 which deals with recovery by an intermediary of arrears of rent due to him from any person for a period up to the date of vesting, cannot also be given effect to. Under Section 6 (1) of the Act an intermediary is entitled to retain agricultural land in his khas possession not exceeding 25 acres as may be chosen by him. A coparcener cannot claim that he has in his khas possession any specific property belonging to the joint Hindu family. From the above provisions, it is clear that a coparcener is not an intermediary under the Act.

33. Mr. Roy, however, pointed out that certain difficulties would arise in case, it is held that the joint Hindu family is an intermediary. It has been contended that if the Karta of the Mitakshara family refuses to exercise the choice of retention of coparcenary property within permissible limit by submitting returns in Form 'B' on behalf of the joint family the other coparceners who are not intermediaries shall not be entitled to exercise that choice of retention. Similarly, if the Karta dies and the coparceners fail to appoint one of them as the Karta, in that case also the same difficulty will arise. It may be that in certain cases, the coparceners might be put to certain difficulties in the matter of retention of land by the joint Hindu family or in the matter of compensation, but in our opinion, these difficulties taking place on the happening of certain events cannot be taken into

consideration in ascertaining whether a coparcener is an intermediary or not.

34. After giving our best consideration in the matter we are of the view that a coparcener is not an intermediary but the collective body of the coparceners constituting the joint Hindu family is an intermediary within the meaning of the West Bengal Estate Acquisition Act. The joint Hindu family should, therefore, be treated as a single individual or a single unit for the purpose of retention of land and also for compensation under the Act.

35. In the result, the judgment and decree of the learned Subordinate Judge are affirmed and the appeal is dismissed. But in the peculiar facts and circumstances of the case involving substantial points of law, we do not make any order as to costs in this appeal.

ARUN K. MUKHERJEA, J.: 36. I agree.

Appeal dismissed.

AIR 1972 CALCUTTA 185 (V 59 C 32)
SANKAR PRASAD MITRA AND SALIL KUMAR DATTA, JJ.

Haji Munna Mia and Co. Pvt. Ltd.,
Petitioner v. Union of India, Respondent.
Civil Revn. No. 1540 of 1971, D/-
13-1-1972.

Civil P. C. (1908), O. 22, R. 4 — Death of one of defendants — Order of abatement — Effect.

By merely recording abatement of the suit under the Rule the Court does not order the dismissal of the suit against the surviving defendant. AIR 1931 Lah 73. Dissented. (Para 13)

In appropriate cases after abatement is recorded, when the court is of opinion that the suit or appeal has become incompetent against other parties as a result whereof the suit or appeal fails, the court may pass an order of its dismissal. When in such a case the abatement against the deceased party is set aside the court may have also to pass an order restoring the suit against the surviving defendants or respondents after setting aside the order of dismissal of the suit or appeal, may be under Section 151. (Para 13)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 153 (V 53) =

1966-1 SCR 102, Pandurang Dhondli
v. Maruti Hari Jadhav 15
(1965) AIR 1965 SC 1531 (V 52) =
1965-2 SCR 830, Union of India
v. Shree Ram Bohra 12
(1964) AIR 1964 SC 1336 (V 51) =
1964-3 SCR 495, Manindra Land

BP/BP/A710/72/MVJ

and Building Corpn. Ltd. v.
Bhutnath Banerjee 10
(1962) AIR 1962 SC 89 (V 49) =
1962-2 SCR 636, State of Punjab
v. Nathu Ram 12
(1955) AIR 1955 Orissa 179 (V 42) =
21 Cut LT 328, Ananga Bhusan
v. Uchhab Sahu 5
(1953) AIR 1953 Nag 12 (V 40) =
1952 Nag LJ 421, Lilwati Bai v.
Gangadhar 9
(1931) AIR 1931 Lah 73 (V 18) =
122 Ind Cas 562, Md. Ali v. Allaha
Ditta 14

Manindra Nath Ghosh, Kalijiban
Mukhopadhyay, for Petitioner; Balai Lal
Pal and Nandalal Pal for Respondent.

SALIL KUMAR DATTA, J.:— This Rule is directed against an Order No. 87 dated 11-2-1971 passed by the learned Subordinate Judge, Fourth Court Alipore dismissing the application of the petitioner defendant No. 2 dated 29-11-1969. The facts of the case are as follows:—

The plaintiff, Union of India instituted a suit on 21-7-1964 being title suit No. 68 of 1964, renumbered Title Suit No. 78 of 1968 on the allegation that the defendant No. 1 Sk. Munna Mia, a businessman, was found liable on account of income-tax for over Rs. 3.26 lakhs for the assessment years 1946-1947 to 1949-1950. On account of non-payment, four certificate cases were initiated and during the pendency of the certificate proceedings, the defendant No. 1, to defraud the Government of its said dues, transferred by several documents various immoveable properties to a private company, the defendant No. 2, the petitioner before us. This company was formed with his family members, the consideration of the transfers being shares in the said company gifted by the defendant No. 1 to them. The plaintiff accordingly prayed for declaration that the said documents mentioned in the plaint were sham, fraudulent, benami and ineffective in law and the properties therein were liable to be sold in execution of the certificates.

2-3. The defendant No. 2 on service of summons entered appearance and filed its written statement denying that the transfers were sham, fraudulent, benami and ineffective in law. It was stated that the transfers were legal, valid and for consideration and the properties so transferred were not liable to be sold in execution of the certificates.

4. In spite of several attempts, summons of the suit could not be served on the defendant No. 1 but curiously enough the suit was placed on board for peremptory hearing and was ultimately fixed on 1-11-1968 for hearing. On the preceding day i.e. on 31-10-1968 the defendant No. 2 by a petition informed the court that the defendant No. 1 died on

17-12-1967 and accordingly adjournment of hearing of the suit was prayed for.

5. Copy of this application was served on the plaintiff on 8-11-1968 and the plaintiff on the same day filed an application asking for direction on the defendant No. 2 to disclose the names of the heirs of the defendant No. 1 so that it could submit such names of the heirs for their substitution. By order dated 24-2-1969, the court directed the defendant No. 2 to disclose the names of the heirs. On 7-3-1969 the defendant No. 2 filed the petition for keeping in abeyance the said order and also for recording a formal order of abatement. On the said petition, on 3-4-1969, the court passed the following order:—

"As the defendant No. 1 has died on 17-12-1967, the suit do abate....."

6. On 3-4-1969, the plaintiff filed a petition under Order 22, Rules 4 and 9 and Section 151 of the Code of Civil Procedure, in continuation of its earlier petition, for setting aside abatement and for substitution of one Sk. Abbasuddin, a son of Defendant No. 1, the only heir the plaintiff stated it could find out after diligent enquiry, as the defendant No. 2 did not supply any names. On 30-4-1969, a similar application for substitution of Sk. Abbasuddin was filed by the plaintiff. On the said petition, Misc. Case No. 32 of 1969 was registered. This application was opposed by the defendant No. 2 who filed a written objection on 28-8-1969. It was contended therein that the suit could not proceed without the heirs of defendant No. 1, so that in absence of his substitution the suit abated as a whole. The legal effect was, it was contended, the abatement of the suit against the defendant No. 1 and the dismissal of suit against the defendant No. 2. On 29-11-1969, the defendant No. 2 filed another petition stating again that the legal effect of order dated 3-4-1969 was that the suit abated against the defendant No. 1 and was dismissed against the defendant No. 2. It accordingly prayed for an order directing that the suit stood dismissed against the defendant No. 2 with effect from 3-4-1969.

7. The Misc. Case was heard on evidence when the plaintiff produced one witness in support of its case. After hearing the parties the Court by order dated 20-2-1970 held that the plaintiff was prevented by sufficient cause from making a prayer for substitution in time. The Misc. Case was allowed on contest and the abatement as against defendant No. 1 was set aside. The court directed the plaintiff to take step for substitution of the defendant No. 1 overlooking that the plaintiff had earlier prayed for substitution of Sk. Abbasuddin on earlier occasions as stated above. The plaintiff thereafter

filed an application on 6-3-1970 for a direction on the defendant No. 2 to disclose the names of the heirs of the deceased defendant No. 1 and also praying for substitution of Sk. Abbasuddin traced so far as his heir. On 18-11-1970 the defendant No. 2 filed an application praying for postponement of direction on it for disclosing the names of the heirs of the deceased defendant No. 1 before its petition of 29-11-1969 was disposed of.

8. By Order No. 87 dated 11-2-1971, the Court rejected the said application and it was observed inter alia:

".....if within time allowed by law no application is made under sub-rule (Rule 4), the suit shall abate against the deceased defendant. In absence of the defendant No. 1, the suit could not proceed at all. Hence the entire suit abated. It cannot be said that the order of abatement should be treated as an order of dismissal as against the defendant No. 2. In this suit the plaintiff challenges the transfers made by the defendant No. 1 in favour of defendant No. 2. There has been an allegation of fraud. I am unable to hold that in absence of legal representative of defendant No. 1 the suit can proceed against the defendant No. 2. It should be presumed that the order of abatement as against the defendant No. 1 was as a matter of fact an order of abatement against the defendant No. 2. The plaintiff's right to proceed with the suit as against the defendant No. 2 was suspended till the abatement was set aside. As soon as the abatement has been set aside the plaintiff has right to proceed with the suit against the legal representatives of the defendant No. 1 and also against the defendant No. 2. In these circumstances the petition of the defendant No. 2 is without any substance. Ordered that the petition of the defendant No. 2 dated 29-11-1969 be dismissed on contest with cost. The defendant No. 2 is directed to disclose the names of the heirs of deceased defendant No. 1 by 6-3-1971. Sk. Abbasuddin as mentioned in the plaintiff's application dated 6-3-1970 be substituted in place of the deceased defendant No. 1. Amend the plaint and register"

The present rule, as we have already stated, is against this order.

9. Mr. Manindra Nath Ghosh, the learned Advocate for the petitioner, contends that the order of 3-4-1969 to the effect that "the suit do abate" meant the dismissal of the suit against the defendant No. 2 by reason of the abatement thereof against the defendant No. 1. Though the words "abatement of the suit" have often been loosely used they have meant consistently in all judicial decisions, as in common parlance, a dismissal of the suit against the surviving defend-

ants. Reliance was placed on the decisions in *Lilawati Bai v. Gangadhar*, AIR 1953 Nag 12 and *Ananga Bhushan v. Uchhab Sahu*, AIR 1955 Orissa 179. On the death of a party in either of the cases it was held in the facts of the cases that the appeals abated as a whole. The order of dismissal in the present case not having been set aside the court erred in holding that by setting aside abatement of the suit against the defendant No. 1 and substitution of his heir, there was also a restoration of the suit against the defendant No. 2. The order setting aside abatement did not, as it could not, set aside the order of dismissal of the suit against the defendant No. 2 and accordingly the court's direction on the defendant No. 2 to disclose the names of the heirs of the defendant No. 1 was without jurisdiction.

10. Mr. Balai Lal Pal, the learned Advocate for the plaintiff opposite party, has disputed the above contention and contends that the court on facts found that there was sufficient cause on the part of the plaintiff for not applying for substitution in time. This Order No. 73 dated 20-2-1970 setting aside abatement became final and binding as it was not assailed and could not be challenged in revision as was held in *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee*, AIR 1964 SC 1336, while no appeal lay against such order. After this order was passed, under Rule 9, Order 22, the court was required to proceed with the suit against the substituted heir of defendant No. 1 and also defendant No. 2. Further the order regarding abatement did not either expressly or impliedly mean a dismissal of the suit against the defendant No. 2.

11. It is obvious that the order that could be passed in the event of death of one of the defendants was one under Order 22, Rule 4. The Rule *inter alia* provides that in cases where there are more than one defendant and the right to sue does not survive against the surviving defendants alone, if no application for making the legal representatives a party to the suit is made in time, the court shall record that the suit shall abate against the deceased defendant. There can be no abatement of a suit under this rule against an existing defendant and order of abatement of the suit can only be passed against a deceased defendant under the said rule. Accordingly the order of abatement of the suit that was passed in the present case was and could be only against the deceased defendant No. 1 but there could be no order of abatement of the suit against the defendant No. 2 which is an existing company. After the abatement of the suit against a deceased defendant is recorded the court will have to consider

the position if the reliefs prayed for in the suit could be granted either wholly or partly against the other defendants in absence of the heirs of the deceased defendant who have not been made parties to the suit. If the reliefs claimed in the suit or any of them cannot be granted in their absence for some reason or other, the court will hold that the suit is incompetent and pass an order of dismissal of the suit against the surviving defendants. Such order must be an express or appropriate order of dismissal and cannot be inferred from an order merely recording abatement of the suit which in law necessarily refers to the deceased defendant. In the present case there is nothing in the order recording abatement that the court considered the position of the suit after this abatement against the defendant No. 1 and accordingly it cannot be said that there was an order of dismissal of the suit against the defendant No. 2 by merely recording an abatement of the suit.

12. Mr. Ghosh's contention is also that the word "abatement" is often loosely used by courts and in common parlance it would mean dismissal of the suit as held in the Nagpur and Orissa cases referred to above. In the Nagpur case cited above, the court was considering if in spite of abatement of an appeal against one of the appellants, the other appellants could proceed with the appeal under provisions of Rule 4 of Order 41 as contended. While negating the said contention, the court also laid down the principle that if a decree cannot be passed without interfering with the interest of others or if the decree to be passed is inexecutable by reason of the fact that decree in favour of the deceased respondent has become final as a consequence of partial abatement, the suit or appeal as the case may be, will abate as a whole. It may also be noted that on the facts the Orissa High Court came to the express finding that it could not proceed with the appeal in view of the partial abatement caused by the death of one of the respondents and accordingly recorded that the appeal as a whole abated. In the case of the *State of Punjab v. Nathu Ram*, AIR 1962 SC 89, the Supreme Court observed:

".....when Order 22, Rule 4 does not provide for the abatement of appeals against the co-respondents of the deceased respondent there can be no question of abatement of appeals against them. To say that the appeals against them abated in certain circumstances is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of relief sought in the appeal."

In *Union of India v. Shree Ram Bohra*, AIR 1965 SC 1531 it was observed that in case of a joint and indivisible decree in favour of the two plaintiffs respondents, when one plaintiff died and his legal representatives are not impleaded in time the appeal against them abates and the appeal against the other plaintiff cannot be proceeded with and becomes incompetent.

13. On the same principle which also applies to this suit it cannot be said by merely recording abatement of the suit under Order 22, Rule 4 the court also ordered the dismissal of the suit against the other defendant. Even if in some cases the words "abatement of the suit" are used, it cannot be said that the court also intended thereby the dismissal of the suit against the surviving defendant in absence of any discussion showing consideration of the position of the suit consequent on the non-substitution of the legal representatives of the deceased defendant in time. We are, therefore, unable to agree that the court intended to pass or did pass an order of dismissal of the suit against the defendant No. 2 or that such was the legal effect of the order regarding abatement. It may be noted that in appropriate cases after abatement is recorded, when the court is of opinion that the suit or appeal has become incompetent against other parties as a result whereof the suit or appeal fails, the court may pass an order of its dismissal. When in such cases the abatement against the deceased party is set aside the court may have also to pass an order restoring the suit against the surviving defendants or respondents after setting aside the order of dismissal of the suit or appeal, may be under Section 151. That situation, as we have already noticed, did not arise in this case in absence of any order of dismissal of the suit against the defendant No. 2. In absence of any express or implied order of dismissal or any finding about the incompetence of the suit on a consideration of the defect of parties following its abatement against the defendant No. 1, we are unable to hold that the court intended or even meant impliedly or expressly a dismissal of the suit itself against the defendant No. 2 which has thus been pending all through in respect of the said defendant. For the above reasons the order impugned in this rule has to be upheld.

14. In passing we must also observe that we do not subscribe to the observation of the learned Judge that the order of abatement against defendant No. 1 is also to be presumed against the defendant No. 2 or that the right of the plaintiff to proceed with the suit against the defendant No. 2 was suspend-

ed till abatement was set aside. The position seems to be that on the death of the party the law allows a time limit of 90 days for making an application for substitution and during this period it would be improper for the court to pass any order decreeing or dismissing the suit as was observed in *Md. Ali v. Allaha Ditta*, AIR 1931 Lah 73. It was observed in that case that during this period the suit is in a state of suspense when no order except merely formal or procedural order can be passed in the suit and that the state of suspense by lapse of time merges into abatement after the expiry of the time prescribed. That however does not mean that the plaintiff's right to proceed with the suit against the defendant No. 2 is suspended till the abatement of the suit against the defendant No. 1 is set aside and after the abatement is set aside the plaintiff's right to proceed with against the heirs of the defendant No. 1 as also the defendant No. 2 comes into life. This proposition is, as we have seen, untenable in law.

15. Mr. Pal lastly made another contention that the present application in revision is not maintainable as the High Court's power under Section 115 is confined to an erroneous assumption of jurisdiction or erroneous failure to exercise jurisdiction or the exercise of jurisdiction illegally or with material irregularity as was observed in *Pandurang Dhondi v. Maruti Hari Jadhav*, AIR 1966 SC 153. It was contended that none of these tests laid down are present in the instant case and accordingly this court is not entitled to interfere with the order which does not touch the jurisdiction of the trial court to pass such order. This contention appears to us to be untenable in the present case as according to the petitioner if there has been a dismissal of the suit against the defendant No. 2 as contended the trial court thereafter had no further jurisdiction to pass any direction on the defendant No. 2 to disclose the names of the heirs of the defendant No. 1.

16. However, for the reasons given above, this rule has to be and is discharged and in the circumstances of the case there would be no order as to costs.

17. Let the records be returned to the trial court as early as possible.

MITRA, J.:— 18. I agree.

Case remanded.

AIR 1972 CALCUTTA 189 (V 59 C 33)
SANKAR PRASAD MITRA AND S. K. DATTA, JJ.

Mrs. Salila Chandra, Plaintiff-Petitioner v. Rev. Hiran Kumar Das Gupta, Defendant-Opposite Party.

Civil Revn. No. 1133 of 1971, D/- 21 12-1971.

W. B. Court Fees Ordinance (17 of 1969), Section 50 (2), Sch. II, Article 1, Clause (g) Proviso — Probate proceeding before Ordinance — Application registered as suit after Ordinance — Proceeding commenced before the Ordinance and petitioner is entitled to benefit of Section 50 (2) — (X-Ref:— Succession Act (1925), Section 295). (Paras 6, 7)

Where a proceeding for probate was instituted before the commencement of the Ordinance but the application for probate was registered after the Ordinance had come into operation, the quantum of Court-fees payable in respect of this proceeding was not governed by the Proviso to Sch. 2, Article 1, Clause (g) of the Ordinance of 1969 but by the Court-fees Act 1870.

(Paras 6, 7)

He is entitled to the benefit of Section 50 (2) of the Ordinance. To determine the question, Section 295 of the Succession Act has to be relied on, according to which the proceeding for probate is continued as a suit in accordance with the provisions of the Civil P. C. when objection is raised to the grant of a probate. The registration of a contentious cause as a suit is an administrative act by the court concerned. It gives effect to the provisions of Section 295 of the Succession Act. In the instant case, the proceeding for probate was therefore commenced before the Ordinance. AIR 1914 Cal 523 and AIR 1928 All 51 and AIR 1956 Raj 119. (1909) ILR 33 Bom 256 Rel. on.

(Paras 6, 7)

Cases Referred: Chronological Paras

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| (1956) AIR 1956 Raj 119 (V 43) = | |
| 1956 Raj LW 411, Bhonri v. Suwalal | 7 |
| (1928) AIR 1928 All 51 (V 15) = | |
| ILR 50 All 238, Bohra Kanhaiyalal v. Gendo | 7 |
| (1914) AIR 1914 Cal 523 (V 1) = | |
| 18 Cal LJ 643, Baijnath Prosad Singh v. Shyam Sunder Kuer | 7 |
| (1909) ILR 33 Bom 256 = 10 Bom LR 1197, Sundarabai Saheb v. Collector at Belgaum | 7 |

Hrishikesh Ganguly, for Petitioner; S. C. Das Gupta and Nanigopal Das, for the State (on notice).

SANKAR PRASAD MITRA, J.:—
 This is an application under Section 115

AP/BP/A201/72/VBB

of the Code. By Rule obtained on the 3rd May, 1971, the petitioner assails an order of the District Judge, 24 Parganas being order No. 4 dated 12-1-1971, in O. S. No. 47 of 1970 (Mrs. Salila Chandra v. Rev. Hiran Kumar Gupta). It appears that the petitioner made an application for probate in respect of the estate of one Miss Salila Ghosh alias Miss S. Ghosh in the Court of the District Delegate on the 27th September, 1969. After this application was made the West Bengal Court-fees Ordinance, 1969 (West Bengal Ordinance No. XVII of 1969) was promulgated on the 15th December, 1969. Section 50 (2) of this Ordinance was as follows:

"All suits and proceedings instituted before the commencement of this Ordinance and all proceedings by way of appeal, revision or otherwise arising therefrom whether instituted before or after such commencement shall, notwithstanding the repeal of the Court-fees Act, 1870, be governed by the provisions of the said Act and the rules made thereunder."

2. In January, 1970, the West Bengal Court-fees (Amendment) Act, 1970, came into force incorporating the provisions of said Ordinance. On the 24th March, 1970, the opposite party appeared in the probate proceeding. On August 20, 1970, the opposite party filed objections and on the 11th November, 1970, the probate proceeding was registered as a suit.

3. The question that arises for our consideration is whether the quantum of Court-fees payable in respect of this proceeding shall be governed by the Court-fees Act, 1870 or by the Ordinance of 1969 and the subsequent Act validating the Ordinance. Under the 1870 Act for a petition of this nature an initial court-fee of Rs. -/12/- ans. or 75 paise was payable which the applicant in the instant case had paid. But under the proviso to Schedule II, Article 1, Cl. (g) of the Ordinance of 1969, certain changes were made. The proviso runs thus:—

"Provided that if a caveat is entered and the application is registered as a suit, one-half the scale of fee prescribed in Article 1 of Schedule 1 on the market value of the estate less the fee already paid on the application shall be levied."

4. The District Judge has asked the applicant to pay the balance of the court-fees in accordance with this proviso. The applicant claims exemption under sub-section (2) of Section 50 of the Ordinance.

5. The proceeding for probate in the instant case was instituted before the commencement of the Ordinance. But the application for probate was registered

as a suit after the Ordinance had come into operation. The District Judge seems to think that since the suit was registered after the Ordinance came into force, court-fees in accordance with the above proviso should be levied. In our opinion, to determine the questions raised in this matter one has to rely on the provisions of Section 295 of the Indian Succession Act. This section runs thus:—

"In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant."

6. This section, therefore, lays down that a proceeding for probate takes the form of a suit when there is a contention. In other words, the proceeding for probate is continued as a suit in accordance with the provisions of the Civil Procedure Code when objection is raised to the grant of a probate. The registration of a contentious cause as a suit is an administrative act by the court concerned. It gives effect to the provisions of Section 295 of the Indian Succession Act. In the instant case, the proceeding for probate was commenced before the Ordinance. And in our view, the petitioner is entitled to the benefit of Section 50 (2) of the Ordinance.

7. Our interpretation, incidentally, of Section 295 of the Indian Succession Act finds support in the decisions in AIR 1914 Cal 523; ILR 50 All 238 = (AIR 1928 All 51); AIR 1956 Raj 119 and (1909) ILR 33 Bom 256. In these premises, the said order of the District Judge of 24 Parganas cannot be sustained.

8. It was argued before us that the proviso referred to above is attracted when (a) caveat has been entered, (b) there is a contention after the probate proceeding has been launched and (c) the proceeding takes the form of a regular suit and is registered as such. It has been argued further that a fiscal enactment must be strictly construed, and in the event of any doubt, construed, in favour of the subject. As we have already given our decision on the basis of the provisions of Section 295 of the Indian Succession Act, we do not propose to deal with this argument in this judgment although they deserve due consideration.

9. In deciding this matter we gave notice to the learned Senior Government Pleader and he has made sub-

missions contrary to those of the petitioner but we are unable to accept them.

10. In the result the Rule is made absolute. Order No. 4 dated 12-1-1971 in O. S. No. 47/70 passed by the District Judge, 24 Parganas, Alipore is set aside. The records would now be sent to the trial Court which would proceed according to law. There will be no order for costs.

S. K. DATTA, J.:— 11. I agree.
Rule made absolute.

AIR 1972 CALCUTTA 190 (V 59 C 34)

SANKAR PRASAD MITRA AND
SALIL KUMAR DATTA, JJ.

M. S. Ram Singh, Defendant-Appellant v. Bijoy Singh Surana and another, Plaintiff-Respondents.

Letters Patent Appeal No. 9 of 1971,
D/- 17-12-1971.

(A) Transfer of Property Act (1882), Section 115 — Surrender of lease by lessee — Lessee's interest in lease is extinguished — Under-lessee becomes lessee directly under lessor by operation of statute and not by devolution of lessee's interest on lessor.

Surrender in law is the yielding up by the lessee of his interest in the lease and it thereby brings in extinction to the lease, so that the relationship of the parties to the lease comes to an end. There is no subsisting interest of the lessee after its extinguishment by surrender, which can devolve or come on the lessor. Thereafter the under-lessee becomes a lessee directly under the lessor with all incidents of his sub lease and such relationship comes into existence under the operation of the statute, on surrender of the head lease and not by devolution or assignment by the lessee of his interest. (Para 9)

(B) Civil Procedure Code (1908), O. 22, R. 10 — Continuation of suit by plaintiffs' assignee — Suit for ejectment by lessee against under-lessee. During pendency of suit lessee surrendering lease to lessor — Lease given to new lessee — New Lessee cannot continue suit instituted by original lessee.

Where during pendency of a suit for ejectment by lessee against under lessee, the lessee surrendered the lease to the lessor who gave it to a new lessee who wanted to be substituted as the plaintiff.

Held no interest of the original plaintiff lessee devolved on the lessor on surrender and through him to the substituted plaintiff so as to enable him to continue the ejectment suit as by the

surrender the interest of the lessee became extinct and there was no interest in existence which could devolve on the lessor and through him to the substituted plaintiff. The suit therefore was not maintainable by him. (Para 11)

(C) Civil Procedure Code (1908), O. 22, R. 10 — Continuation of suit by substituted plaintiff — Surrender of lease by lessee during pendency of suit for ejectment by him against under lessee — Lease given to new lessee who wanted to continue suit as substituted plaintiff — Substituted plaintiff cannot have carriage of suit in absence of pleading as to surrender — He must affirmatively prove that he is rightful owner entitled to possession. (1888) 16 Ind App 23 (PC) and AIR 1949 PC 278 Foll.

(Para 17)

(D) Transfer of Property Act (1882), Section 111 (e) — Determination of lease by surrender — Surrender mentioned in Clause (e) provides for immediate yielding of the interest — Surrender in future is not warranted by law. (Para 17)

(E) Registration Act (1908), S. 17 (1) (b) — Surrender of lease — Surrender by instrument in writing purporting to extinguish right of tenant valued at over Rs. 100 — Deed is compulsorily registrable even though invalid because of surrender on future date, AIR 1960 Mys 87, Foll. (Paras 19 and 21)

(F) Evidence Act (1872), Section 64 — Objection to admissibility of document — Objection relating to admissibility of document under law — Objection can be taken even at appellate stage. (1943) 47 Cal WN 607 (613) Foll. (Para 23)

Cases Referred: Chronological Paras

- (1960) AIR 1960 Mys 87 (V 47),
Nadig Neelakanta Rao v. State of Mysore 19, 20
(1958) AIR 1958 SC 394 (V 45) =
1958 SCR 1287, Saila Bala Dassi v. Nirmala Sundari Dassi 13
(1957) AIR 1957 Mad 472 (V 44),
K. Panchapagesa Ayyar v. K. Kalyanasundaram Ayyar 22
(1952) AIR 1952 SC 109 (V 39) =
1951 SCR 655, Mummareddi Nagireddi v. Pitti Durairaja Naidu 7
(1950) AIR 1950 Cal 376 (V 37) =
86 Cal LJ 293, Anil Chandra Banerjee v. Gopinath Mukherjee 6, 13
(1949) AIR 1949 PC 278 (V 36) =
76 Ind App 202, Lakshmananna v. T. Venkateswarlu 17
(1943) 47 Cal WN 607, Gopal Das v. Shri Thakurjee 23
(1934) AIR 1934 PC 105 (V 21) =
61 Ind App 200, Sitanna v. Viranna 7
(1920) AIR 1920 Cal 858 (1) (V 7) =
59 Ind Cas 788, Sari Debi v. Saila Bala Dasi 19

(1919) AIR 1919 Cal 694 (V 6) =
22 Cal WN 441, Bengal Coal Co. Ltd. v. Monoranjan Bagchi 19

(1919) AIR 1919 Cal 840 (1) (V 6) =
53 Ind Cas 17, Abdul Majid v. Hari Charan Halder 19

(1898) 25 Ind App 210 = ILR 26 Cal 29 (PC), Ram Churn Singh v. Ranigunge Coal Association Ltd. 7, 9

(1888) 16 Ind App 23 = ILR 16 Cal 473 (PC), Mohima Chundar Mozoomdar v. Mohesh Chunder Neogi 17

Ranjit Kumar Banerjee, Rama Prasanna Bagchi, Bachittar Singh, Snehansu Sekareswar Roy, for Appellant; Hirendra Chundur Ghosh, Gautam Prasad Chatterjee, Samindra Chandra Ghosh, for Respondents.

SALIL KUMAR DATTA, J.:— This is an appeal by the tenant defendant under clause 15 of the Letters Patent. The suit was dismissed by the learned Judge, Third Bench, City Civil Court, Calcutta. On appeal Chittatosh Mookerjee, J. set aside the judgment and decree under appeal and decreed the suit.

2. The case in the plaint is as follows: The defendant was a monthly tenant under the plaintiff Oswal Jain & Co., in respect of certain rooms and one kitchen in the fifth floor of premises No. 7/1C, Lindsay Street, Calcutta (described in the schedule to the plaint and hereinafter referred to as the suit premises) at a monthly rent of Rs. 223.84p, the tenancy being according to English calendar month. The tenancy was determined by notice to quit, duly served on the defendant, with expiry of September, 1961. It was alleged that the defendant had sub-let his tenancy without the previous consent in writing of the plaintiff and as such was not entitled to any protection under the West Bengal Premises Tenancy Act, 1956. The suit was accordingly instituted on December 7, 1961 claiming a decree for recovery of possession of the suit premises.

3. The suit was contested by the defendant who filed a written statement contending inter alia that the plaint was vague and misleading in material particulars and did not disclose any cause of action. It was further alleged that there were two sub-tenants since before the 1956 Act with the knowledge and consent of the landlord. The legality, validity and sufficiency of the notice and its service were also challenged. The defendant in the premises submitted that the suit should be dismissed.

4. The suit proceeded in its course and the following issues were framed by the Court on April 2, 1962.

1. Has the tenancy been determined by notice to quit?

2. Has the defendant sub-let, assigned or transferred his tenancy with consent in writing?

3. Is the plaintiff entitled to a decree for recovery of possession?

4. To what reliefs, if any, the plaintiff is entitled?

On June 28, 1963, Smt. Sukhdevi Kumari Surana filed an application stating that the plaintiff was the lessee of the premises No. 7/10, Lindsay Street, Calcutta under the owners, the Trustees to the Estate of Seth Mannalalji Surana Memorial Trust. The plaintiff surrendered his lease with all its existing right on May 15, 1963 and after surrender, the Trustees had leased out the premises to the applicant with right to continue the present suit. In the circumstances the applicant prayed for being substituted in the place of the plaintiff. The application was heard on July 5, 1963 when the defendant contended, as it appears from the order sheet of the suit, that in view of the documents the applicant had not the carriage of the suit although she might be the legal owner of the leasehold property. The trial court on the said date allowed the application without prejudice to the merits of the cases of the parties. The plaint was directed to be amended and was amended recording only that Sm. Sukhdevi Kumari Surana was substituted in place of the original plaintiff, as prayed for by her in her said application. An additional written statement was filed by the defendant after the amendment wherein he contended that the suit was not maintainable by the present plaintiff nor had she the right to proceed with the suit and further there was no relationship of landlord and tenant between the parties. Two additional issues were thereafter framed by the court as follows:

5. Is there any relationship of landlord and tenant between the parties?

6. Has the substituted plaintiff right to continue the suit?

5. The suit was tried on evidence along with another ejectment suit between the parties when inter alia, an unregistered deed of surrender dated May 15, 1963 and a registered lease dated July 2, 1963, were proved by the plaintiff's only witness and marked exhibits 7 and 6 respectively. The trial court held that there had been sub-letting as alleged in the plaint and notices were legal and valid and duly served. It was further held that the substituted plaintiff became landlord of the defendant in view of the documents, but as the deed of surrender was not registered it could not affect any immoveable property nor be received in evidence affecting such property. There was thus no assignment,

creation or devolution of right to continue the suit within the meaning of Order 22, Rule 10 of the Code. The substituted plaintiff could not thus ask for decree on the basis of the notice served by the original plaintiff nor had she the right to continue the suit. It was also held that it was doubtful whether the relationship of landlord and tenant could be established between the substituted landlord and the statutory tenant. The suits, heard analogously, for the same reasons were dismissed.

6. Appeals were preferred in this Court against the said decrees by the substituted plaintiff and were heard analogously before Chittatosh Mookerjee, J. It was found by Mookerjee, J., that the original plaintiff was a monthly tenant and had admittedly yielded up the estate held by it in favour of the trustees. The said surrender was accepted and acted upon by the tenant and the landlord and it was not open to the defendant to dispute it. It was further held that by the surrender of the original plaintiff followed by the creation of a new lease in favour of the substituted plaintiff, there was a creation of interest in her favour within the meaning of Order 22, Rule 10. Accordingly she was entitled to be brought on record and to proceed with the suits. The finding of the trial Judge to the contrary, on the face of his finding that the substituted plaintiff became the landlord of the defendant by operation of law, was contradictory and untenable. The contention of the defendant that the transferee of the legal representative who was never brought on record, was not entitled to apply under Order 22, Rule 10 was not accepted. On the authority of *Anil Chandra v. Gopinath*, AIR 1950 Cal 376, it was held that such transferee as the substituted plaintiff in the present case, could be brought on record under Section 146. Bringing the trustees on record and thereafter the substituted plaintiff would be a pointless formality and there was no illegality in straight-way substituting the present plaintiff who was entitled to proceed with the suit. It was also held in this case that the defendant sublet the suit premises without consent in writing of the landlord and was not entitled to any protection. The suit was accordingly decreed while the other suit was dismissed as the ground for eviction was not established. The present appeal, by the tenant, arises from the judgment and decree passed against him as stated above.

7. Mr. Ranjit Kumar Banerjee, the learned Advocate for the tenant appellant, has raised several contentions assailing the judgment under appeal. His first contention is that the substituted

plaintiff is not entitled to continue the suit. The right to continue the suit is claimed on the basis of a surrender by the original plaintiff of his interest to his landlord and subsequent lease of the suit premises to the substituted plaintiff. Even if there was a surrender, it was an extinguishment or effacement of the interest of the original plaintiff as lessee. As such interest is wiped out, the lessor acquired no interest through the lessee as his legal representative nor was there any devolution or transfer of the interest of lessee to the lessor. By the surrender, however, the underlessee is brought under immediate relation with the lessor with the same incidents of tenancy under Section 115 of the Transfer of Property Act. Reliance was placed on the decision in *Ram Churn Singh v. Ranigunge Coal Association Ltd.*, 25 Ind App 210 at p. 217 (PC), wherein surrender by a lessee was held to be a complete extinguishment of the interest of the lessee. Reliance was also placed on the decision in *Vytla (Sitanna) v. Marivada Viranna*, 61 Ind App 200 at p. 207 = AIR 1934 PC 105 at p. 108 in which the Privy Council observed that the basis of the doctrine of surrender is the effacement of the widow's interest and not the ex facie transfer by which such effacement is brought about. Following this decision in *Mummareddi Nagi Reddi v. Pitti Durairaja Naidu*, AIR 1952 SC 109 at p. 111, it was observed that the basic principle upon which the doctrine rests is the self effacement by the widow or withdrawal of her life estate which opens the estate of the deceased husband to his next heirs at that date. In the case of lease, by surrender no interest of the lessee came on the lessor as it was effaced or extinguished while the underlessee is thereby brought under immediate relation with the lessor under Section 115 of the Transfer of Property Act, 1882.

8. Mr. Hirendra Chunder Ghosh, the learned Advocate for the substituted plaintiff, the respondent before us, referred to Section 111 of the Transfer of Property Act, 1882 which provides as follows:

Sec. 111. Determination of lease — A lease of immoveable property determines

..... (e) by express surrender; that is to say in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them....."

Mr. Ghosh contends that surrender is not a complete extinction of the interest of the lessee, as the underlease is kept alive by Section 115 and the lessor steps into the shoes of the lessee as landlord in so far as the underlessee is concerned, who on surrender holds the

same tenancy under the lessor. It is thus really a devolution or assignment of interest, as consequence of surrender under the statute, of the lessee's interest to the lessor in respect of the tenancy, attracting Order 22, Rule 10 of the Code. By the new lease to the substituted plaintiff, the lessor creates an intermediary interest between himself and the underlessee, upgraded by the surrender, to the status of a lessee, so that the substituted plaintiff claiming under the lessor could continue the proceedings in the same manner as the lessor could and there could be no dispute that the lessor in whom the interest of the original plaintiff devolved, was entitled to continue the suit in his name in view of the surrender. By the combined operation of Order 22, Rule 10 and Section 146, the suit in any event could be continued by the substituted plaintiff.

9. Surrender, under the statute, is the yielding up by the lessee of his interest to the lessor. In Woodfall's 'Landlord and Tenant' Twenty Seventh Edition Vol. I pages 860-1, while considering surrender by express terms it is observed in Article 1854.

"A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may merge by mutual agreement It differs from a release in this respect, that the release operates by the greater estate descending upon the less, whereas a surrender is the falling of a less estate into a greater."

Further in Article 1859, stating the requisites of a good surrender it is observed again.

"That the surrenderee has a higher and greater estate in the thing surrendered than the surrenderor hath, so that the estate of the surrenderor may be drowned therein."

The Privy Council in *Ram Churn Singh*, 25 Ind App 210 (PC) (supra) observed:

"The right of relinquishment is a privilege given to the tenants, by means of which they may restrict the lease and establish their tenure upon a new basis, or may extinguish the lease altogether."

It will thus appear that the surrender in law is the yielding up by the lessee of his interest in the lease and it thereby brings an extinction to the lease, so that the relationship of the parties to the lease comes to end. There is thus no subsisting interest of the lessee after its extinguishment by surrender, which may devolve or come on the lessor. If it were a question of devolution of interest of the lessee unto the lessor, the legal underlessee will automatically be the lessees immediately under the lessor.

This is however not so, and as otherwise the interest of the underlessee will determine with the determination of the original lease, the underlessee is given statutory protection of his interest under his new landlord, the lessor, on the same terms and conditions of his original tenancy. It is obvious therefore the underlessee becomes a lessee directly under the lessor with all incidents of his sub-lease and such relationship comes into existence under the operation of the statute, or surrender of the head lease and not by devolution or assignment by the lessee of his interest in the lessor.

10. It will be of interest to note that the reversion to which the lessor becomes entitled by surrender in respect of the underlease upgraded to the direct lease under him, is not the reversion on the underlease to which the lessee was entitled before surrender. As was observed in *Hill and Redman's "Law of Landlord and Tenant"* (15th Edition) Article 386 page 508.

"Surrender of the term does not destroy the right of the underlessees. As regards them, and as regards third parties generally, the surrender operates only as a grant subject to their rights and the term is treated as continuing so far as is required for preservation of such rights. This principle makes it necessary to provide for the substitution of a new reversion for the leasehold reversion has been surrendered and also, in the case of a surrender and renewal for the validity of the renewed lease as against the underlessees. Under the Law of Property Act, 1925 (Section 139), the estate of the head lessor is deemed to be the reversion on the underlease to the extent and for the purpose of preserving such incidents to and obligations on the surrendered leasehold reversion as, but for the surrender thereof, would have subsisted."

Under Section 115 of Transfer of Property Act, a substituted reversion on the underlease in place of its reversion to the lease has been provided in favour of the lessor as the lessor has been made entitled to the rent and benefits of contracts binding on the underlessee, on surrender of the lease by the lessee. It is a reversion created by statute and not the reversion to the lease which became extinct on surrender.

11. There is thus no escape from the conclusion that no interest of the original plaintiff-lessee devolved on the lessor, and it was accordingly not competent for the lessor to continue the pending ejectment suit instituted by the lessee against the underlessee. There can be no dispute that the lessor, on surrender, has become by operation of law the lessor of

the underlessee now upgraded as lessee with the same terms and conditions as the original lease and such right carries with it the right to institute suit of eviction by the lessor against such underlessee. The lessor can carve out his interest as lessor of this lease in favour of some one as was done in favour of the substituted plaintiff, who, in turn, will be entitled to sue in ejectment on determination of this lease in a regular manner. Such interest again will be an independent and separate interest altogether created in favour of the intermediate lessee. That however does not mean that the lessee's interest devolved on the lessor and through him to the substituted plaintiff so as to enable her to continue the ejectment suit. As we have seen by the surrender the interest of the lessee became extinct and there was thus no interest in existence which could devolve on the lessor and through him to the substituted plaintiff. The suit accordingly is not maintainable by the substituted plaintiff.

12. Mr. Ghosh contended that the surrender was accepted and acted upon and the defendant as underlessee had no concern or right to challenge such surrender. On such surrender, accepted and acted upon the lessor, the Trustee, became entitled to the interest of the lessee and by the subsequent lease in favour of the substituted plaintiff, there was a creation of intermediary interest in her favour, so that she was entitled to be brought on record and entitled to proceed with the suit. This contention found favour with the first appellate court while decreeing the suit. As already seen, the position in law is that by surrender, the interest of the lessee is completely obliterated, so that no interest of the lessee subsists after surrender. The said lessor on surrender by operation of law becomes the immediate landlord of the defendant and by the new lease, the substituted plaintiff in turn becomes such landlord in respect of the tenancy, which needs be determined before the suit for eviction could be instituted by the intermediary lessee. It has been observed in *Foa's "General Law of Landlord and Tenant"* (8th Edition) Art. 1001 (page 639) as follows:—

"Art. 1001. Position of underlessee—Underlessees not being parties or privies to the lease, their rights are not disturbed by the surrender of the lessee's interest.

Hence, where the lessee underlets a portion of the demised premises and afterwards surrenders his lease to the lessor, the latter cannot dispossess the underlessee without determining his interest in a regular manner"

There is accordingly nothing contradictory in the finding of the trial court that

though the substituted plaintiff had become the landlord of the defendant, she is not entitled to proceed with the suit as the interest of the original plaintiff was destroyed by surrender and no interest devolved on the lessor and through him, to the substituted plaintiff.

13. Mr. Banerjee contended that in view of the position in law there was no scope for the substituted plaintiff to be brought on record in place of the original plaintiff either under O. 22, R. 10 or Section 146 of the Code of Civil Procedure or by the combined operation of the said provisions. Mr. Ghosh on the other hand contended that there was first a devolution of interest of the lessee in favour of the lessor, the Trustees. Accordingly the substituted plaintiff was entitled to have the carriage of the suit claiming through the lessor. Both parties referred to the decision in *Sm. Saila Bala v. Sm. Nirmala Sundari*, AIR 1958 SC 394, where the Supreme Court in construing Section 146, observed:—

"That section was introduced for the first time in the Civil P. C. 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense."

Mr. Ghosh also relied on the decision in AIR 1950 Cal 376 (supra) which laid down that under Section 146, an application or proceeding of a like nature can be taken by a transferee as could have been taken by the transferor, so that if a transferor could ask for substitution, his transferee could also make an application claiming through him under Section 146. Applying the principle in this case Mr. Ghosh submitted that even though the Trustees were not substituted, there was no bar to the substitution of the present plaintiff as transferee. A point was raised that Section 146 does not apply to pending proceedings for which the procedure would be under O. 22, R. 10. The said provisions, however, do not apply, as no interest of the original lessee devolved or came on the lessor who again was not the applicant. As we have seen, in the findings we have arrived at, it is not necessary to consider this aspect at all as the interest of the original plaintiff extinguished on surrender and there was no occasion for any devolution or assignment of his interest to the lessor or any one else.

14. In the view we have taken, it may not be necessary to consider other contentions raised in the appeal. For disposal of the appeal, however, on all points, we feel called upon to consider the other interesting points raised in the

appeal. Mr. Banerjee has contended that there is no pleading nor evidence in support about the alleged surrender by the original plaintiff. The case of surrender was made in the application for substitution, supported by the evidence of the plaintiff's only witness, who stated that the surrender took place on May 15, 1963 and after surrender there was an intermediary lease by the Trustees, the head lessor, in favour of the substituted plaintiff. The surrender as it appears from the deed of surrender Ex. 7 was not on May 15, 1963 but with the expiry of May 1963. It was contended that there could be no legal surrender in future. It was also contended that the deed of surrender being in writing was compulsorily registrable and not being registered is inadmissible in evidence. In absence of proof of title of the substituted plaintiff which it was incumbent on her to establish to obtain a decree for possession, the suit is liable to fail, apart from other considerations.

15. Mr. Ghosh has disputed the above contentions and submitted that there was ample pleading and proof of surrender by the original plaintiff and the subsequent lease to the substituted plaintiff. The factum of surrender was stated in the application for substitution and there was at no point of time any denial or dispute about the factum of surrender, rather than there was an admission by non-traverse. A new question of fact, now raised for the first time is not permissible. Mr. Ghosh further wanted the Court to ignore the date of surrender mentioned in the application as being on May 15, 1963. Basing his case even on oral surrender as no writing for such surrender is necessary, he submitted that in the case of substitution no further amendment of the plaint is necessary after the disposal of the application for substitution when the claim for substitution is decided on contest.

16. It appears to us that when there is a substitution on the death of a party to the proceedings, a note to that effect in the cause title may be sufficient. In cases where the substitution is claimed on the basis of any assignment, creation and devolution of title, it will be proper to insert necessary averments in the plaint by its amendment at proper stage enabling the contesting parties an opportunity to meet the claim as also the court for determination of the matters in controversy. If this course is not taken, it would result in incongruous pleadings, as in the instant case, as the original plaintiff has been substituted, the reference to the word "plaintiff" in the several paragraphs of the plaint stating the tenancy of the defendant and its determination can have no reference to the sub-

stituted plaintiff. The contesting party will have no occasion to deal with such claim in his written statement. There will also be no scope of any issues being framed thereon in absence of pleadings, and even the Court will have no occasion to determine the claim of the substituted plaintiff to the reliefs.

17. In the light of above discussion there is force in the contention of Mr. Banerjee that in absence of pleading as to surrender, the substituted plaintiff's claim to have the carriage of the suit and to the reliefs prayed should have been rejected. It is obvious that there was no surrender on May 15, 1963 as stated in the application for substitution and in the evidence of P. W. 1. The deed of surrender recited as follows:—

".....Messrs Oswal Jain and Co. hereby surrender and yield up all its right, title and interest and possession as the Lessee in respect of the premises in favour of the Landlords (i. e. Trustees with effect from expiry of the last day of the month of May, 1963."

Such surrender is not legal or valid, nor being in terms with express surrender mentioned in Cl. (e) in Section 111 which as we have seen, provides for immediate yielding up of the interest and a surrender in futuro is not warranted by law. Faced with this difficulty Mr. Ghosh asked us to read the document as a whole and also suggested that the surrender was oral, and no writing is necessary therefor. There is no dispute that a surrender takes place by yielding up of the interest of the lessee and no writing is necessary. Even so, nowhere in the pleadings or in the application for substitution there is a whisper of oral surrender at all or of surrender on a date other than May 15, 1963. Though in the application for substitution, the surrender is stated to have taken place on that date, which could be oral, the plaintiff's only witness stated in evidence that "that company (the original plaintiff) by this deed of surrender surrendered the monthly tenancy in favour of the Trust." As is well known, the plaintiff, in a suit for recovery of possession, must affirmatively prove that he is the rightful owner entitled to possession as enunciated in *Mohima Chunder Mozoomdar v. Mohesh Chunder Neogi*, 16 Ind App 23 at p. 26 (PC) and that the plaintiff must recover by the strength of his own title. The same principle was again enunciated in *K. Lakshman v. T. Venkateswarlu*, AIR 1949 PC 278 at p. 285. There can therefore be no doubt that the plaint suffers from fatal infirmity, firstly because it contains no pleading of surrender and secondly if the pleading in the application be treated as a part of the plaint, such pleading of

surrender and the evidence in support do not establish a surrender valid in law.

18. The next point urged by Mr. Banerjee is about the admissibility of the deed of surrender Ex. 7. A surrender need not be in writing, but if in writing, Mr. Banerjee contends, it must be registered as it purports to extinguish right, title and interest of the value of one hundred rupees and upwards, to or in immoveable property, as provided in Section 17 (1), under Cl. (b) of the Indian Registration Act, 1908. Accordingly Ex. 7 was compulsorily registrable and in absence of such registration, the consequence will follow.

19. Mr. Banerjee referred to the decision in *Bengal Coal Co. Ltd. v. Monoranjan Bagchi*, AIR 1919 Cal 694 in which it was observed that a surrender or relinquishment does not require to be in writing but may be inferred from acts of parties. In *Abdul Majid v. Hari Charan Halder*, AIR 1919 Cal 840, it was held that a surrender is not required to be by an instrument registered. The same view was taken in *Sari Debi v. Sailabala Das*, AIR 1920 Cal 858, in which it was held that even though the original tenancy was created by a registered lease, its surrender would be valid if it is accepted and acted upon by the landlord. But in the present case, as the surrender was by instrument in writing it was compulsorily registrable as was held in *Nadig Neelakanta Rao v. State of Mysore*, AIR 1960 Mys 87. It was held that as the instrument of surrender purports to extinguish the right of the tenant, valued at over Rs. 100/—, it is compulsorily registrable.

20. Mr. Ghosh disputed the contention and in his turn contended on the authorities of this Court cited above, that as the surrender was accepted and acted upon, as also evidenced by Exs. 6 and 7, no further instrument was necessary. He further contended that surrender was not an extinguishment of interest in immoveable property as contemplated in Cl. (b) of Section 17 (1) of the said Act, but as it was relinquishment of the lessee's interest, Cl. (b) of Section 17 (1) was not attracted. Further the interest of the original tenant was that of a monthly tenant and such tenancy does not require registration under Cl. (d) and its surrender accordingly did not require registration. Mr. Ghosh also contended that the Ex. 7 did not by itself create, declare or extinguish any right as would appear reading the document as a whole and accordingly it came under the exception in Cl. (b) of sub-section (2) of S. 17. On that ground the decision in *Nadig Neelakanta Rao*, AIR 1960 Mys 87 (supra) was sought to be distinguished.

21. As we have seen, surrender is an extinguishment of the lessee's interest and there is no dispute that value of the interest would be over Rs. 100/-. The document recites a surrender in praesenti and even if the surrender purports to be effective on a further date, it would make no difference on this aspect for the purposes of registration. Clause (b) of Section 17 (1) includes all instruments which purport or operate to create, assign, limit or extinguish whether in present or in future any right, title or interest of value of Rs. 100/- and upwards, to or in immoveable property. Apart from the surrender as evidenced by the document Ex. 7 and the evidence in support thereof there is no other pleading or evidence in support of oral surrender nor it is dependent on any subsequent document. The document Ex. 7, as we have seen, purports to extinguish the interest of the lessee in his tenancy, and though a surrender on a future date as contended it is an invalid surrender, for the purpose of Section 17 (1) of the Indian Registration Act, the document is compulsorily registrable and is not excepted by any of the provisions of the Act.

22. The next point for consideration is the effect of non-registration of the instrument of Ext. 7. Mr. Banerjee contended that as the document Ex. 7 was compulsorily registrable, in absence of registration, the document is inadmissible in evidence. Under Section 49, a document required to be registered, unless registered will not be received as evidence of any transaction affecting such property except that the document may be received as evidence of any collateral transaction not required to be effected by registered instrument. Mr. Ghosh, however, contended that the appellant should not be allowed to raise this issue after the document has been exhibited and marked as an exhibit. Such objection should have been taken at the earliest opportunity so that the party concerned could have taken steps for registration, for which in the present case, the prescribed period of registration was yet to expire. Mr. Ghosh further contended that the provisions of Section 17 (1) strike at the documents and not at transactions and reliance was placed on the decision in *K. Panchapagesa Ayyar v. K. Kalyanasundaram Ayyar*, AIR 1957 Mad 472. The provisions of the Registration Act cannot render invalid an oral surrender which does not require any written instrument at all. Mr. Ghosh also referred to Section 48 which provides for the cases where registered documents take effect against oral agreements. Mr. Ghosh however based his real objection on the proviso to Section 49, contending that the document could be treated as

evidence of any collateral transaction not required to be effected by registered instrument.

23. There is no doubt that the objection as to the admissibility of the document has to be taken at the earliest stage of hearing. As Mr. Banerjee has pointed out, such objection relates to the mode of proof of documents, where if such objection was taken, the party concerned could adduce stricter formal proof. If however, the objection relates to the admissibility of the document itself under the law, such objection is available to the party even at the appellate stage. This seems to be the effect of the observations made by the Privy Council in *Gopal Das v. Sri Thakurji*, (1943) 47 Cal WN 607 at p. 613. As to the contention regarding Sections 48 and 49, it appears that while Section 48 has no application, the proviso to Section 49 also does not support the contention of Mr. Ghosh, as in this case there is no collateral transaction other than surrender.

24. Mr. Ghosh has lastly contended that if the application for substitution is found as not maintainable, the original plaintiff should be allowed to proceed with the suit. It is obvious that the order of the trial court in allowing substitution without prejudice to the merits of the cases of the parties and keeping the question open is wrong and contrary to the principles of provisions of R. 5 or Rule 10, Order 22 of the Code. The trial court, on hearing, found that the substituted plaintiff was not entitled to proceed with the suit and accordingly the suit was dismissed. No appeal was preferred by the original plaintiff against the decree and at this stage, it is no longer possible to put the clock back as submitted by Mr. Ghosh, as the decree of the trial court which has been final and binding on the original plaintiff cannot now be reopened and it was open to the original plaintiff either to prefer an appeal or to be added as appellant in the appeal under provisions of O. 41, R. 20 of the Code in proper time.

25. In the result, this appeal succeeds and is allowed, the judgment and decree under appeal are set aside and those of the trial court are restored. There will be no order for the costs of this appeal.

SANKAR PRASAD MITRA, J.:—

26. I agree.

Appeal allowed.

AIR 1972 CALCUTTA 198 (V 59 C 35)**B. C. MITRA AND AJAY K. BASU, JJ.**

The Chartered Bank, Appellant v. The Commissioner for the Port of Calcutta, Respondent.

A. F. O. O. No. 99 of 1969, Award Case No. 14 of 1968, D/- 22-11-1971.

(A) Arbitration Act (1940), S. 34 — Application to stay proceedings — Grant of — Principles regarding.

Where a party had repudiated the contract and such repudiation in effect raised the contention that there was no contract at all between the parties, it was not open to that party to take advantage of that portion of the contract which enjoined arbitration. (Case law discussed).

(Paras 15, 16, 17)

(B) Arbitration Act (1940), S. 34 — Stay of suit when may not be granted.

Where the decision of the Arbitrator would not give the plaintiff the reliefs he has claimed in the suit and the plaintiff would have to file a suit for the reliefs even after the award of the Arbitrator, the stay of suit would not be granted.

(Para 22)

(C) Arbitration Act (1940), S. 40 — Application for stay of proceedings — Grant of — Principles.

Suppression of material facts cannot be a reason for rejection of application for stay of.

(Para 23)

Cases Referred: Chronological Paras

- (1970) AIR 1970 Cal 221 (V 57),
New Great Insurance Co. of India
Ltd. v. United Equipments and
Stores (Pvt.) Ltd. 15
- (1960) AIR 1960 SC 1156 (V 47)=
1960-3 SCR 713, Printers (Mysore)
Pvt. Ltd. v. Pothan Joseph 10
- (1959) AIR 1959 SC 1362 (V 46)=
1960-1 SCR 493, Union of India
v. Kishorilal Gupta & Bros. 10, 14
- (1958) AIR 1958 All 522 (V 45),
Ram Bahadur Thakur v. Thakur
Das 10
- (1955) AIR 1955 SC 53 (V 42)=
1955 SCR 862, Anderson Wright
Ltd. v. Moran and Co. 8, 28
- (1954) (1954) 1 QB 8, Christopher
Brown Ltd. v. G. W. H. S. Halftone 7
- (1953) AIR 1953 SC 182 (V 40)=
1953 SCR 572, Gaya Electric
Electric Supply Co. Ltd. v. State
of Bihar 10, 14
- (1953) 91 Cal. LJ 1, Matabhai
Gulabdas & Co. v. Mahaluxmi
Cotton Mills Ltd. 15
- (1952) AIR 1952 Punj 63 (V 39)=
53 Pun LR 321, Chiranjivlal v.
Tropical Insurance Co. Ltd. 15
- (1951) 88 Cal. LJ 34, Pannalal
Sagoremull v. Fateh Chand
Murlidhar 7

- (1949) ILR (1949) 1 Cal 199 = 53
Cal WN 505, Hanutmal Boyd. v.
Khusiram Benarsilal 7, 15
- (1942) 1942-1 All ER 337 = 1942
AC 356, Heyman v. Darwins
Ltd. 9, 13, 15, 28
- (1942) 1942 AC 130, Charles Osenton
and Co. v. Johnston 10
- (1936) 1936-2 All ER 952, Toller v.
Law Accident Insurance Society
Ltd. 15
- (1924) AIR 1924 Mad 336 (V 11)=
45 Mad LJ 653, Anglo Persian
Oil Co. Ltd. v. P. S. P. Aiyer 10
- (1917) 1917-1 KB 486 = 86 LKJB
257, King v. General Commrs.
for the Purposes of the Income-
tax Act 23
- (1915) 1915 AC 499 = 84 LKJB
640, Jureidini v. National British
and Irish Millers Insurance Co.
Ltd. 14

Subrata Roy Choudhury, for Appel-
lant; Biswarup Gupta, for Respondent.

B. C. MITRA, J.:— The respondent instituted Suit No. 2556 of 1967. (The Commissioners for the Port of Calcutta v. The Chartered Bank) for recovery of Rs. 7,35,000/- and for other reliefs. The basis of the respondent's claim is that on or about May 5, 1965, it was agreed between the respondent and a British Company known as Blyth Dry Docks Shipping Building Co. Ltd. (hereinafter referred to as the Company) that the Company would build and deliver to the respondent 2 Hopper Barges at a price of £ 3,50,000/- each aggregating £ 7,00,000/-. In consideration of the contract the appellant by two several Deeds of Guarantee dated 7-6-1966 guaranteed the due performance and observance by the company of all the covenants and conditions of the said contract for supply of Barges and promised to pay on demand £ 17,500/- in respect of each of the said two Barges in the event of a breach or non-performance of the contract or in the event of any neglect or omission by the company. Pursuant to the said contract for the supply of the 2 Barges the respondent from time to time paid divers sums to the company aggregating £ 1,75,000/-.

2. On or about September 13, 1966, the company went into voluntary liquidation without completing, constructing or delivering the said 2 Barges or any of them. The respondent contends that the appellant failed to pay £ 35,000/- under the said 2 guarantees or any portion thereof.

3. On or about November 29, 1967, the appellant was served with the writ of Summons in the said Suit No. 2556 of 1967. The appellant entered appearance in the Suit and on January 5, 1968, took out a notice of motion for stay of the Suit and all proceedings there-

under. This application was disposed of by the trial Court by a judgment and order of May 12, 1969, by which the application for stay of the suit was dismissed. This appeal is directed against the judgment and order dated May 12, 1969.

4. Before proceeding to deal with the contentions of the parties I should refer to the correspondence that passed between the parties in the matter of their rival contentions under the contract. On December 20, 1966, the respondent wrote to the appellant to say that the company had failed to carry out the contract, and that the Guarantee furnished by the appellant had become enforceable. The appellant was therefore called upon to pay Rs. 3,50,000/- under the two Deeds of Guarantee within 15 days. On January 28, 1967, the appellant wrote to the respondent that no formal contract was signed by the respondent and the company, and as no such contract had in fact been signed, the terms of the Guarantees were not operative, and therefore there could be no effective claim under the Guarantees. On March 2, 1967, the appellant wrote to the respondent that a contract existed between the respondent and the company when the tender was accepted, on the understanding that when a formal contract was signed, it would govern what was being done meanwhile, and that the final contract which was to be signed by the parties was concluded at the latest on July 27, 1966. In paragraph 3 of this letter the appellant alleged that as the Guarantee was given in respect of a contract which arose out of the tender and acceptance and not the concluded contract between the parties the contract of guarantee had been superseded and no longer applied. There were several other contentions raised in this letter to which it is not necessary to refer. On April 26, 1967, the appellant forwarded to the respondent a memorandum raising various contentions namely:—

(a) A tender was accepted by the company which was to be embodied in a formal contract a pro forma of which was included in the tender documents.

(b) The contract came into existence when the tender was accepted and such acceptance was on the understanding that if a formal contract was signed it would govern what was being done meanwhile.

(c) The tender and acceptance constituted a tentative contract.

(d) The concluded contract was the result of correspondence which was finally concluded by the company's letter of July 27, 1966. The contract then had retrospective effect and brought into effect Cl. 38 of the Pro-forma Contract so that all previous con-

tracts between the parties were thereby cancelled.

(e) The Guarantee does not purport to and does not guarantee the concluded contract.

(f) The arbitration clause was altered in material respect by the concluded contract unknown to the appellant.

5. It is clear from the contents of the letters written on behalf of the appellant, that it was contending that the terms of the Guarantee Agreement did not become operative and that the contract of Guarantee had been superseded. It is in the face of these contentions that it has to be decided if the appellant is entitled to an order for stay of the suit under Section 34 of the Arbitration Act, 1940. The trial Court, upon analysis of the correspondence, came to the conclusion that the appellant was contending that the contract containing the Arbitration clause never came into being, and there was no binding contract between the parties. It was therefore held that this was a controversy on which the Arbitrator could not adjudicate. It was further held that the appellant was denying the existence as well as the validity of the agreement which contained the arbitration clause, and that the existence and validity of the arbitration agreement could not be the subject-matter of arbitration. On these findings the trial Court came to the conclusion that the appellant was not entitled to an order for stay of the suit.

6. Mr. Subrata Roy Chowdhury appearing for the appellant contended that the existence and validity of the contract of Guarantee was never challenged by his client. He argued that what was contended was that the arbitration agreement was superseded and that the terms of the Guarantee did not become operative so as to sustain a claim by the respondent against the appellant. It was further argued that the appellant never disputed or denied that it had signed the 2 Deeds of Guarantee. He submitted that it was not his case that the contract was void ab initio, nor was it a case where a party denied having entered into a contract, nor a case where the existence of the contract itself was questioned.

7. Counsel for the appellant further argued that his client was ready and willing to go to arbitration. He argued that the material time for the purpose of ascertaining readiness and willingness to go to arbitration, in an application under Section 34 of the Arbitration Act, was the time when the proceedings were commenced. It was contended that whatever might have been the contentions of the appellant before the writ of Summons was served, there could be no doubt, that at the relevant time the appellant was ready

and willing to refer to dispute to Arbitration. In support of these contentions he relied on Russell on Arbitration, 18th Ed. p. 153 for the proposition that where there was an arbitration agreement, and one of the parties to the agreement commenced an action for determination of the dispute in a suit, the prima facie leaning of the Court was to stay the action, and leave the plaintiff to the Tribunal to which he had agreed. Reliance was also placed on a decision of this Court in (1951) 88 Cal LJ 34, Pannalal Sagoremull v. Fateh Chand Muralidhar for the proposition that by mere denial of a contract a party could not defeat the arbitration agreement nor could he take away the jurisdiction of the arbitrator to decide the dispute on the merits. That was, however, an application for setting aside an award. The arbitrators took evidence on the question whether the contract had been entered into. In that case the contract contained the usual arbitration clause for reference of the dispute to the Bengal Chamber of Commerce. We do not think that this decision is of any assistance to the appellant in this case. Reliance was also placed on another decision of this Court in ILR (1949) 1 Cal 199, Hanutmal Boyd v. Khusiram Benarsilal. In that case it was held that in an application for stay under Section 34 of the Act, it was for the defendant in the suit, who applied for stay, to satisfy the Court that conditions for an order for stay were satisfied, and once that was done, the onus shifted to the plaintiff to show that although the conditions were fulfilled, there was sufficient reason why the matter should not be referred to arbitration. This decision again is not of much assistance to the appellant in this case because the basic question in this case is whether, having regard to the disputes agreed to be referred, it is open to the arbitrator to go into the question if he had jurisdiction to adjudicate upon the dispute. Reliance was next placed on an English decision in (1954) 1 QB 8, Christopher Brown Ltd. v. G. W. H. S. Halfone for the proposition that where the jurisdiction of the arbitrator was challenged, he was not bound immediately to refuse to act, until the question of jurisdiction had been determined by a Court of competent jurisdiction. The arbitrator, it was held, was entitled to inquire into the question of jurisdiction, not for the purpose of a decision, which would be binding upon the parties, but for the purpose of satisfying himself whether he ought to go on with the arbitration or not, and that if it became clear to him that he had no jurisdiction, then he might decide not to go on with the arbitration. I do not think that this decision again is of much assistance in this case, because as I shall notice later on,

not only the appellant contended firstly that the contract of Guarantee which embodied the arbitration agreement, did not become operative and secondly that the arbitration agreement was superseded, the scope of adjudication by arbitration of the dispute in this case was very limited in nature.

8. Counsel for the appellant next relied upon a decision of the Supreme Court *Anderson Wright Ltd. v. Moran & Co.*, AIR 1955 SC 53. Reliance was placed on the 4 conditions for grant of stay laid down in paragraph 7 of the Report. It was argued that as soon as proceedings were commenced by a party to an arbitration agreement, and the legal proceeding sought to be stayed was in respect of a matter agreed to be referred, and no steps had been taken in the proceedings and there was readiness and willingness and finally there was no sufficient reason why the matter should not be referred to arbitration, an order for stay of the suit ought to be made. He argued that in this case all the conditions to the making of an order for stay were satisfied and therefore the trial Court should have stayed the suit as prayed for. It is to be noticed, however, that the arbitration clause in the case before the Supreme Court was in the widest possible terms namely: "All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of and/or relating to this contract whether or not the obligations of either or both parties under this Contract be subsisting at the time of such dispute and whether or not this Contract has been terminated or purported to be terminated or completed, shall be referred to the arbitration of the Bengal Chambers of Commerce under the Rules of its Tribunal of Arbitration for the Rules, the arbitration shall be conducted."

9. Reliance was next placed by Mr. Roy Chowdhury on *Heyman v. Darwins Ltd.*, (1942) 1 All ER 337. Reliance was placed on a passage at p. 343 of the Report where Viscount Simon, L. C., and that if one party to the alleged contract was contending that it was void ab initio, the arbitration clause could not operate, for, on this view the clause itself was also void, but if the parties were at one in asserting that they entered into a binding contract, but a difference had arisen between them, as to whether there had been a breach by one side or the other or as to whether circumstances had arisen discharging one or both parties from further performance, such differences should be regarded as differences which had arisen "in respect" or "with regard to" or "under" the contract, and an arbitration clause which used these or similar expressions should be con-

strued accordingly. Reliance was also placed on the observations of Lord Macmillan at p. 346 of the Report, where it is stated that repudiation in the sense of a refusal by one of the parties to a contract to perform his obligation thereunder, did not itself abrogate the contract, and the contract in such a case was not rescinded, as it could not be rescinded by the action of one of the parties alone. It seems to us however, that the decision in *Heyman v. Darwins Ltd.* is against the contentions of Counsel for the appellant. The observations of Viscount Simon L. C., on which Mr. Roy Choudhury relied, have to be read in the context of certain other observations at p. 341 of the Report, to which our attention was drawn by Mr. Biswarup Gupta, counsel for the respondent. These observations are: "If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains." Mr. Gupta contended, and I think rightly that in this case the appellant contended that in the events that have happened, the Contract of Guarantee, which included the arbitration clause, did not become operative at all. I shall turn to this question later in this Judgment.

10. Reliance was next placed by Counsel for the appellant on a Bench decision of the Madras High Court in AIR 1924 Mad 336, *Anglo Persian Oil Co. Ltd. v. P. S. P. Aiyer*. In that case it was held that where there was a submission to arbitration, and a party chose to bring a suit, the other party could decide whether or not he should accept the verdict of the Court, which he could indicate by taking some step in aid of the action or whether he would avail himself of his contractual right to go to arbitration, and if the other party misled the plaintiff into bringing a suit, that might provide ground for punishing him in costs. This decision to my mind is of no assistance to the appellant in this case as it is nobody's case that the respondent was misled into filing the suit. The next case to which Mr. Roy Chowdhury referred was a decision of the Supreme Court, *Gaya Electric Supply Co. Ltd. v. State of Bihar*, AIR 1953 SC 182. Reliance was placed on this decision for the proposition that the legal proceedings which were sought to be stayed must be in respect of a matter which the parties had agreed to refer, and which came within the ambit of the arbitration agreement, and that where a suit was commenced as to a matter which lay outside the submissions, the Court was bound to refuse a stay. It was also held that where the arbitration agreement was broad and comprehensive,

and one of the parties sought to avoid the contract, the dispute was referable to arbitration, if the avoidance of the contract arose out of the terms of the contract itself. The observation of the Supreme Court at p. 184 of the Report are very relevant: "A party cannot rely on a term of the contract to repudiate it and still say that, the arbitration clause should not apply. If he relies upon a contract, he must, rely on it for all purposes. Where, however, an arbitration clause is not so comprehensive and is not drafted in the broad language which was used in the House of Lord's case, namely, "in respect of" any agreement, or "in respect of something arising out of it", that proposition does not hold good". It seems to us that the decision of the Supreme Court is entirely against the contentions of Counsel for the appellant. The arbitration agreement in this case, as I shall notice later on, is by no means, comprehensive. It is a limited reference on 2 particular points, and on none other, and in this case the Guarantee agreement is sought to be avoided for reasons dehors the contract and is not sought to be avoided by reason of something done under the agreement itself or by reason of breach of the term of the agreement. Furthermore, the appellant's contention that the agreement did not become operative, or that it stood superseded was not a contention which was made only before the dispute arose, but these are contentions which have been adhered to by the appellant even after commencement of the suit in the very application, out of which this appeal arises. I shall refer to this question later in this judgment. The next case relied on by the Counsel for the appellant was also a decision of the Supreme Court, *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 SC 1362. In that case it was held by a majority that if an arbitration agreement was couched in the widest terms, the dispute whether there was frustration or repudiation of the contract would be covered by it. This decision again is of no assistance to the appellant in this case, but it supports the contentions of the respondent as I shall notice later on. The only other decision on which counsel for the appellant relied was a Bench decision of the Allahabad High Court in AIR 1958 All 522, *Ram Bahadur Thakur v. Thakur Das* in which it was held that it was in the direction of the Court as to whether an order staying a suit should be made, and that the discretion is to be exercised judicially, sparingly and cautiously. It was also held that in commercial cases there should be very strong grounds for refusing a stay. We do not see how this decision at all helps the appellant in this case. It certainly is within the discretion of the

Court to grant or to refuse a stay, but once the trial court has exercised such discretion, it should not be lightly or readily interfered with, even though the Appellate Court might feel that if the decision rested with it, its own conclusion might have been different. (See Russell 18th Ed. p. 150, 1942 AC 130 and AIR 1960 SC 1156).

11. The existence, the binding effect and the enforceability of the Guarantee agreement has been challenged by the appellant in the correspondence that passed between the parties. In the letter dated January 28, 1967, the appellant contended that the terms of Guarantee agreement were not operative, as no contract had been signed between the appellant and the Contractor. In the letter dated March 2, 1967, the appellant contended that the final contract between the respondent and the Contractor was concluded on July 27, 1966 and as the Guarantee was given by the appellant in respect of the contract which arose out of tender and acceptance, and not the concluded contract between the parties, by virtue of Cl. 32 of the concluded contract, the Contract of Guarantee was superseded and no longer applied. In the last paragraph of this letter it was reaffirmed that the contract between the respondent and the Contractor was a contract which was concluded on July 27, 1966, and this contract superseded all other contracts including the Contract of Guarantee. The letter concluded by saying that the guarantee given must be considered cancelled and no claim can be retained on the basis of the same. In the Memorandum annexed to the respondent's letter of April 26, 1967, it was contended that the contract between the respondent and the Contractor, arrived at on the basis of tender and acceptance, was a tentative contract. It was also contended that the Guarantee did not, in fact, guarantee the concluded contract and that the arbitration clause was altered in material respect by the concluded contract unknown to the appellant. It is clear from the correspondence that the appellant was contending that the Contract of Guarantee was not operative, that it was superseded, and it did not guarantee the contract between principles namely, the respondent and the company. Counsel for the appellant contended that although this might have been the attitude of his client before the institution of the suit, his client's views in the matter had changed since the service of the writ of Summons on November 29, 1967, and that as will appear from the petition, the appellant was, at any rate, since the service of the Writ of Summons, ready and willing to do all things necessary for the proper conduct of the arbitration proceedings.

12. This contention on behalf of the appellant, however, cannot be accepted, having regard to what is stated in the Affidavit-in-reply affirmed by Victor Ralph Winton on March 13, 1968. In paragraph 7(b) of this affidavit the deponent referred to the letter of January 28, 1967, and there is nothing to show that the appellant had changed its views with regard to the contention in that letter that the Guarantee agreement was not operative. On the other hand the deponent expressly craved leave to refer to that letter. In paragraph 7(d) of this affidavit the deponent refers to the letter of March 2, 1967, and again there is nothing to show or suggest that the appellant has changed its views with regard to the contention raised in that letter, that the contract of Guarantee had been superseded and no longer applied. Finally, in paragraph 7(f) of the affidavit the deponent refers to the letter of April 26, 1967 and there is no suggestion in the affidavit that the appellant had changed its views with regard to the contentions contained in the Memorandum which was annexed to the letter of April 26, 1967.

13. Before passing I should deal with a contention of Counsel for the appellant, that in an application for stay, the Court should look into only the plaint and the pleadings in the application for stay, and to nothing else. This submission is altogether untenable. The Court should look into not only the plaint and the pleadings in the application but also to the correspondence that passed between the parties before the institution of the suit in Order to determine their rival contentions regarding the contract containing the arbitration clause (See 1942-1 All ER 337 (supra) at p. 340).

14. The letters written on behalf of the appellant to which I have referred earlier raised 3 contentions, namely, that the terms of the Guarantee agreement were not operative, that the contract of Guarantee had been superseded, that the Guarantee did not purport to and did not, in fact, guarantee the concluded contract between the principals, and that the arbitration clause was altered in a material respect unknown to the appellant. The question is, is there any difference between these contentions and a repudiation of the contract by one of the parties? I see none. The contention, that the terms of the guarantee agreement never became operative so as to bind the parties and the contention that the contract had been superseded, are in my view outright repudiation of the contract. Counsel for the respondent contended, and I think rightly, that there was a repudiation of the contract which went to the very substance of the whole contract, and therefore the appellant could not rely upon the arbi-

tration clause, even assuming there was a valid agreement to refer the same to arbitration. In support of this contention reliance was placed by counsel for the respondent on a decision of the House of Lords *Jureindini v. National British and Irish Millers Insurance Co. Ltd.*, 1915 AC 499. Dealing with this question Viscount Haldane L. C., said at p. 505 of the Report: "Now, my Lords, speaking myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up the repudiation can be entitled to insist on a subordinate term of the contract still being enforced." Reliance was also placed by Counsel for the respondent on a decision of the Supreme Court AIR 1959 SC 1362 (supra). Reliance was also placed on another decision of the Supreme Court AIR 1953 SC 182 (supra). In this case it was held that where a party sought to avoid a contract for reasons de hors the contract, the arbitration clause could not be invoked as it went along with the other terms of the contract, and that a party could not rely on a term of the contract to repudiate it, and still say that the arbitration clause should not apply. Counsel for the respondent contended that the appellant's contention was and still is, that the contract containing the arbitration clause did not become operative, and that it had been superseded, and therefore the appellant could not be allowed, at the same time to urge that the arbitration agreement survived and should be enforced. It seems to us that there is a good deal of force in this contention. We do not see how the appellant can contend that although the contract of guarantee was superseded and although it never became operative as between the parties, yet it is in existence and should be treated to have become operative for the purpose of arbitration.

15. On this question Counsel for the respondent also relied on several other decisions to which I will now refer. He relied on *Toller v. Law Accident Insurance Society Ltd.*, (1936) 2 All ER 952. In that case it was held that if an issue was referred to arbitration and a finding was given by the Arbitrator that there was no contract in existence, that would be a finding that the arbitration clause never existed and the arbitrator had no jurisdiction to deal with the matter and that such an issue would be a proper issue to be tried in Court. In that case, however, a Proposal Form for a car insurance was signed but no premium was paid nor a policy issued, but Cover Notes were issued from time to time. It was in these facts that it was contended that the contract of Insurance containing the arbitration clause never came into existence. The facts in this case seem to us to be

different from the facts in the instant appeal, inasmuch as there is no dispute in this case that the Deed of Guarantee was signed by the parties. I therefore do not think that this decision is of any assistance to the respondent except for the principle it lays down. Counsel for the respondent also relied on the observations of Viscount Simon L. C., in 1942-1 All ER 337 (supra) at p. 341 of the Report to the effect that if a party was denying that the contract ever bound him at all, such an attitude would disentitle him from relying on the arbitration clause which it contained. Reliance was next placed by Counsel for the respondent on a decision of this Court reported in (1953) 91 Cal LJ 1. I do not think that decision is of any assistance as it was not dealing with the case of an order for stay of the suit under Section 34 of the Arbitration Act, 1940. Mr. Gupta also relied on a decision of the Punjab High Court in AIR 1952 Punj 63, *Chiranjiv Lal v. Tropical Insurance Co. Ltd.* In that case again it was held that where a party had repudiated the contract and such repudiation in effect raised the contention that there was no contract at all between the parties, it was not open to that party to take advantage of that portion of the contract which enjoined arbitration. Reliance was also placed by Mr. Gupta on a decision of this Court reported in (1949) 53 CWN 505 for the proposition that where the question of jurisdiction of the Arbitrator was raised in an application for stay, the Court was competent to decide the question whether the Arbitrator had jurisdiction or not. I do not think that this decision is of any assistance to the respondent in this case. Reliance was also placed on a decision of this Court in AIR 1970 Cal 221. I do not think this decision throws any light on the question with which we are concerned in this appeal.

16. In the facts in this case and on the law as it is settled now, I have no hesitation in holding, that even if the arbitration agreement was wide enough to embrace within its ambit, the dispute raised in the plaint, the suit ought not to be stayed, having regard to the contentions of the appellant to which I have earlier referred.

17. The appellant ought not to be allowed to say that though there is no operative and binding arbitration agreement and though the contract between the parties had been superseded, the contract containing the arbitration clause ought to be treated as alive and binding between the parties so as to compel them to go to arbitration.

18. Let us now proceed to have a closer look at the arbitration agreement in this case. The arbitration clause is

part of the Contract of Guarantee and it is necessary that the arbitration clause should be set out in order to appreciate its scope and effect. It is as follows:

"Now this Indenture Witnesseth that in consideration of the premises, the Bank hereby guarantees to the Commissioners the punctual, true and faithful performance and observance by the Contractor of the covenants and conditions on the part of the Contractor contained in the said Contract and the Bank undertakes and agrees with the Commissioners and unequivocally promises to pay to the Commissioners upon demand in writing whenever required by them from time to time to do and within a fortnight from the date of such demand sum or sums not exceeding in the whole £ 17,500 (Seventeen thousand five hundred pounds only) as may become payable to the Commissioners by the Contractor by virtue or arising in any way whatsoever out of or in connection with the said Contract or by reason of any breach or non-performance of the same or by the neglect, omission or breach of the said contract by the Contractor PROVIDED ALWAYS and it is hereby expressly stipulated and agreed that if any question arises as to whether any sum has become so payable by the Contractor to the Commissioners or whether the Contractor is guilty of any breach or non-performance of the said Contract or of negligence or omission to perform the same, the decision of an Arbitrator in England to be appointed by the Ministry of Transport Government of India shall be final and conclusive and this Indenture Further Witnesseth that the Guarantee herein contained shall not be revocable by notice of dissolution, bankruptcy, liquidation, closure or winding up of the business of the Contractor or any change in the constitution or composition of the Contractor's business and the liability of the Bank under these presents shall not be impaired in any way by any extension of time or variation or alteration made, given, conceded or agreed to by the Commissioners in any of the terms or conditions of the said Contract or any other indulgence given by the Commissioners or by reasons of any failure on the part of the Commissioners to enforce any of their remedies against the Contractor and or by reason of failure on the part of the Commissioners to observe or perform any of the stipulations contained in the said Contract and to be observed or performed by the Commissioners or by any other dealing between the Commissioners and the Contractor whether any of the above takes place with or without the knowledge of the Bank and that the Guarantee herein contained shall remain in full force and virtue until all claims

and demands of the Commissioners by virtue or arising out of or in connection with the said Contract have been fully paid and satisfied Provided Always and it is hereby agreed by and between the parties that the Bank's liability under the Guarantee is restricted to a maximum sum of £ 17,500 (Seventeen thousand five hundred pounds only) and this guarantee shall remain in force up to and including a period of six months after acceptance of the vessel in Calcutta unless a suit or an action to enforce a claim under the guarantee is filed against the Bank within six months after acceptance of the vessel in Calcutta as aforesaid all rights of the Commissioners under the guarantee shall stand forfeited and the Bank shall be released and discharged from all liabilities thereunder."

19. There can hardly be any doubt that what the Bank was guaranteeing was the punctual, true and faithful performance and observance by the company of the covenants and conditions on the part of the Company. The Bank promised to pay to the respondent, upon demand, in writing and within a fortnight of such demand, the sums specified, as may become payable to the respondent by the company by virtue or arising in any way whatsoever out of or in connection with the contract or by reason of breach or non-performance of the same. Then comes the arbitration clause which says that if any question arises as to whether any sum has become so payable by the company to the respondent or whether the company is guilty of any breach or non-performance of the contract or of negligence or omission to perform the same, the decision of an Arbitrator in England to be appointed by the Ministry of Transport, Government of India, shall be final and conclusive. The reference to arbitration is therefore on two clearly defined and limited disputes, namely: (1) If any sum has become payable by the company to the respondent and (2) if the company is guilty of breach or non-performance of the said contract or of negligence or omission etc. The Arbitrator therefore has no jurisdiction to adjudicate upon any dispute other than those two. It is not a reference to arbitration couched in the wide terms to which I have referred earlier in this judgment. What is, however, of the utmost importance so far as this appeal is concerned, is that the arbitrator has no jurisdiction at all under the terms of the agreement to go into the question of liability of the Bank to the appellant. That question has been left severely alone, and entirely outside the jurisdiction of the Arbitrator. The suit which is sought to be stayed is a suit by the

respondent against the Bank to enforce its claim. Looking at the plaint, there can be no doubt that the dispute in the suit is altogether outside the ambit of the terms of reference. In other words, the scope of the suit, as it appears from the plaint, is entirely outside the disputes agreed to be referred to the Arbitrator.

20. In paragraph 1 of the plaint the respondent pleads the agreement between the parties to the suit, namely, the Commissioners for the Port of Calcutta and Blyth Dry Docks Ship-building Co. Ltd. for the supply of 2 barges. In paragraph 2 the Contract of Guarantee between the plaintiffs and the defendant is pleaded, the terms of Guarantee being that the defendant guaranteed punctual, true and faithful performance by the Contractor of all the conditions of the contract and promised to pay on demand to the plaintiff a sum of £ 17,500 in each of the 2 guarantees in the event of any breach or non-performance of the contract. In paragraph 3 of the plaint the respondent pleads payment of diverse sums aggregating £ 1,75,000. In paragraph 4 of the plaint the respondent pleads the voluntary liquidation of the Contractor and failure to construct and supply the 2 Barges. In paragraph 5 of the plaint the respondent pleads that he suffered loss and damages. In paragraph 6 of the plaint it is alleged that the appellant failed and neglected to pay £ 35,000 being the amount of 2 guarantees. In paragraph 7 of the plaint it is alleged that the respondent is entitled to Rupees 7,35,000/- with interest of 6 per cent. These are all the averments in the plaint in the suit which is sought to be stayed by the appellant.

21. The correspondence between the respondent and the company which culminated in a contract for the construction and supply of the 2 barges, as also the two Deeds of Guarantee were annexed to the plaint. It is manifestly clear from the plaint that no dispute has been raised therein on the two questions which the parties agreed to refer to arbitration namely: (1) Whether any sum has become payable by the Company to the respondent and (2) Whether the company is guilty of any breach or non-performance of the Contract or of negligence or omission to perform the same. These are the only two disputes which the parties agreed to refer to arbitration. But the only dispute set out in the plaint is the failure on the part of the appellant to pay to the respondent the sum of Rs. 7,35,000/- which the appellant promised to pay to the respondent, upon failure or neglect on the part of the Contractor to construct and supply the 2 Barges. In these facts, the conclusion is inescapable that the dispute rais-

ed and pleaded in the plaint is not a dispute which the parties had agreed to refer to arbitration. The law in this country as it stands today does not entitle the appellant to a discretionary order for stay of suit, in a case such as this.

22. Looking a little deeper into the matter it will be at once seen that arbitration will not, and cannot by any means give to the respondent, the relief which he has claimed in the suit. If the matter was referred to arbitration the only questions that the Arbitrator could adjudicate upon, were whether any sum became payable by the company to the respondent and whether the company was guilty of breach or non-performance of the Contract or of negligence or omission to perform the same. A decision of the Arbitrator on either of these two questions, or on both, would not give to the respondent the amount it has claimed in the suit. Faced with this position, Counsel for the appellant submitted that after getting the award as contemplated by the agreement between the parties, the respondent would have to file a suit for recovery of its dues. If such is the position, as no doubt it is, we see no reasons for staying the suit, which is the only means by which the respondent can try to obtain satisfaction of its claim against the appellant. Even if an award is obtained on either or both of the questions agreed to be referred, dispute in the suit would still remain outstanding and would have to be adjudicated upon in Court on the basis of the claim laid in the plaint.

22-A. There remains only 2 other contentions raised by Mr. Gupta to be dealt with. These were firstly that complicated questions of law were involved, and therefore the dispute should not be referred to arbitration and secondly that discretion should not be exercised in making an order of stay of the suit as the appellant had suppressed the fact that the petitioner was denying the acceptance and validity of the arbitration agreement. The questions of law, which according to the respondent, are too complicated to be dealt with in arbitration, have been set out in paragraph 15 of the petition. We are of opinion that those questions are by no means so complicated as to enable us to hold that they would be beyond the competence or ability of the Arbitrator to adjudicate upon them.

23. On the second question namely suppression, Mr. Gupta submitted that as the appellant had failed to mention in the petition its views on the validity and enforceability of the arbitration agreement, as expressed in the correspondence men-

tioned earlier, it was guilty of suppression, and for that reason the Court's discretion should not be exercised in its favour in granting a stay of the suit. In support of this contention Counsel for the respondent relied on *The King v. The General Commrs.* for the purposes of the Income-tax Act, (1917) 1 KB 486. That was a case of a Rule Nisi in a high prerogative writ and it was held that suppression of material facts in the writ petition was enough to discharge the Rule Nisi. I do not think that the analogy of suppression in a writ petition can be applied to an application for stay of a suit under the Arbitration Act. In any event, we do not think that the alleged suppression was such as to hold that by itself it is enough to refuse to stay the suit. We are not impressed by either of these 2 contentions urged by Mr. Gupta and in our view the trial Court was right in rejecting these contentions.

24. There is however, one another matter to which I should refer before I conclude. Counsel for the respondent relied on the last few lines of the Contract of Guarantee which are as follows:

"And this Guarantee shall remain in force up to and including a period of six months after acceptance of the vessel in Calcutta unless a suit or an action to enforce a claim under the Guarantee is filed against the Bank within six months after acceptance of the vessel in Calcutta as aforesaid. All rights of the Commissioners under the Guarantee shall stand forfeited and the Bank shall be released and discharged from all liabilities thereunder."

25. Relying on this part of the Contract between the parties Counsel for the respondent submitted that the respondent was bound to file a suit against the Bank if it wanted to keep the Guarantee alive beyond the period of six months from the acceptance of the vessel. He also submitted that the parties contemplated by the Contract itself, that a suit should be filed by the respondent for enforcement of its claim under the Contract of Guarantee. It seems to us that this contention on behalf of the respondent is well-founded. It was within the contemplation of the parties that a suit had to be filed within a period of six months after acceptance of the vessel in Calcutta, and unless such a suit was filed the appellant would stand released and discharged from its obligations under the Contract of Guarantee. Under the compulsion of the terms of contract the respondent is obliged to file a suit if it wanted to keep its claim against the appellant alive six months after the acceptance of vessel in Calcutta. It is true that the question of acceptance

of vessel in Calcutta did not arise as the barges were neither manufactured nor delivered. But the intention of the parties is quite clear from the terms of the Contract namely, that a suit was contemplated by both the parties to the contract in certain events and that the respondent's claim against the appellant can only be enforced by a suit and not by a reference of the dispute to arbitration. That position seems to us to be amply clear from the terms of the contract itself.

26. For the reasons mentioned above this appeal fails and is accordingly dismissed with costs.

AJAY K. BASU J.:— 27. I concur with my Lord but would like to add that on construction of the document (Bank Guarantee), Ext. G, at page 30 of the Paper-book, it is clear that the contracting parties to the said guarantee agreement were the Chartered Bank of 4 Netaji Subhas Road, Calcutta, and the Commissioner for the Port of Calcutta and in the recital to the said contract it is inter alia mentioned that Blyth Dry Docks Ship Building Co. Ltd. of London, supplier of 2 steel barges shall furnish a Bank Guarantee by a scheduled bank in Calcutta for a sum of £ 15,500 and pursuant to that the guarantee was furnished by the Bank as mentioned in the said document Ext. G.

28. The alleged arbitration clause incorporated in the said guarantee is certainly outside the ambit and scope of the agreement between the contracting parties. That arbitration only speaks of an Arbitrator in London who will decide the quantum of the sum payable by the Contractor i.e. Messrs. Blyth Dry Docks Ship Building Co. Ltd. of London to the Commissioner for the Port of Calcutta. This arbitration clause does not mention anything about any dispute or claim against the bank. Therefore, the alleged case of action or claim against the bank in terms of the guarantee is not contemplated and is wholly outside the scope of the arbitration agreement. The bank has nothing to do with the arbitration clause in the agreement. This is clear from the fact that at the end of the said paragraph 3 in the said document, Ext. G, it is mentioned that on certain eventualities a suit will have to be filed against the bank to enforce the claim under this guarantee. Therefore, on the construction of the document itself following the principles laid down in 1942-1 All ER 337 and AIR 1955 SC 53, it is clear that the stipulating parties to the guarantee did not bind themselves to the arbitration agreement as such.

29. Therefore, the bank is not entitled to get a stay of the suit under Section 34 of the Indian Arbitration Act,

30. Even assuming that the arbitration clause is binding on the parties to the guarantee (though there is no cogent reason for that) even then one of the essential ingredients for stay under Section 34 of I. A. Act would be whether the petitioner was ready and willing to proceed with the arbitration at the commencement of the proceedings.

31. Mr. Subrata Roy Choudhury, appearing for the appellant, urged that though it might appear from the correspondence disclosed in the affidavits that sometime prior to the commencement of the proceedings his client was contending that the guarantee agreement was invalid or was altered or was superseded and not binding or there was only a tentative agreement and no finally concluded contracts and from which it might appear that prior to the commencement of the proceedings the petitioner was not ready and willing to proceed with the arbitration but nonetheless at the time of the commencement of the proceeding which is the material time, his client might have taken a complete somersault and was ready and willing to abide by the arbitration clause in the contract of guarantee on which the plaintiff has filed the suit and so the petition should succeed. Because what is relevant is the attitude of the party at the commencement of the proceedings and not before. The suit was filed on or about the 9th November, 1967 and the writ of summons was served on the 29th November, 1967 and the application for stay was moved on the 5th January, 1968 and the correspondence relied on were earlier to the filing of the suit.

32. On proper consideration of the affidavits particularly affidavit-in-reply affirmed by Victor Ralf Winton, Deputy Manager and constituted Attorney of the Chartered Bank on 13th March, 1968 in paragraph 7 of his affidavit particularly in sub-paragraphs (b), (d) and (f) he has relied on his client's contention in the correspondence that passed earlier. That is to say there was in fact no resiling from the earlier attitude which was shown from the beginning of the dispute in the correspondence i.e. challenging the contract and the validity of the agreement. From which it is clear that the petitioner was not ready and willing even at the time and after the commencement of the proceeding.

33. I have no hesitation to say that the application for stay was not bona fide or made in the interest of justice and this appeal should be dismissed.

34. I may also mention here that the said Blyth Dry Docks Ship Building Co. of London which went into voluntary liquidation made it clear that they are not in a position to fulfil the said contract

(Vide letter dated 28th January, 1967) when they said that the barges will not be completed and even in their letter dated 20th September, 1967 they said:

"No Indian contracts have been or are being carried out by the Joint Liquidators."

Appeal dismissed.

AIR 1972 CALCUTTA 207 (V 59 C 36)

AMARESH ROY AND A. K. DE, JJ.

Sukumar Bysack, Plaintiff-Appellant
v. Sushil Kanta Banerjee, Defendant-Respondent.

Second Appeal No. 520 of 1967, D/- 7-5-1971.

(A) Evidence Act (1872), Ss. 91, 92—
Oral evidence to show real nature of the transaction was admissible and is not barred by Ss. 91 and 92.

Sections 91 and 92 do not preclude the defendant from showing by evidence that though the document was executed in the form of an agreement for sale of land, the real nature of transaction was a loan for which the document was a security. AIR 1936 PC 70 & ILR (1956) 1 Cal 59 & AIR 1954 Cal 48 and AIR 1954 Cal 379 & AIR 1967 Cal 351 & (1966) 70 Cal WN 982, Followed. (Para 11)

(B) Specific Relief Act (1877), Ss. 20, 22 — Contract for sale — Hard and unconscionable bargain — Discretion to enforce specific performance must not be exercised arbitrarily but judicially — Decree for refund of earnest money to plaintiff with interest modified in second appeal to one of specific performance owing to lapse of time since contract was entered into.

The discretion of Court to enforce specific performance in cases where the bargain in question has been established by evidence to be hard and unconscionable, cannot be exercised arbitrarily and must be exercised judicially in the circumstances of each case. (Para 12)

Where in a suit for specific performance of an agreement for sale, the bargain was found to be not merely improvident or for inadequate consideration but definitely unconscionable, it would be inequitable to enforce performance of contract, and at best the plaintiff could be entitled to a refund of earnest money with stipulated interest. It was held by the High Court in second appeal that such a decree passed by the courts below in favour of the plaintiff would be in proper and judicial exercise of discretion of court for balancing equities between the parties. (Para 12)

But in the changed circumstances owing to lapse of time (as more than 12

years had elapsed since the contract was entered into and also from the date when the suit was instituted), it was held by the High Court that the decree made in favour of the plaintiff would be unjust and inequitable to him. Taking all the matters into consideration the High Court held that it would be just and equitable to both the parties to modify the decree to the extent that if within the stipulated date the plaintiff appellant deposited in the trial court Rs. 15,000/- in cash to be paid to the defendant respondent, there should be a decree for specific performance of the agreement for sale against the defendant and in favour of the plaintiff. If the said amount was not deposited within the prescribed date, the decree passed in the suit by the lower courts would stand affirmed.

(Para 12)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Cal 351 (V 54) =
70 Cal WN 139, Banku Behari
Chandra v. Kalyani Devi 10
(1966) 70 Cal WN 982 = ILR (1966)
2 Cal 641, Budhu Sau v. Mangal
Sau 10
(1956) ILR (1956) 1 Cal 59, Manindra
Nath Bose v. Narendra Kishore
Mitra 10
(1954) AIR 1954 Cal 48 (V 41) =
1954 Cri LJ 13; Sukumar Banerjee
v. Hiralal Chatterjee 10
(1954) AIR 1954 Cal 379 (V 41) =
1954 Cri LJ 1015, Satish Chandra
Saha v. The State 10
(1936) AIR 1936 PC 70 (V 23) =
63 Ind App 126, Tyagaraja
Mudaliar v. Vedathanni 9
(1914) AIR 1914 Cal 137 (V 1) =
ILR 41 Cal 852, Haradhan Deb
Nath v. Bhagabati Dasi 9
Lala Hemanta Kumar, Paresh Nath
Bhattacharyya and Iswari Prosad Agra-
wal, for Appellant; Bankim Chandra
Banerjee and Deba Prosad Mukherjee,
for Respondent.

AMARESH ROY, J.:— This appeal is by the Plaintiff in a suit for specific performance of a contract alleged to be a contract for sale of immovable properties. Plaintiff had also prayed in the suit for possession of the disputed properties by evicting the defendant therefrom and other ancillary reliefs. Plaintiffs lost in the original court of Subordinate Judge and also in the appeal. Hence this Second Appeal has been preferred in this Court.

2. Plaintiff's case was that defendant was the owner of the disputed properties and he had agreed to sell those to the plaintiff for a consideration of Rs. 8000/-. On 23-12-1958 an agreement for sale was executed and registered between the parties, the plaintiff having paid Rs. 3,500/- as earnest money. It was

agreed that defendant shall make out a good and marketable title, deliver the title deeds and connected papers within two days from the date of registration of the agreement, clear the mortgage of the property created by him in favour of Government of West Bengal within 21 days from the date of agreement by paying up the dues of the mortgagee out of the earnest money and complete the transaction of sale within 30 days from the date of delivery of title deeds. Plaintiff alleged that he was ready and willing to pay the balance consideration and made repeated demands on the defendant to comply with the terms of the agreement but the defendant failed to do so. At the same time plaintiff also alleged that the defendant not having disclosed or paid up the dues of Government under the mortgage and also monies due to the Municipality and Calcutta Electric Supply Corporation, the plaintiff is entitled to withhold a portion of the consideration money for clearing those liabilities.

3. Defendant contested the suit. His case is that plaintiff really advanced a sum of Rs. 2232/- as loan at a time the defendant was in urgent need of money for maintaining his big family. The document in the form of agreement for sale was executed as security for the said loan and plaintiff gave assurances that the transaction shall be treated as a loan and security for that loan. Defendant contended that the plaintiff at best can claim refund of the earnest money with 6 per cent. interest thereon.

4. At the trial evidence was given on both sides. While on the plaintiff's side reliance was placed mainly on the registered document proved in evidence and marked Ext. 1 and a bunch of letters marked Ex. 2 series; on the side of the defendant also reliance was placed on some of the clauses in Ex. 1 and contents of letters Ex. 2 series by examining several witnesses to show the real nature of the transaction and the surrounding circumstances in which the transaction was entered into in support of the defendant's case that the transaction was really a loan and the document Ex. 1 was executed as a security for that loan. Some of those witnesses are persons who were present at the transaction and attested the document Ex. 1.

5. Facts brought out in evidence and accepted by both the Courts below are that defendant came to India as a refugee from East Bengal leaving all his property in that country. He has a large family to maintain and look after. He purchased the land in suit measuring about 2 cottas 9 chittaks at a consideration of Rs. 6250/-. Then he took a loan from Government of an amount of Rupees

3250/- for building a house on that land. The property at the time of the transaction evidenced by Ex. 1 consisted of an one storied building having three bed rooms, one Verandah, one C. I. roofed room and sanitary privy and a ringwell. Defendant testified that he spent about Rs. 15,000/- for those structures. Value of the property at the relevant time according to the estimate of D. W. 1 who is an Engineer and expert would not be less than Rs. 21,000/-. Correspondence by letters Ex. 2 series shows that plaintiff's definite case was that the defendant had failed to make out good marketable title and had neither cleared the liability to Government under mortgage nor paid the dues of the Municipality and Calcutta Electric Supply Corporation.

6. A question however was raised whether evidence to show that nature of the transaction was loan and not an agreement for sale of immovable property could be adduced in view of the registered document Ex. 1. Both the courts below held by referring to decisions cited that oral evidence to show real nature of the transaction was admissible and is not barred by the provisions in Ss. 91 and 92 of Evidence Act.

7. Taking into consideration evidence on record, the surrounding circumstances and probabilities of events particularly the several terms in Ex. 1 and definite stand taken by plaintiff as evidenced by letters Ex. 2 series the trial court held that real transaction was one of a loan of Rs. 2232/- at an interest of 6 per cent. per annum and Ex. 1 was executed as security for that loan. It is not an agreement of sale at all, though the document Ex. 1 was executed in that form. The parties never intended that the Bainapatra (Ex. 1) would be given effect to except as a security for the loan. In the terms of the deed particularly in Cls. 3, 4 and 5, the defendant not having made out a good marketable title, as in the plaintiff's definite case, Cl. 8 of the deed Ex. 1 can be enforced that the defendant shall refund the earnest money with interest at the rate of 6 per cent p. a.

8. The learned Subordinate Judge also held that even if the agreement for sale is effective, the plaintiff cannot obtain a decree for specific performance either as of right or as a matter of course. Court has a discretion in the matter of granting an equitable remedy and that discretion should be exercised by taking into consideration all the surrounding circumstances and equity of the bargain. Plaintiff's claim for a decree for specific performance of contract of sale was disallowed but a decree in his favour directing defendant to refund the earnest money with interest was passed in the trial court.

9. Plaintiff appealed against that decree. The appellate Court agreed with the findings of facts arrived at by the trial court and also held that on the authority of Privy Council decision in AIR 1936 PC 70, (Tyagaraja Mudaliyar v. Vedathanni) Sections 91 and 92 of Evidence Act do not preclude the defendant from showing by evidence that though the document was executed in the form of an agreement for sale, the real nature of transaction was a loan for which the document was a security. The appellate Court also held on the authority of the decision of this Court in the case of Haradhan Deb Nath v. Bhagabati Dasi, ILR 41 Cal 852 (853) = (AIR 1914 Cal 137) that Section 20 read with Sec. 22 of Specific Relief Act gives discretion to Court not to enforce specific performance in cases where bargain appears to be so hard as to be unconscionable, so that its actual performance would in the circumstances be inequitable. Being of the view that the discretion has been rightly exercised by the Subordinate Judge, the appellate Court affirmed the decree passed in the trial court and dismissed the appeal with costs.

10. Plaintiff has preferred this Second Appeal from that judgment and decree of the appellate Court. Appearing in support of the appeal the learned Advocate Mr. Lala acknowledged that on questions of fact, the concurrent findings of the Courts below are conclusive and cannot be reopened. But Mr. Lala sought to argue two points as question of law. First, he contended that the Courts below are not correct in overruling the objection of admissibility of evidence to show that facts are contrary to what appears unambiguously in the written contract. To answer this contention on behalf of the Respondents the learned Advocate Mr. Banerjee has relied on the Privy Council decision cited by the Courts below and also on later decisions of this Court explaining the scope of Secs. 91 and 92 of Evidence Act (See ILR (1956) 1 Cal 59, Manindra Nath Bose v. Narendra Kishore Mitra; (AIR 1954 Cal 48, Sukumar Banerjee v. Hiralal Chatterjee); (AIR 1954 Cal 379 (381), Satish Chandra Saha v. The State); (70 Cal WN 139 = (AIR 1967 Cal 351), Banku Behari Chadra v. Sm. Kalyani Devi); ((1966) 70 Cal WN 982, Budhu Sau v. Mangal Sau)).

11. We agree with the contention of Mr. Banerjee that the Courts below have correctly applied the law and have not committed any error in following the decision of the Privy Council and later decisions of this Court above referred to.

12. Only other point raised by Mr. Lala for Appellant before us is the use of discretion of Court for granting equitable relief by enforcing specific perfor-

manance. Mr. Lala is right in asserting that the discretion cannot be exercised arbitrarily and must be exercised judicially in the circumstances in each case. He did not contend that Court has no discretion at all and is compelled to grant the relief of specific performance of a contract that has been established by evidence. His contention was that discretion has not been judicially and properly exercised for rejecting the claim of specific performance of the contract proved in this case. That contention does not appear to us to be sound. In the circumstances of the present case and on evidence on record both the Courts below have found that the transaction was in fact not a contract for sale of land, but only a transaction of loan. Then only the Courts below considered the aspect that even if it is an agreement for sale of land on the terms of that contract plaintiff is entitled to a decree for enforcing Cl. 8 thereof because plaintiff's own case is that Cls. 3, 4 and 5 have not been complied with by defendant and he having failed to make out a good marketable title plaintiff is entitled at best to a decree for refund of the earnest money mentioned in Ex. 1 with interest as stipulated in Cl. 8 of that document. That is a decision must in favour of the plaintiff and has been made in proper and judicial exercise of discretion for balancing equities between the parties. On the findings of the Courts below, to enforce performance of contract of sale, would be inequitable because the bargain was not merely improvident or for inadequate consideration but was definitely unconscionable. We agree with that finding.

13. Mr. Lala then argued that more than 12 years have elapsed since the contract was entered into and also from the date when the suit was instituted. In the changed circumstances by lapse of time, the decree made in favour of the plaintiff will be unjust and inequitable to him. Mr. Lala therefore prayed for modification of the decree suitably on equitable grounds. Mr. Banerjee for the Respondent indicated that his client will not object to stand in the way of suitable modification of the decree for doing justice and equity between the parties that this Court may think proper.

14. Taking all matters into consideration we hold that it will be just and equitable to both parties to modify the decree to the extent that if within 30th of June 1971 the plaintiff deposits in the trial court Rs. 15,000/- in cash to be paid to the defendant, there shall be a decree for specific performance of the agreement for sale against the defendant and in favour of the plaintiff. If the said amount of Rs. 15,000 is not deposited

by plaintiff within 30th June next, the decree passed in the suit shall stand affirmed. With that modification of the decree the appeal is dismissed without costs.

DE, J.:— 15. I agree.

Order accordingly.

AIR 1972 CALCUTTA 210 (V 59 C 37)

S. A. MASUD, J.

Rajlakshmi Dassi Bechulal Das, Plaintiff v. Krishna Chaitanya Das Mohanta, Defendant.

Testamentary Suit No. 3 of 1969, D/- 13-1-1971.

(A) Succession Act (1925), S. 222 — Application for probate — Delay—Effect.

If there is positive proof of execution of the will by oral and documentary evidence delay, by itself cannot be a ground for refusing grant of probate. Further if suspicious circumstances can be given a possible explanation court should not refuse grant of probate when the attesting witnesses have otherwise proved voluntary execution of the will and the testamentary capacity of the testator. (Para 8)

(B) Succession Act (1925), S. 63 — Proof of execution.

The evidence should be examined collectively and in doing so oral, documentary and surrounding circumstances should be taken into consideration. Before an evidence is rejected on grounds of discrepancies the court must satisfy itself that those discrepancies cannot be explained on account of defective memory, failing power of observation. (Para 13)

Cases Referred: Chronological Paras

(1945) AIR 1945 PC 105 (V 32)=

49 Cal WN 481, Manindra Chandra Lala v. Mahaluxmi Bank Ltd. 8

(1939) AIR 1939 Cal 87 (V 26)=

ILR (1938) 2 Cal 173, Kristo Gopal Nath v. Baidya Nath Khan 8

(1939) AIR 1939 Cal 674 (V 26)=

69 Cal LJ 394, Kedar Nath Tushnial v. Raj Kumar Das 13

(1937) AIR 1937 Cal 595 (V 24)=

41 Cal WN 1204, Durgapada Bera v. Atul Chandra Bera 8

(1908) 13 Cal WN 370 = 36 Ind

App 9 (PC), Kishorilal v. Chuni-lal 14

(1894) 1894 PD 151 = 70 LT 453,

Tyrrell v. Painton 8

JUDGMENT:— In this matter the Will of one Sm. Rajlakshmi Dassi of No. 7, Fariapukur Street, now known as

AP/BP/A4/72/RSK

Sibdas Bhaduri Street. Calcutta has been challenged by the defendant, hereinafter described as "Mohanta." According to the plaintiff, Bechulal Das, the sole executor, Rajlakshmi executed her will on November 28, 1929 and thereafter on December 18, 1929 she died. Under the said will the testatrix has provided for a life interest in the said premises No. 7 Fariapukur Street in favour of her younger sister Sm. Saraswati Dassi. It is also provided that on the death of Sm. Saraswati Dassi the brother of the testatrix Shri Gopal Chandra Das and his daughter Sm. Jagatmohini Dassi shall enjoy the said property in equal shares during the period of lifetime of each of them. The Will further states that on the death of the said Gopal Chandra Das and Sm. Jagatmohini Dassi 5 persons, i.e. Surendra Nath Das, Ganendra Nath Das, Ananda Nath Das, Dwijendra Nath Ghosh and the plaintiff Bechulal Das will get the said property in equal shares absolutely. The testatrix under the Will also devised to the plaintiff Bechulal Das her 1/3rd share absolutely in a brick built house at Nabadwip immediately on her death. On December 17, 1933 Saraswati and Jagatmohini separately executed two wills in respect of their respective 1/3rd share in the Nabadwip property in favour of the said Mohanta. On December 2, 1944 Mohanta made an application in Nadia for probate of the will of Saraswati (probate Case No. 101/1944). Some time in 1947 Gopal Chandra Das died. The plaintiff and Jagatmohini contested the probate proceeding in respect of Saraswati's will and also filed written statement on October 6, 1947 probate was granted to Mohanta in respect of the will of Saraswati and simultaneously a compromise took place. In the said proceedings it was agreed that Mohanta will sell 1/3rd share of Saraswati in premises No. 111, Bowbazar Road, Nabadwip to Bechulal and in fact the sale took place on Oct. 7, 1947 and the probate was granted to Mohanta on October 10, 1947. On March 15, 1958 Jagatmohini died. Mohanta who was also the executor of Jagatmohini's will applied for probate. in the Court at Nadia. Bechulal contested the said probate proceedings and filed a written statement where he mentioned the existence of Rajlakshmi's will. Bechulal contested the said probate proceedings, but towards the later part of the hearing he did not appear and consequently probate was granted to Mohanta on April 9, 1962. On September 20, 1963 Mohanta filed a suit in this court against Bechulal claiming the Calcutta property under the will of Jagatmohini. In the said suit on February 11, 1964 Bechulal filed a written statement. On June 6, 1967 Bechulal made an application before this court for

grant of probate to him as the executor to Rajlakshmi's will. On July 29, 1967 probate was granted to Bechulal in common from without special citation in favour of Mohanta. On March 5, 1968 Mohanta's suit appeared in the list of Deb. J. for hearing. Next day Bechulal's solicitor sent a copy of the probate to Mohanta's solicitor stating that under Rajlakshmi's will Mohanta had no right, title and interest in the Calcutta property. On July 30, 1968 on the application of Mohanta the said order for grant of probate of Rajlakshmi's will to Bechulal was revoked by consent. On September 3, 1968 Mohanta entered caveat and the present proceeding before me arises out of Bechulal's original application for grant of probate. Mohanta is seriously challenging the existence and the validity of Rajlakshmi's will. The following issues have been raised and settled:—

Issues.

1. Is the alleged will genuine?
2. Was it validly executed?
3. Did the testatrix have testamentary capacity at the time of execution of the said will?
4. To what relief, if any, is the petitioner entitled?

In my view the evidence relating to issues Nos. 1, 2 and 3 may conveniently be discussed together.

2. The first witness called by Bechulal is Durgagati Chakraborty, a retired Government servant of 69 years age. His evidence may be stated as follows.

He knew Rajlakshmi personally who died on December 18, 1929. He frankly has admitted that Bechulal was his friend and occasionally he went to visit him at his house and in that connection he came to know Rajlakshmi. Bechulal used to call Rajlakshmi 'pisima' i.e. paternal aunt and was residing with her at No. 7 Fariapukur Street. On November 28, 1929 at about 3 p.m. he went to Rajlakshmi's house. He went there and found some witnesses there; Rajlakshmi was present and her younger sister Saraswati was also present. He went there at the request of Bechulal who asked him to be present there for being a witness to the execution of the said will. One Ashutosh Ghosh read over the will to Rajlakshmi and after hearing the contents of the said will she approved the same. Thereafter she put her signature in his presence and after her signature, Sunit Chandra Mitra, a pleader and Dr. M. L. Sarkar and thereafter Ashutosh Ghosh and Nidharam put their signatures one after another. He signed the document after all of them. He has identified the will and also encircled the signature of Rajlakshmi, himself and other witnesses i.e. Sunit

Chandra Mitra, Dr. M. L. Sarkar and Nidhuram. According to him all the signatures were made at the same sitting. He in fact identified the signature of Rajlakshmi in all the pages of the will (Q. 19 to 47). Various questions were put in the cross-examination by Mr. Banerjee on behalf of the said Mohanta. In answer to Q. 178 he said that Rajlakshmi was not very much conversant with reading and writing and the substance of the will was read over to her. Rajlakshmi could not read and write but could just put her signature somehow (Q. 179).

3. Mr. Ghosh on behalf of the plaintiff next called Sunit Chandra Mitra a lawyer of 74 years age. The substance of his evidence may thus be stated. He has identified his own signature and also the signatures of Rajlakshmi and Ashutosh Ghosh in the will. Apart from Ashutosh Ghosh he has also mentioned Durgagati Chakraborty. According to him about 8 or 10 persons were present at the time of the execution of the will. Ashutosh, who happens to be a distant relation one day came to him and took him to the house of Rajlakshmi. He introduced him to Rajlakshmi and told him that she had decided to get her will executed and also wanted him to be the witness in that will. Sunit however, told Ashutosh that as he received his licence recently he suggested the help of his senior lawyer Nalini Nath Ghosh an advocate in Alipore Court. Thereafter Sunit took Ashutosh to Nalini Babu. The will was written out by Haridas Ghosh, the clerk of Nalini Babu. On the date of execution Ashutosh took him to Rajlakshmi's house at Fariapukur Street where he saw two or three persons present. Few other persons came thereafter. Ashutosh called Rajlakshmi and she came there and Ashutosh read over the document to Rajlakshmi. Rajlakshmi approved the same and put her signature (Q. 40). He has identified his own signature and also that of Rajlakshmi in the will. He has been shown an endorsement below the signature of Rajlakshmi which reads as follows:—

"The testatrix of this will Sm. Rajlakshmi Dassi signs in our presence having perused it and she is known well to us."

He had admitted that the said endorsement was done by him after Rajlakshmi and the attesting witnesses put their respective signatures. He did the same as he thought that with such endorsement the will would not be complete (Q. 42-47). According to him Rajlakshmi was well at the time of the execution of the will and he has denied that Rajlakshmi was completely bed ridden or in a comatose condition on that date. In cross-examination

the questions have been asked whether Rajlakshmi read out the will herself. His definite answer is that she did not read the will herself and the endorsement which he added was incorrect. He reiterated that such an endorsement was made by him as he thought wrongly that such endorsement was necessary (Q. 140 to 157). He has frankly admitted that many persons signed the will but among them he remembers Ashutosh and Durgagati Chakraborty (Q. 186). The evidence of this witness has impressed me inasmuch as he has given the evidence frankly. He has admitted his mistakes and his ignorance in the matter of the preparation of a will. He appears to me to be a truthful witness.

4. The next witness is Bechulal Das, the propounder of the will. Although he was not one of the attesting witnesses he was present at the time of the execution of the will (Q. 7). This witness happens to be a distant relation of Rajlakshmi and was earning his livelihood by private tuition since the age of 13 or 14. He is now 68 years old. He also served M/s. Martin Burn & Co. from 1936 to 1956. But as he fell seriously ill he had to retire prematurely. He has explained the circumstances under which the will was executed (Q. 30 to 94). Rajlakshmi expressed her desire to make a will whereby she wanted to settle her properties in a particular manner. Her sisters Saraswati and Jagatmohini were childless widows and were living with her in the said premises at No. 7 Fariapukur Street. It is Bechulal's evidence that since 1929 he used to stay with his own family members and also his elder brother and his family members in the said house with Rajlakshmi, Saraswati and Jagatmohini. Rajlakshmi wanted that after her death Saraswati Dassi should get a life-estate in the said Calcutta property and after her death Gopal Ch. Das, and Jagatmohini will have a life-estate and thereafter the Calcutta property was to be divided among 5 persons including Bechulal. It was her definite desire that 1/3rd of the property at Nabawdip would be given to Bechulal absolutely after her death. Accordingly this will was later executed in accordance with her desire with the help of Bechulal's friend Ashutosh, Sunit Mitra one of the distant relatives of Ashutosh and also Nalini Nath Ghosh the senior lawyer of Sunit Mitra. Ashutosh brought Nalini Babu to Rajlakshmi's house. He introduced him to Rajlakshmi and thereafter Rajlakshmi gave him instruction to draft a will. Nalini Babu drafted the said will but he expressed his unwillingness to sign as an attesting witness as he was busy. The will as drafted by Nalini Babu was handed over to Rajlakshmi and the said will was executed on the 28th

November 1929 in presence of the attesting witnesses who were earlier informed about the date of the execution of the will (Q. 38 to 63). Bechulal has corroborated other witness on material points. Although his evidence has got to be examined with caution inasmuch as he being the propounder and also a legatee is naturally very much interested in getting the probate. Durgagati, Sunit and Bechulal have given evidence that Rajlakshmi understood the contents of the will and put her signature in the will at the same sitting and in the presence of Dr. M. L. Sarkar and Nidhiram Das. Rajlakshmi has put her signature not only at the bottom of the last page of the will but also put her signatures on 4 other pages of the same.

5. Mr. Banerjee on behalf of the Mohanta has strenuously argued that the probate should not be granted to Bechulal inasmuch as there are extraordinary circumstances which show that the alleged will of Rajlakshmi is not genuine. It is now necessary to discuss Mr. Banerjee's objections. Firstly, the inordinate delay on the part of Bechulal in making an application for the grant of probate 38 years after the execution of the will has not been satisfactorily explained, and, as such, the court should consider this fact as a suspicious circumstance which cannot justify grant of probate to Bechulal. I agree with Mr. Banerjee that this unusual delay on the part of Bechulal in making an application to this court for grant of probate raises doubt as to the genuineness of the will. The will was executed on November 28, 1929. Rajlakshmi died on December 18, 1929. Bechulal, the executor of the will, did not apply to this court for grant of probate until June 6, 1967. Admittedly, Mohanta was known to Bechulal. Mohanta was the executor to the wills of Rajlakshmi's sister Saraswati and also her brother's daughter Jagatmohini which were executed on the same day i.e. on December 17, 1933. On December 2, 1944 Mohanta made an application in the Nadia court for probate of the will of Saraswati. In the said probate proceedings written statements were filed by Bechulal along with Jagatmohini. The most natural thing on the part of Bechulal would be to mention the existence of the will in the said written statement but he did not do so. Mr. Banerjee continues to argue that obviously Bechulal was not relying on Rajlakshmi's will for the simple reason that the same was never executed by Rajlakshmi. At first this argument of Mr. Banerjee impressed me and I was satisfied that Rajlakshmi's will never existed. It must have been manufactured subsequently by Bechulal to grab the Calcutta property. But on examination of other evidence and the

surrounding circumstances I am satisfied that the delay cannot be fatal to Bechulal's application as the delay has been explained satisfactorily.

6. Saraswati had 1/3rd share in the Nabadwip property which she gave to Mohanta by her will. In Nabadwip property Gopal Das and Rajlakshmi also had 1/3rd share each. After Gopal's death Jagatmohini became entitled to his 1/3rd share. Rajlakshmi's 1/3rd share was the subject-matter of her alleged will. In the probate proceedings of Saraswati's will the properties belonging to Rajlakshmi were not directly affected. If the property of Rajlakshmi was also the subject-matter of Saraswati's will it would have been considered relevant. Saraswati did not dispose of any property belonging to Rajlakshmi, Bechulal and Jagatmohini, however, challenged the genuineness of the will on other grounds and naturally Bechulal's evidence on this point to the effect that it was not necessary for him to mention about Rajlakshmi's will in the said proceedings should be accepted. On the contrary, it is surprising that Mohanta has compromised the said probate proceedings of Saraswati's will and agreed to sell 1/3rd share of Saraswati in Nabadwip property to Bechulal. This is quite consistent with the evidence of Bechulal that Mohanta had knowledge of Rajlakshmi's will and Bechulal's claim as the owner to Rajlakshmi's 1/3rd share in Nabadwip property under Rajlakshmi's will. As the Calcutta property was not the subject-matter of the probate proceeding of Saraswati's will Bechulal thought that it was not necessary to mention Rajlakshmi's will. There is logic in the case of Bechulal when he has stated that it was not necessary for him to mention about Rajlakshmi's will in the probate proceedings of Saraswati's will. In the affidavit of assets filed by Mohanta the Calcutta property was not included. Saraswati's probate proceedings took place in 1944. In fact Mohanta himself came to know from the Corporation records in 1959 that Saraswati was recorded as the owner of the Fariapukur Street property. Thus Rajlakshmi's will was not a relevant factor in the probate proceedings of Saraswati's will in 1944 vide Mohanta Q. 275-285, 505-616 and Ext. "E". In this connection reference may be made to the recital in the deed of conveyance which was executed by Mohanta in favour of Bechulal in 1947 in respect of Saraswati's 1/3rd share in Nabadwip property as stated above where it is stated that Mohanta was selling Saraswati's 1/3rd share in Nabadwip property to Bechulal who had also a share therein. (vide page 7 of Ext. E.). This recital substantiates the fact that Mohanta had knowledge of the existence of Rajlakshmi's will and Bechulal's claim under

the same. In fact no satisfactory explanation has been given by Mohanta as to the reason why he agreed to sell 1/3rd share of Saraswati in Nabadwip property to Bechulal. It was suggested to Bechulal in cross-examination that Mohanta never examined the deed of conveyance but Mohanta stated in his evidence that he only examined the portion relating to the consideration money and the description of the property sold and did not take care to read the rest of the document. But it is difficult to accept this evidence of Mohanta inasmuch as the very sentence which refers to the consideration money contains also the fact that Bechulal had a share in the property: vide Mohanta Q. 294-350. Further Saraswati died in 1940 whereas Gopal died in 1947. If Rajlakshmi died intestate her Calcutta property was to be inherited by her brother Gopal and in the Corporation record Gopal's name should have been mentioned but as Mohanta himself has admitted that the Corporation record showed the name of Saraswati. This fact also supports existence of Rajlakshmi's will inasmuch as under Rajlakshmi's will Saraswati during her lifetime was entitled to enjoy the Calcutta property vide Ext. (w). It should also be remembered that both the wills of Saraswati and Jagatmohini were executed in 1933, i.e. about 4 years after the death of Rajlakshmi. But the said wills did not mention the Calcutta property at all. The omission of Calcutta property in the said wills is consistent with provisions of Rajlakshmi's will that the property ultimately could vest in 5 legatees including Bechulal. Further the appointment of Mohanta as the executor of Saraswati's and Jagatmohini's will shows that Saraswati and Jagatmohini had confidence in Mohanta. It is extraordinary that Saraswati and Jagatmohini never told Mohanta during their lifetime that either of them was the owner of the Calcutta property left by Rajlakshmi. According to Mohanta he came to know about the Saraswati's ownership in the Calcutta property after a search of Corporation records in 1959. Jagatmohini died after the Act of 1956 came into force. If Jagatmohini knew that she was really the owner of Calcutta property being the heir of Rajlakshmi she could have mentioned the Calcutta property by executing a Codicil. She did not do so nor did Mohanta remind her to do the same. On the contrary, the non-inclusion of Calcutta property in any document in 1957 and 1958 shows that Jagatmohini had knowledge of the fact that Rajlakshmi under her will bequeathed the Calcutta property to Bechulal and four others absolutely subject to the life estate of Saraswati and Jagatmohini.

7. In the probate proceedings of Jagatmohini's will (probate case No. 69 of 1970) before the District Judge, Nadia, Bechulal contested the grant of probate to Mohanta and the probate case was marked as a contentious cause and numbered as P. C. No. 10 of 1960. Bechulal in his written statement challenged the will on the ground of undue influence and coercion and also mentioned the existence of Rajlakshmi's will executed about 30 years ago. It was necessary for Bechulal to mention the existence of Rajlakshmi's will on this occasion inasmuch as under the will of Jagatmohini Mohanta was to get all her properties. As stated earlier she did not mention specifically the Calcutta property. But Mohanta on the assumption that Jagatmohini has inherited the Calcutta property as her legal heir under the Hindu Succession Act 1956 claimed the Calcutta property also, which was one of the properties mentioned in Rajlakshmi's will and naturally Bechulal mentioned Rajlakshmi's will in his written statement. According to Bechulal he could not be present at the final hearing of the said testamentary matter on April 9, 1962 when the probate of the will of Jagatmohini was issued in his absence. As Bechulal was in continuous possession of the Calcutta property for more than 30 years Mohanta filed a suit in this court for declaration of his title and recovery of possession. When the said suit was pending on June 6, 1967 Bechulal made an application in this court for the grant of probate of the will of Rajlakshmi (Matter No. 120 of 1967). On July 11, 1967 Bechulal obtained an order for issue of general citation and publication of the same in Dainik Basumati. No citation to Mohanta was prayed for. On July 29, 1967 the probate was granted to Bechulal by this Court. On March 7, 1968 when Mohanta's suit appeared in the list for hearing before Deb. J. the solicitor for Bechulal wrote to Mohanta's solicitor the Bechulal was granted the probate of Rajlakshmi's will. On May 10, 1968 Mohanta made an application to this court for revocation of the grant of probate to Bechulal. On July 30, 1968 the grant of probate was revoked without any contest by Bechulal. Mr. Banerjee has made strong comments of Bechulal's conduct in getting the probate without citation to Mohanta and also in selling 1/3rd share of Rajlakshmi in Nabadwip property for Rs. 1500/- soon after getting the said probate. There is no doubt that this conduct on the part of Bechulal does create a suspicion. But it appears that in Bechulal's application for grant of probate of Rajlakshmi's will he mentioned the claim of Mohanta in the Calcutta property in the pending suit against him. The general citation was published in Dainik Basumati on July 14,

1967 under the orders of the court and the court did not issue any special citation to Mohanta presumably because Bechulal's counsel did not ask for the same. But in any event Mohanta cannot have any grievance now as the said grant of probate was subsequently revoked. Similarly the sale of $\frac{1}{3}$ rd share of Rajlakshmi in Nabadwip property by Bechulal cannot be construed as fatal to this application. Mohanta has not claimed any share in Nabadwip property under Rajlakshmi's will. Mohanta's omission to claim Nabadwip property in the pending suit in the Calcutta or elsewhere also corroborates the fact that Mohanta perhaps had knowledge of Rajlakshmi's will whereby Bechulal was given the said property absolutely. Secondly Bechulal got the probate on July 29, 1967 and Bechulal sold his $\frac{1}{3}$ rd share of Rajlakshmi in Nabadwip property on April 8, 1968. It is quite possible that Bechulal was in need of money, as he has stated in his evidence, for his family expenses and also for meeting the litigation expenses in the High Court. Thus it cannot be said that the suspicious conduct of Bechulal cannot be explained.

8. The strongest point of Mr. Banerjee is that the court should not exercise its discretion in granting probate to an executor who has applied for the same 37 years after the death of the testator. In support of his contention that delay is not always a ground for refusal of probate, Mr. Ghose has referred me to the following decisions:— *Manindra Chandra Lala v. Mahaluxmi Bank Ltd.*, AIR 1945 PC 105; *Durgapada Bera v. Atul Chandra Bera*, 41 Cal WN 1204 at pp. 1208-1209 — (AIR 1937 Cal 595); *Kristo Gopal Nath v. Baidya Nath Khan*, AIR 1939 Cal 87 and *Tyrrell v. Painton*, (1894) PD 151. In my view if there is positive proof of execution of the will by oral and documentary evidence delay, by itself cannot be a ground for refusing grant of probate. Further if suspicious circumstances can be given a possible explanation court should not refuse grant of probate when the attesting witnesses have otherwise proved voluntary execution of the will and the testamentary capacity of the testator. Reliance may be placed on AIR 1939 Cal 87 (supra); AIR 1945 PC 105 (supra). Bechulal was in possession of the Calcutta property all along and nobody has threatened to dispossess him. The Nabadwip property was tenanted and there is no evidence to show that there was a dispute in respect of the rent of $\frac{1}{3}$ rd share of Rajlakshmi. Mohanta could have led evidence to the effect that the rent in respect of the said $\frac{1}{3}$ rd share of Rajlakshmi property was being collected by persons other than Bechulal. On the contrary Bechulal's definite evidence is

that as he could not have any interest in the Calcutta property until the death of Saraswati and Jagatmohini, he did not think it necessary to apply for a probate. Of course, Bechulal has raised the plea that he did not make the necessary application for want of fund as he has a large family to maintain and also to get several daughters married. Mr. Banerjee has pointed out that Bechulal was earning money as a tutor and also as an employee in Martin Burn Co. and also collected sale proceeds of $\frac{1}{3}$ rd share of Saraswati's will and $\frac{1}{3}$ rd share of Rajlakshmi's will in the Nabadwip property. This explanation also does not seem to be very improbable in view of the fact that the sale proceeds would not exceed a sum of about Rs. 2500/-. But Mr. Banerjee laid stress on the fact that even assuming Bechulal had no interest in the Calcutta property until Jagatmohini's death in 1958, there is no justification for his delay in making an application in 1967. On this point also explanation given by Bechulal is not improbable. Jagatmohini died in 1958. Mohanta applied for probate of Jagatmohini's will in June 1960 which may be said to be the first threat to Bechulal's title in the Calcutta property. The said proceeding came to an end on April 9, 1962. On February 2, 1962 I find an affidavit by Ashutosh Ghosh who as an attesting witness has stated that the will was duly attested. On September 20, 1962 Mohanta filed a suit in this court for declaration of title in respect of the Calcutta property. Bechulal had to get money to contest the said suit and also to make an application for grant of probate of Rajlakshmi's will in this court. As the said suit was not ready for hearing he was not keen to make the application earlier. In June 1967 when Mohanta's suit appeared in the list for hearing he must have been advised to make the necessary application for grant of probate which he did on June 6, 1967. It may be remembered that Bechulal filed a written statement on February 11, 1964 and also affidavit of documents on March 20, 1964. Even assuming that his plea of financial difficulties is rejected in my view the delay of about 7 or 8 years cannot by itself warrant the dismissal of this application.

9. There are other reasons why Bechulal's explanation should be accepted. It appears from the oral and documentary evidence that Mohanta had always been stating that Rajlakshmi died in 1920. The obvious reason for making out such a false plea was to prove that the will could not have been executed in 1929. Secondly, Mohanta's evidence that Rajlakshmi was in a state of coma in November, 1929 cannot be accepted inasmuch as according to Mohanta him-

self he did not visit Rajlakshmi for more than two occasions. In fact different versions were given by Mohanta as to the number of his visits to Rajlakshmi. Thirdly, there is also evidence to show that in connection with the present proceedings Mohanta was going to several attesting witnesses with the obvious object to dissuading the witnesses from giving evidence in the present proceeding. Fourthly, as stated earlier, the deed of conveyance by which he sold Saraswati's 1/3rd share in Nabadwip property to Bechulal shows that Bechulal had shares in Nabadwip property. This fact supports Bechulal's case that Mohanta had knowledge of his right under Rajlakshmi's will. Fifthly, as stated earlier Saraswati's will and Jagatmohini's will did not contain any reference to the Calcutta property. Sixthly, in the Corporation assessment record Saraswati was shown as the owner of the Fariapukur property. The inclusion of only Saraswati's name can only be explained by the fact that Saraswati had a life estate under Rajlakshmi's will and, as such, her name was recorded as the owner of the said house during her lifetime. At the time of Saraswati's death the assessment record dated December 29, 1959 shows that Sm. Saraswati Dassi has been described as the owner of the Fariapukur street property. But her name is written above the words, "estate Rajlakshmi Dassi." If Rajlakshmi died intestate there was no reason for mentioning the said words, "estate Rajlakshmi Dassi." It may be remembered that Rajlakshmi died on December 18, 1929 and Saraswati died on October 14, 1940. After Rajlakshmi's death the name of her brother Gopal Chandra Das should have been substituted instead of Saraswati. But the fact that Saraswati's name was mentioned substantiates the petitioner's case. Bechulal was residing with Rajlakshmi in Fariapukur Street since long prior to Rajlakshmi's death. He was living not only with his family but also with his brothers family in the said house. After Rajlakshmi's death Saraswati, Gopal Chandra Das or Jagatmohini never protested against their occupation in the said property. After all Bechulal is a very distant relation and he had no legal right to stay in the said Calcutta house with his family under the law of Intestate Succession. Even Mohanta at any stage never complained to anybody against Bechulal's occupation. These facts show that Bechulal's legal right as executor under Rajlakshmi's will was recognised by Saraswati, Gopal, Jagatmohini and Mohanta.

10. Mr. Banerjee has next contended that Rajlakshmi had no testamentary capacity at the time of the execution of the will inasmuch as she was

seriously ill and was living in a semi-conscious condition. This contention of Mr. Banerjee cannot be accepted. Durgagati in his evidence (Q. 23, 197-205, 210-212, 211-215) Sunit in his answers to Q. 40-49, 117, 123, 128, 129, 132, 134, 141, 146 and Bechulal also in his answers to Q. 66 to 79, 166-172, 716-722 have without any contradiction stated the will was read over to Rajlakshmi and she approved the contents of the will and then put her signature on the document. According to Mohanta himself, he was not a regular visitor to the said Calcutta property. There is no evidence to corroborate Mohanta's story that Rajlakshmi could not have executed the will as she was in a comatose condition in the last few months of 1929.

11. Mr. Banerjee has also raised the point that the signatures of Rajlakshmi in the will show that they were not written voluntarily or with ease. No issue of undue influence has been specifically raised. A lawyer, a doctor and Government servant have given evidence to the effect that Rajlakshmi put her signatures in the document in their presence. No admitted signature has been produced so that the court might be in a position to compare her genuine signature with her signatures in the will. Mohanta has not categorically stated that the signatures in the will were not signatures of Rajlakshmi. If it would have been a forged document it was not necessary for the forger to put Rajlakshmi's signature on every page of the will. A forger would not ordinarily make a mistake with respect to the spellings of Rajlakshmi's name. On the contrary, the existence of discrepancies give indication that the will was signed by a person who is not sufficiently literate. In fact, the witnesses in support of the petitioner's case have stated that Rajlakshmi was not literate; vide Durgagati Q. 178, 202, Bechulal Q. 542-544 and for the said reason it is natural for Rajlakshmi to put her signatures with difficulties.

12. Mr. Banerjee has also argued that the will is not a natural document. In my view there is no sufficient force in the said contention. Both Saraswati and Jagatmohini were childless widows and Rajlakshmi had provided a life estate for them. Rajlakshmi allowed Bechulal to stay in the house and naturally Rajlakshmi has made provision for Bechulal along with others after the death of Saraswati and Jagatmohini. No evidence has been adduced to the effect that Rajlakshmi had a great affection for Gopal Das. Nor did I find any evidence showing that Gopal Das was protesting against Bechulal's stay in the family or claiming an interest as an heir in the Calcutta property on intestacy.

13. Lastly Mr. Banerjee has drawn my attention to several contradictions in the evidence of Durgagati Sunit and Bechulal. The first contradiction according to Mr. Banerjee was that their evidence as to the number of persons present at the time of the execution of the will was different. I have carefully examined the evidence of Durgagati (Q. 431-444) Sunit (Q. 40-41, 106-112, 118-121, 181-186 and also Bechulal (Q. 30, 31, 536, 541, 557-581). Most of the witnesses have stated that several persons were present. Sunit has stated that when he came into the house about 2 or 3 persons were there but some other persons came later. Similarly a comment has also been made that Durgagati has stated that the date on which the will was executed was a holiday or a Sunday. But Mr. Banerjee has drawn my attention to the 100 years calendar showing that 28th November 1929 was not a Sunday. There is nothing to show that November 28, 1929 was not a public or a local holiday. Durgagati himself in Q. 19 has stated that most probably it was a holiday. Similarly contradictions have also been pointed out in respect of the subsequent endorsements below the signature of Rajlakshmi in the will as mentioned earlier. Durgagati has also stated with respect to the said endorsement that he cannot remember definitely (Q. 181-183, 193). He was specifically asked whether the endorsement was there when he put his signature on the alleged will. His answer was "Yes". In Q. 193 he was asked whether the endorsement was made after Rajlakshmi has put her signature or before she put her signature. His definite answer is that he cannot exactly remember. In my view the contradictions are not substantial enough to enable me to reject other positive evidence. It should be remembered that the witnesses are giving evidence in 1970 about an incident that happened in 1928-29. Apart from that fact that the witnesses have given their evidence after about 40 years, in my view the evidence should be examined collectively and in doing so oral, documentary and surrounding circumstances should be taken into consideration. Before an evidence is rejected on grounds of discrepancies the court must satisfy itself that those discrepancies cannot be explained on account of defective memory, failing power of observation. Reliance may be placed on Kedar Nath Tushnial v. Raj Kumar Das, 69 Cal LJ 394 at pp. 399, 415 = (AIR 1939 Cal 674) and Kishorilal v. Chunilal, (1908) 13 Cal WN 370 (PC).

14. For all the reasons stated above the issues should be answered in the following manner:—

(1) Yes.

(2) Yes.

(3) Yes.

(4) The probate of the will of Rajlakshmi Dassi dated November 28, 1929 should be granted to the petitioner as the sole executor to have effect throughout the State of West Bengal.

15. In the premises there will be order in terms of prayer "B". The plaintiff will realise the costs out of the estate and the defendant will bear his own costs.

Order accordingly.

AIR 1972 CALCUTTA 217 (V 59 C 38)

S. C. GHOSE, J.

Heavy Engineering Corporation Ltd.,
Petitioner v. Crompton Greaves Ltd., Res-
pondent.

Award No. 13 of 1969, D/- 25-11-1970.

Contract Act (1872), S. 7 — Acceptance of proposal — Tender — Even if special conditions are given with the invitation to tender showing general conditions former cannot apply when acceptance specifies only those general conditions and by agreement term 'contract' is to include general and special conditions but no special conditions are prescribed. ILR (1950) 1 Cal 550 & AIR 1956 Cal 280, Referred. (Para 15)

The letter of acceptance is the counter offer and when acted upon it becomes accepted. Then the special conditions can never become part of the contract.

(Para 15)

Cases Referred: Chronological Paras
(1967) AIR 1967 Cal 168 (V 54),

M/s. Teamco Pvt. Ltd. v. T. M. S. Mani 6

(1966) AIR 1966 Cal 588 (V 53),
Shree Bhawani Cotton Mills v. Union Textile Traders 6

(1956) AIR 1956 Cal 280 (V 43) =
60 Cal WN 420, Jyoti Brothers v. Shree Durga Mining Co. 12

(1955) AIR 1955 Cal 588 (V 42),
Laxmi Chand Baijnath v. Kishanlal Sohanlal 6

(1952) 56 Cal WN 763, Karanji & Co. v. Indo-China Trading Co. Ltd. 6

(1950) ILR (1950) 1 Cal 550, Kedar-nath Atma Ram v. Kesoram Cotton Mills Ltd. 12

ORDER:— This is an application made by Heavy Engineering Corp. Ltd. inter alia for stay of the Suit No. 2388 of 1968 (Crompton Greaves Ltd. v. Heavy Engineering Corporation Ltd.) and all proceedings thereunder. On or about 4th October, 1963, the applicant issued a notice bearing No. 4/FF/63 inviting tender for the supply of a Transformer, Switchgear, Circuit Breaker, Isolator, Sele-

IO/JO/E371/71/JRM/AKJ

nium Rectifier Panel etc. It is alleged that pursuant to the said invitation to tender the respondent's predecessor, one Greaves Cotton Crompton Parkinson Ltd. submitted a tender bearing No. AQ/P7210/SED for the supply of a Transformer. The said tender was accepted. It is alleged by the respondent that the said invitation to tender contained a pamphlet which contained certain special conditions. The respondent alleges that the respondent's predecessor submitted the said tender subject to the said special conditions. The said tender, however, was accepted by the petitioner by a letter dated 24th September, 1964, bearing No. PUR/FFP/35426/EL/64/217. The relevant parts of the invitation to tender are set out below:

"Sealed item rate tenders are invited from reputed and experienced suppliers for the supply of machinery and equipment including all accessories for the Foundry Forge Hatia, Ranchi, in respect of the following categories:

The suppliers will be required to give a performance guarantee of the rated capacity of the equipment offered by them and also guarantee for functional output tests on the completion of the erection of the equipment. Tender forms, conditions and specifications of the tender are obtainable from the office of the General Manager, Foundry Forge, Heavy Engineering Corporation Ltd, P. O. Hatia, Ranchi, on any working day during the usual working hours from 12th August, 1963 to 31st August, 1963 (both days inclusive) on payment of the following tender fee in cash (non-refundable):

2. The relevant portion of the Acceptance of tender submitted by the letter dated 24th September, 1964, are set out below:

"Your offer for the following items has been accepted as per details given below:

This contract will be governed by our general terms and conditions specified by HEC Ltd. which can be had on payment of Rs. 0.50 np."

3. The said letter contains terms as to price, sales tax, delivery, despatch instructions, insurance, inspection, payment tests and guarantee.

4. The respondent supplied the said Transformer without one Drain Valve and 6850 Litres of Transformer oil of the value of Rs. 10,375/-. On account of the aforesaid the petitioner deducted the said sum of Rs. 10,375.50 P. from the bill for the Transformer as submitted by the respondent. On 22nd September, 1968, the respondent filed a suit in this court being Suit No. 2388 of 1968 (Crompton

Greaves Ltd. v. Heavy Engineering Corporation Ltd.) for the recovery of a sum of Rs. 14,951.70 P. from the petitioner. The general conditions of contract mentioned in the said letter of acceptance contains an arbitration clause to the following effect:

"15. In the event of any dispute or difference of opinion between the Heavy Engineering Corporation and the contractors as to the respective rights and obligations of the parties hereafter or as to the true intent and meaning of these presents and the many articles or conditions thereto, such dispute or difference of opinion shall be referred to the sole arbitration of the Chairman, Heavy Engineering Corporation and his decision shall be final, conclusive and binding on the parties."

5. According to the petitioner because of the aforesaid arbitration agreement between the parties which is valid and subsisting this suit must be stayed inasmuch as the subject-matter of the suit concerns matters agreed to be referred under the said arbitration agreement.

6. Mr. Bhaskar Gupta appearing on behalf of the respondent submits that in the instant case, general conditions as per the letter of acceptance formed part of the contract. According to the definition of the word "Chairman" in Cl. 1 (v) of the said general conditions the word "Chairman" means the Chairman of the Board of Directors of the Heavy Engineering Corporation Limited and includes the Executive Director, the Controller of Stores and Purchase, the Deputy Controller of Purchase and every other officer authorised to execute contracts relating to purchase and supply of stores on behalf of the Corporation. Thus Mr. Gupta contends that the Arbitrator named in Cl. 15 of the General Conditions of the Contract may mean any of the officers meant by and included in the term "Chairman", in Cl. 1 (v) of the said general conditions of contract. Thus it is not certain as to who is the named arbitrator and so the said arbitration agreement is uncertain and void. It may be lawfully contended by one party that Chairman of the Heavy Engineering Corporation is the Arbitrator while the other party may contend that not the Chairman of the Company but the Executive Director is the named arbitrator. It may also be contended that any of the officers mentioned in Cl. 1 (v) is the named arbitrator. Thus the said clause is void for uncertainty. In support of his contention Mr. Gupta relied on the case of Karanjil and Co. v. Indo-China Trading Co. Ltd., (1952) 56 Cal WN 763 where agreement was to refer the disputes to a Chamber of Commerce in Calcutta. There being many Chambers of Commerce in Calcutta

it was not certain as to which Chamber of Commerce was the named arbitrator and thus the agreement was held to be void for uncertainty. Mr. Gupta also relied on the case of *Laxmi Chand Baijnath v. Kishanlal Sohanlal*, AIR 1955 Cal 588, where the arbitrators were X or Y and thus the arbitration agreement was also held to be void. *Shree Bhawani Cotton Mill's case*, AIR 1966 Cal 588 and *M/s. Teamco Private Ltd. v. T. M. S. Mani*, AIR 1967 Cal 168 relied on by Mr. Gupta also lay down the same principle.

7. From a perusal of the different clauses of the general conditions of contract it appears that only in Cl. 5 the words "The Chairman, Heavy Engineering Corporation Ltd." have been used. In Cl. 15 the words "The Chairman, Heavy Engineering Corporation" have been used. Clause 5 deals with deposit of security by endorsing G. P. Note in favour of the Chairman, Heavy Engineering Corporation Ltd. Clause 15 of course deals with arbitration. In Cl. 6 the word "Chairman" has been used twice; in Clause 7 it has been used thrice while in Clause 9 it has been used 5 times. In clause 11 as well the said word 'Chairman' has been used twice. Thus it appears that the parties used the word "Chairman" in cases where the parties intended that the "Chairman" shall mean and include the Chairman of the Company as well as other officers mentioned in the definition Cl. 1 (v) of the said general conditions. But in cases where the parties intended to refer and mean the Chairman of the Heavy Engineering Corporation Ltd., they have used the expression "The Chairman, Heavy Engineering Corporation Ltd." or "the Chairman, Heavy Engineering Corporation." In any event the definition clause defines the word "Chairman". It does not define or seek to explain the meaning of the words "Chairman, Heavy Engineering Corporation Ltd." or the expression "Chairman, Heavy Engineering Corporation". The distinctive choice of meaning of the words "Chairman, Heavy Engineering Corporation Ltd." or "The Chairman, Heavy Engineering Corporation" with meticulous care has been done only to give meaning to the different clauses. The expression "Chairman, Heavy Engineering Corporation" in Cl. 15 only means the Chairman himself and not any other officer of the said Corporation. The parties by agreeing to Cl. 15, agreed that the disputes should be adjudicated upon by an officer of the highest category only to ensure justice and impartiality to stranger contractors. Thus disputes with the Corporation itself have to be decided by the Chairman of the Corporation. Mr. Gupta contends that since a contractor may be a company the words Heavy Engineering Corporation has

been added after the word Chairman in Clause 15 to mean only the Chairman of the Heavy Engineering Corporation and not of the contractor where contractor is a company and it does not in any other way distinguish the words from the word "Chairman" as defined in Clause 1 (v).

8. For the reasons stated above I am unable to accept the said contentions of Mr. Gupta.

9. Mr. Gupta then contends that the respondent was invited to submit tender subject to the special conditions of contract which were sent to the respondent together with the notice to tender. The respondent submitted the tender subject to the said special conditions. The said conditions are also applicable to this contract inasmuch as the word 'contract' under general conditions means according to the definition clause "The notice to tender, instruction to tender, the tender, acceptance of tender, — 'Particulars' defined in the said conditions of contract and those general and special conditions that may be added." Thus according to Mr. Gupta the definition clause in the general conditions of contract which certainly is applicable to the contract also attracts and makes applicable the said special conditions of the contract in the instant case. The said special conditions of contract also contains an arbitration clause to the following effect:

"(i) All questions, disputes or differences of any kind whatsoever arising out of or in connection with the contract at any time whether during the currency of the contract or thereafter its completion and during the guarantee period, other than the satisfactory period of completion of the functional or output test of the machinery and equipment and/or their performance during the guarantee period in respect of which the decision of the employer shall be final and binding (hereinafter referred to as "accepted matters") shall be submitted in writing by the supplier to the employer and the employer shall within a reasonable time after the submission of the same make and notify his decision thereon in writing;

(ii) If the supplier is dissatisfied with the decision of the employer or if the employer fails to make a decision within a reasonable time then and in any such case but not including any of the accepted matters, the supplier may demand in writing that such matter in question, dispute or difference be referred to arbitration;

(iii) All such matters to be submitted to arbitration as aforesaid shall be referred for decision to two Arbitrators, one to be nominated by the employer and the other by the supplier. In the event of the two arbitrators being divided in

opinion, the matter under dispute shall be referred for decision to an umpire to be appointed by the two arbitrators.

(iv) Unless otherwise agreed upon by the parties the venue of the arbitration proceedings shall be at Ranchi in the State of Bihar, India;

(v) Subject as aforesaid provisions of the Arbitration Act 1940, or any statutory modifications or re-enactment thereof and of the Rules made thereunder for the time being in force shall apply to all arbitration proceedings under this clause."

10. The arbitration clause in general conditions being contrary to the terms of arbitration clause contained in the special conditions it is not certain as to which clause shall prevail and thus both the arbitration clauses are void for uncertainty.

11. Mr. Gupta then contends that the special conditions of contract must prevail over the general conditions and therefore, arbitration clause contained in the special conditions must prevail. The said arbitration clause only confers right upon the respondent to refer the matters to arbitration in certain circumstances mentioned in the said clause. The respondent having instituted the said suit has given a go-by to his right to exercise the option to refer to arbitration and thus this suit must be continued.

12. The arbitration clause in the special conditions although confers the option upon the respondent only, is according to Mr. Gupta, a valid arbitration clause and is binding upon both the parties. Mr. Gupta, in support of his contention, relies on the case of Kedarnath Atma Ram v. Kesoram Cotton Mills Ltd., ILR (1950) 1 Cal 550 (553). Mr. Gupta also relies on Jyoti Brothers v. Shree Durga Mining Co., AIR 1956 Cal 280.

13. Mr. Pal, appearing on the other side, contends that the arbitration clause contained in special conditions is void for want of mutuality.

14. The aforesaid contentions of the parties seems to me to be not necessary to be decided for decision in the instant application for the reasons stated hereinafter. From the relevant portion of the tender notice, a copy whereof has been annexed to the affidavit in opposition filed on behalf of the respondent, it appears that the conditions governing the tender have to be obtained from the office of the General Manager, Foundry Forge, Heavy Engineering Corporation Ltd, at Ranchi. The contract in the instant case was a contract of category 'C' as will appear from the tender notice itself. Thus it is evident that only those conditions which shall be obtained from the office of the said General Manager applic-

able to this kind of contract will be the conditions applicable to this contract. No such conditions has been stated to have been obtained by or relied upon by the respondent in the instant application.

15. The definition clause of the contract will apply to the contract between the parties — "unless the context otherwise requires the word 'defined' shall mean" as has been laid down in the definition clause. The definition of the word 'contract' lays down that only those general and special conditions that may be added to the contract shall apply to the contract between the parties. No special condition was added to or incorporated in the contract between the parties. But by express words, the general conditions were added to and incorporated in the letter of acceptance of tender. The respondent acted upon the said acceptance of tender and or the said letter and on the terms and conditions mentioned therein. In any event the acceptance of the tender submitted by the respondent having been made only on the terms and conditions contained in the letter of acceptance, the said letter was a counter offer and the respondent having acted upon the said letter of acceptance on the terms contained therein, accepted the said counter offer. Thus even if the tender was submitted subject to the special conditions the said special conditions never became part of the contract between the parties. The said special conditions never applied to the contract between the parties.

16. Thus in any view of the matter the special conditions of the contract are not applicable to the contract in the instant case and there cannot be any contradiction between the arbitration clause contained in the general conditions of contract and the arbitration clause contained in the special conditions of the contract. There is only one arbitration clause applicable to the said contract i.e. Clause 15 of the general conditions of contract.

17. Thus in my opinion there is a valid and subsisting arbitration agreement in the shape of Clause 15 of the said general conditions between the parties.

18. There cannot be any doubt that the subject-matter of the suit involves matters agreed to be referred by the said arbitration agreement. The petitioner was ready and willing to do everything for the proper conduct of the arbitration and has not taken any step in the proceedings. There is no reason whatsoever as to why the stay would not be granted in the instant case.

19. For the reasons stated above this application must succeed. The suit being Suit No. 2388 of 1968 is stayed.

20. Costs of and incidental to this application shall abide by the result of the arbitration proceedings.

Petition allowed.

AIR 1972 CALCUTTA 221 (V 59 C 39)
SANKAR PRASAD MITRA AND SALIL KUMAR DATTA, JJ.

Keshab Chandra Datta, Petitioner v. Ballygunge Estate Pvt. Ltd., Opposite Party.

Civil Revn. Case No. 3080 of 1971, D/- 6-1-1972.

(A) Civil P. C. (1908), S. 115 — No jurisdictional error either of law or of fact — High Court would not interfere even if the Subordinate Judge is in error in his appraisal of evidence adduced before him. AIR 1953 SC 23 & AIR 1971 SC 2324, Rel. on. (Para 3)

(B) Civil P. C. (1908), O. 9, R. 13 — Ex parte decree — Allegation that neither the summons nor the notice was duly served — Application under O. 9, R. 13 for setting aside decree maintainable — It cannot be said that only remedy lies in properly constituted suit. (Paras 9, 10)

(C) Civil P. C. (1908), O. 9, R. 13 — Application for setting aside ex parte decree — Satisfaction of the ex parte decree through execution proceedings no bar for making application.

(Paras 15, 19)

Even when an ex parte decree has been fully executed it is open to the Court to set aside the decree on proper grounds and if the ex parte decree is set aside on an application under Order 9, Rule 13 the principles of restitution laid down in Section 144 of the Code of Civil Procedure would be attracted. The fact that a conveyance has been executed by the Court would not disentitle the defendant from seeking its remedies under O. 9, R. 13. (Case law relied on).

(Paras 15, 19)

Cases Referred: Chronological Paras

(1971) AIR 1971 SC 2324 (V 58) =

(1970) 2 SCR 368, M/s. D. L. F.

Housing and Construction Co.

(P) Ltd. v. Sarup Singh

(1966) AIR 1966 SC 948 (V 53) =

(1966) 3 SCR 24, Binayak Swain

v. Ramesh Chandra

(1966) 70 Cal WN 1027, Khushi

Mohan Saha v. Subhas Chandra

Saha

(1960) AIR 1960 Cal 309 (V 47),

Atul Chandra Sarkar v. East

Bengal Commercial Bank Ltd.

(1953) AIR 1953 SC 23 (V 40) =

1953 SCR 136, Keshardeo

Chamria v. Radha Kishan Chamria

3

(1952) AIR 1952 Assam 111 (V 39)

= ILR (1952) 4 Assam 247,

Hurmat Ali v. Matlib Ali

18

(1916) AIR 1916 Cal 710 (V 3) =

20 Cal WN 667, Abdul Rahman

v. Sarafat Ali

14, 16

(1910) 14 Cal WN 182 = 3 Ind Cas

30, Raghunandan Singh v. Jag-

dish Singh

13, 16

(1900) 4 Cal WN 692 = ILR 27 Cal

810, Set Umedmal v. Raja Sri-

nath Ray

12, 16

(1899) ILR 23 Bom 716 = 1 Bom

LR 213, Zendoal Nandal v.

Kishorilal Mehtabhai

11

S. D. Banerjee with B. C. Dutt and Partha Dutt, for Petitioner; R. Choudhury with B. C. Sen, for Opposite Party.

SANKAR PRASAD MITRA, J.:

This Rule has been obtained against order No. 42 dated the 23rd October, 1971 in Miscellaneous Case No. 28 of 1971 (arising out of Title Suit No. 58 of 1970) passed by the Second Subordinate Judge, Alipore. It appears that on the 17th August, 1970, the plaintiff instituted a suit for specific performance of contract for transfer of Aleya Cinema to the plaintiff and, alternatively, for a decree for Rs. 1,12,314.83 and for other reliefs. On November 25, 1970 an ex parte decree was passed in the Suit. The defendant, by this decree, was directed to execute and register a Deed of Transfer in respect of the said Cinema. The decree was sealed and signed on the 5th December, 1970. On January 27, 1971 notice of the Title Execution Case No. 3 of 1971 was stated to have been served on the defendant. Since the defendant did not appear, on the 27th February, 1971, the Court executed an Indenture of Conveyance. On the 1st March, 1971 the conveyance was registered.

2. On April 13, 1971 the defendant made an application under O. 9, R. 13 of the Code on the ground of fraudulent suppression of summons. A Miscellaneous Case was started, being Miscellaneous Case No. 28 of 1971. The learned Trial Judge recorded the evidence of witnesses of both the parties and ultimately came to the conclusion that neither the summons nor the notice of the execution case was served on the defendant. The learned Subordinate Judge set aside, in the premises, the ex parte decree by his order under challenge.

3. Mr. Sankardas Banerjee, learned counsel for the petitioner before us, opened his case by inviting us to consider the depositions of the various witnesses who were examined by the learned Subordinate Judge. Mr. Banerjee wanted us to hold that the evidence adduced by these witnesses had not been properly ap-

preciated. We pointed out to him that in the exercise of our revisional jurisdiction we could not go into these questions. It may be that the Subordinate Judge is in error in his appraisal of the evidence adduced before him. But unless the error is a jurisdictional error, either of law or of fact, while exercising our powers under Section 115 of the Code, we cannot interfere with the order passed by him. In this connection it would be enough to refer to one of the earlier decisions of the Supreme Court as also to its latest decision. In the case of *Keshardeo Chamria v. Radha Kishan Chamria*, 1953 SCR 136 = (AIR 1953 SC 23), it has been pointed out that as the order of the Subordinate Judge was one that he had jurisdiction to make and as he had, in making that order, neither acted in excess of his jurisdiction nor with material irregularities nor committed any breach of procedure, the High Court acted in excess of its revisional jurisdiction under Section 115 of the Code and the order of remand and all proceedings taken subsequent to that order were illegal. The Supreme Court categorically reiterated that Section 115 applied to matters of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it, and if a subordinate Court had jurisdiction to make the order it had made and had not acted in breach of any provision of law or committed any error of procedure which was material and might have affected the ultimate decision, the High Court had no power to interfere however profoundly it might differ from the conclusions of that court on questions of fact or law.

4. The latest decision of the Supreme Court to which our attention has been drawn, is the decision in *M/s. D. L. F. Housing & Construction Co. (P.) Ltd. v. Sarup Singh* reported in AIR 1971 SC 2324. In paragraph 8 at page 2327 it has been observed that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The Supreme Court says further that the words "illegally" and "with material irregularity" as used in Cl. (c) of Section 115 do not cover either errors of fact or of law, they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, according to the Supreme Court, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The Supreme Court, on the facts before it, has warned that mere-

ly because the High Court would have felt inclined had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference in revision under Section 115 of the Code when there was no illegality or material irregularity committed by the Additional District Judge concerned in his manner of dealing with the question.

5. In view of all these well-settled principles it is unnecessary for us to discuss in this judgment the various points which Mr. Banerjee has urged in support of his contention that the Trial Judge has committed errors in his appreciation of the evidence led before him on behalf of the parties. Learned Counsel realised that our jurisdiction in this matter was limited and proceeded to make two substantial contentions. These contentions were: (1) if the defendant Company's case was that service of the summons and service of notice of the execution case were tainted with fraud the remedy lay not in an application under Order 9, Rule 13 but in a properly constituted Suit and (2) an application under Order 9, Rule 13 was not maintainable when an *ex parte* decree had already been satisfied through execution proceedings duly launched.

6. Mr. Banerjee did not cite any specific authorities in aid of any of his contentions aforesaid. But he cited the case in AIR 1960 Cal 309, (*Atul Chandra Sarkar v. East Bengal Commercial Bank Ltd.*) which, according to him, gave some support to his first contention. In this case the first defendant East Bengal Commercial Bank Limited obtained a decree in the High Court against the plaintiff and the second defendant, Oriental Trading syndicate, on an overdraft amount on the 20th July, 1949. It was an *ex parte* decree. The plaintiff Atul Chandra Sarkar did not make any application for setting aside the *ex parte* decree or prefer any appeal therefrom. He filed a suit on January 21, 1949 claiming a declaration that the *ex parte* decree of the 20th July, 1948 was void and of no effect and asked that the decree be set aside. The allegations in the plaint were:

(i) On March 16, 1946 an agreement was made by and between the Bank on the one hand and the plaintiff and the second defendant on the other whereby the Bank was to lend to the second defendant the sum of Rs. 5,000/- against securities of bills drawn or to be drawn by the firm, such loan to be guaranteed by the plaintiff.

(ii) In pursuance of this agreement various sums of money were advanced by the Bank to the firm and bills deposited by the firm were collected by the Bank and appropriated towards its dues.

(iii) On May 31, 1946 the plaintiff revoked the said guarantee by notice in writing.

(iv) On May 31, 1946 a sum not exceeding Rs. 3581/6/9 was due by the second defendant to the bank and a number of bills drawn by the second defendant and exceeding the abovementioned sum remained with the bank for collection and appropriation.

(v) Thereafter the firm deposited various bills with the Bank which were duly collected by the Bank thus wiping out the liability of the firm.

(vi) In November, 1948 the Bank purported to execute the decree made on 20-7-1948 and caused to be attached various properties belonging to the plaintiff.

(vii) The writ of Summons was never served upon the plaintiff who had no opportunity to defend the suit filed by the bank."

7. It was also stated in the plaint that "..... the said decree was obtained ex parte fraudulently by suppression of the summons and by perpetrating a fraud upon the Court by suppression of material facts, in particular by suppression of the fact as to the revocation of the guarantee by the plaintiff as aforesaid."

8. This Court came to the conclusion that the suit was not maintainable. According to this Court mere non-service of summons is not enough to found a cause of action for setting aside a decree; where mere non-service in the complaint the remedies available are (i) application under Order 9, Rule 13 (ii) an appeal from the ex parte decree and (iii) an application for review under O. 47, Rule 1. General allegations of fraud, however, strong the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. The expression "suppression of summons" by itself does not amount to a sufficient averment of fraud. By itself it means little more than not serving it. Something more would be necessary; there would have to be an averment that there was collusion between the process server and the identifier or that there was a deliberate misleading of the process server or other similar allegations.

9. This case in our opinion is no authority for the proposition that when there are allegations of fraud in the service of summons or the notice of execution the party affected can only take recourse to a suit. Order 9, Rule 13 has its limitations but subject to these limitations there appears to be no bar to an application under this Rule even when the

allegation is that there has been a fraudulent suppression of summons. To make the position clear let us try to examine the language of Rule 13 of Order 9. It says: "In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:"

10. The opening words of the Rule are indeed comprehensive. In every case where the defendant's allegation is either that the summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the defendant may make an application under this Rule. In other words when any of the two conditions aforesaid is satisfied there is no legal bar to an aggrieved defendant making an application under Rule 13 of Order 9. In the instant case we have gone through the petition for setting aside the ex parte decree. No doubt various allegations relating to fraudulent suppression of summons and of notice of the execution case have been made but the sum and substance of these allegations seem to be that the defendant complains that neither the summons nor the notice was duly served. In these circumstances, we are unable to hold that the application under Order 9 Rule 13 was not maintainable or that the petitioner's only remedy lay in a suit.

11. Let us now discuss Mr. Sankardas Benerjee's second contention namely no application under Order 9, Rule 13 lies when an ex parte decree has been satisfied by execution. Here again Mr. Banerjee did not cite any authorities to support him. He, however, drew our attention to the Bombay High Court's Judgment in Zendooolal Nandlal v. Kishorilal Mehtabhai reported in (1899) ILR 23 Bom 716. The Bombay High Court has held that the fact that an ex parte decree has been satisfied, does not disentitle a defendant from applying to the Court to set it aside under Section 108 of the Civil Procedure Code (Act XIV of 1882) which corresponds to Order 9 Rule 13 of the present Code. Mr. Banerjee submitted to us that it was not a sound judgment. But he did not

tell us why he thought that the decision should not be followed.

12. In our view, satisfaction of an *ex parte* decree creates no bar to an application under Order 9 Rule 13. We derive support for this view not only in the Bombay High Court's Judgment but also in several judgments of our Court which have ultimately been approved by the Supreme Court. In *Set Umed Mal v. Raja Srinath Ray* (1900) 4 Cal WN 692, this Court has held that a sale in execution of a mortgage decree, where the decree-holder is the auction-purchaser must be set aside, when the decree itself is set aside under Section 108 of the Civil P. C., 1882, even though the sale had been duly confirmed.

13. In *Raghu Nandan Singh v. Jugdish Singh* (1910) 14 Cal WN 182 an *ex parte* decree and sale under it were set aside and after a rehearing a decree was again passed against the judgment-debtors. This Court has held that the principle of Section 144 of the Code of Civil Procedure cannot be availed of to set aside the order setting aside the sale. When a decree has once been set aside under Section 108, Civil P. C. (Act 14 of 1882), it cannot by any subsequent proceeding be taken to be revived. If a decree is passed against the judgment-debtors on rehearing it is a new decree and does not revive the former decree. At page 182 it is observed: "It is argued that we are to apply by analogy the principle of restitution provided in Section 144 of the new Code corresponding with Section 583 of the old Code. This appears to us not to be applicable. After the decree has once been set aside under Section 108 it cannot by any subsequent proceeding be taken to be revived and proceedings under it are consequently invalid. We do not see how we can extend the principle laid down on appeal by Section 144, nor can we see any reason why it should be necessary to do, for the decree passed in the rehearing is a new decree so far as the defendants Nos. 4, 7 and 8 are concerned on account of some defect in the trial."

14. The next case is a stronger one. It is the case of *Abdul Rahaman v. Sarafat Ali* reported in 20 Cal WN 667 - (AIR 1916 Cal 710). It has been held in this case that the assignee from the decree-holder who has purchased property in execution of his own decree is in no better position than his assignor, and the sale is set aside when the decree is set aside even when the decree-holder has sold the property to a stranger. As soon as an *ex parte* decree is set aside, the sale, where the decree-

holder is the purchaser, falls through and is not validated by a fresh decree subsequently made.

15. All the authorities cited above point to the conclusion that even when an *ex parte* decree has been fully executed it is open to the Court to set aside the decree on proper grounds and when the Court does set it aside the principles of restitution would be attracted.

16. The Supreme Court has considered *inter alia*, the cases reported in 4 Cal WN 692; (1910) 14 Cal WN 182 and 20 Cal WN 667 - (AIR 1916 Cal 710) in its judgment in *Binayak Swain v. Ramesh Chandra* reported in AIR 1966 SC 948 and has explained the doctrine of restitution in relation to an *ex parte* decree. The Supreme Court has said that the principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from. In the case before the Supreme Court in execution of an *ex parte* decree passed in an appeal by the District Judge, the property of the judgment-debtor was sold and purchased by the decree-holder himself. The High Court subsequently set aside the *ex parte* decree and the suit was remanded for rehearing and fresh disposal. The SC is of the view that on these facts the judgment-debtor under Section 144 of the Code is entitled to restitution of his properties which the decree-holder had purchased subject to equities to be adjusted in favour of the decree-holder. The Supreme Court has stated further upholding this Court's view expressed in the judgments cited above, that by the passing of a subsequent decree upon a fresh disposal of the suit the execution sale held in the *ex parte* decree which the High court has set aside was not validated. At the time of the application for restitution, the SC has said, the judgment-debtor was entitled to restitution because on that date the decree in execution of which the properties were sold had been set aside. The Supreme Court says further that the judgment-debtor is entitled to restitution notwithstanding anything

that happened subsequently as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff at the time when the application for restitution was made.

17. We may also refer to the judgment of Mr. Justice Chatterjee in *Kushi Mohan Saha v. Subhas Chandra Saha*, reported in (1966) 70 Cal WN 1027. Mr. Justice Chatterjee has held that Section 144 of the Code refers to all cases of variation or reversal of the decree including one by an Order under O. 9, R. 13 of the Code and is not limited to variation or reversal of a decree by a Court of Appeal. If a decree, therefore is set aside by an order under Rule 13 of Order 9 it is varied and as such Section 144 applies. We are in agreement with this view.

18. Lastly, we would refer to the Assam High Court's judgment in *Hurmat Ali v. Matlib Ali* AIR 1952 Assam 111. The Assam High Court has held that where in execution of a decree for specific performance, the plaintiff got the possession of the properties and then transferred them to another person and the decree was reversed on appeal, the defendants were entitled to get restitution under Section 144 from the transferees from the original decree-holder.

19. These authorities are clearly contrary to the submission of counsel for the petitioner that an application under Order 9, Rule 13 could not be made in this case inasmuch as the conveyance had already been executed in favour of the plaintiff pursuant to the ex parte decree. It seems that if the ex parte decree is set aside on an application under Order 9, Rule 13 the principles of restitution laid down in Section 144 of the Code of Civil Procedure would be attracted and the fact that a conveyance has been executed by the Court in the circumstances stated above does not disentitle the defendant from seeking its remedies under Order 9, Rule 13.

20. In these premises this Rule is discharged and the interim order is vacated. The petitioner will pay to the opposite party the costs of this application hearing fee being assessed at 10 gold mohurs. Let the records be sent back expeditiously.

SALIL KUMAR DATTA, J.: 21.
I agree.

Rule discharged.

AIR 1972 CALCUTTA 225 (V 59 C 40)

A. K. MUKHERJEA AND

M. M. DUTT, JJ.

State of West Bengal, Appellant v. Secretary, Union Club, Purulia, Respondent.

A. F. O. D. No. 798 of 1965, D/- 9-12-1971.

(A) Land Acquisition Act (1894), Section 23 (1) — Determination of market value — Post notification sales — When can be considered.

Post notification sales of similar lands in the locality cannot be taken into consideration while determining the market value of the acquired land if the court finds that after publication of the notification the price of the lands in the locality had been affected. Whether the notification affected the price of lands has to be determined on the facts proved in the case and the onus to prove such facts is on the party who objects to the consideration of such sale transaction. Where there is no such proof they can be taken into consideration. (1909) ILR 33 Bom 325 & AIR 1966 Mys 66, Rel. on.

(Paras 5, 6)

(B) Land Acquisition Act (1894), Section 23 (1) — Sale transactions not relied on by Collector — Whether Government can rely on them in reference.

When the Collector who acts as the agent of the Government in assessing the market value of the acquired land has not relied on particular sale transactions it will not be open to Government to rely upon them in reference proceedings under Section 18. (X-Ref.— Section 18). AIR 1967 Cal 631 & AIR 1967 Andh Pra 230, Rel. on.

(Para 12)

(C) Land Acquisition Act (1894), Section 19 (1) (d) — No disclosure of basis of valuation by Collector — Onus to prove valuation incorrect.

The onus to prove the valuation made by the Collector to be incorrect is on the claimant. Where the Collector in making the reference does not state the basis of his valuation the burden of proof on the claimant is nominal and can be discharged by slight evidence. (1907) ILR 34 Cal 599, Rel. on.

(Para 13)

Cases Referred: Chronological Paras
(1967) AIR 1967 Andh Pra 230
(V 54) = (1966) 2 Andh WR 186.

Sub. Collector Ongole v. Yerra Anumanchamma 12

(1967) AIR 1967 Cal 631 (V 54) = 72 Cal WN 235, Charu Prokash Ghosh v. State of West Bengal 12

(1966) AIR 1966 Mys 66 (V 53) = (1965) 1 Mys LJ 300, M. S. Nanjappa v. Special Land Acquisition Officer 6

(1909) ILR 33 Bom 325 = 10 Bom
LR 660, Govt. of Bombay v.
Karim Tar Mahomed 6

(1907) ILR 34 Cal 599, Fink v.
Secy. of State for India 13

S. C. Das Gupta, for Appellant; B. C.
Dutt and Shib Kumar Majumdar, for
Respondent.

M. M. DUTT, J.:— This appeal has been preferred by the State of West Bengal against the award dated August 24, 1964, of the learned District Judge, Purulia, under Section 18 of the Land Acquisition Act (hereinafter referred to as the Act).

2. The appellant State of West Bengal acquired 1.35 acres of land appertaining to certain plots belonging to the respondent, the Union Club of Purulia. The relevant notification under Section 4 of the Act was published on September 4, 1952 and the declaration under Section 6 of the Act was published long thereafter on February 2, 1961.

3. The Land Acquisition Collector classified the land as Bastu I land and Bastu II land. He valued the Bastu I land at Rs. 9,800/- per acre and the Bastu II land at Rs. 7,800/- per acre. On the basis of the said rates the Land Acquisition Collector made an award of Rupees 15,313.40 as compensation for the land acquired. Being aggrieved by the said award of the Collector, the respondent made an application for a reference to the District Judge under Section 18 of the Act.

4. Before the learned District Judge the respondent claimed compensation at the rate of Rs. 1,000/- per cotta. In support of their claim for compensation at the said rate, the respondent relied on certain sale deeds marked as Exhibits 4 to 4d. The learned District Judge could not place reliance on these sale transactions excepting the transaction evidenced by Exhibit 4C which is a sale deed dated February 23, 1953. The appellant also filed certain sale deeds marked as Exhibits A to A(7). The learned District Judge, however, rejected all these documents relied on by the appellant. The learned District Judge came to the finding that there was no distinction between Bastu I land and Bastu II land as made by the Land Acquisition Collector. According to the learned District Judge the acquired land was Bastu I land and no portion of it was Bastu II land. After considering the evidence of the witnesses of the parties and relying on the sale deed Exhibit 4C, the learned District Judge came to the conclusion that the acquired land should be valued at the rate of Rs. 24,000/- per acre. Upon these findings, the learned District Judge

awarded compensation to the respondent in respect of the acquired land at the rate of Rs. 24,000/- per acre plus the usual statutory allowance under Section 23 (2) of the Act. Hence this appeal by the State of West Bengal.

5. The finding of the learned District Judge that the acquired land is Bastu I land, has not been challenged by Mr. Das Gupta, learned Advocate for the appellant. He, however, strenuously urged that the sale deed Exhibit 4C being a post notification transaction should not be relied on in determining the market value of the acquired land. It was submitted by Mr. Das Gupta that under no circumstance a post notification transaction could be a proper indicia for ascertaining the market value of the land. We are, however, unable to accept the said contention of Mr. Das Gupta. Under Section 23(1), the Court has to determine the market value of the land. One of the methods of valuation is the price paid, within a reasonable time, in bona fide transactions of purchase of land acquired, or of the land adjacent to the land acquired having similar advantages. Such transactions of sale indicate the price of the land acquired on the date of the notification. The Court has to consider whether or not any particular transaction of sale affords a fair criterion of the market value of the land acquired. There is no rule that a post notification transaction of sale of land similar to the acquired land cannot be looked into. If in considering a post notification sale, the Court finds that after the publication of the notification the price of the lands in the locality has been affected, in that case, it will not be proper for the Court to rely on such a transaction of sale, for it will not be of any guide for the determination of the market value of the acquired land.

6. Whether the notification has affected the price of the land in the neighbourhood of the acquired land or not cannot be assumed by the Court, but has to be determined on facts proved in the case. The onus to prove such facts is on the party who objects to any such transaction of sale being relied on by the Court for ascertaining the market value of the acquired land. The view, which we take finds support from the decision in Govt. of Bombay v. Karim Tar Mahomed, (1909) ILR 33 Bom 325. It has been held in that decision that sales after the date of notification must be discarded when it has been proved that the values have been affected one way or the other by circumstances which have arisen after that date. A Division Bench of the Mysore High Court in M. S. Nanjappa v. Special Land Acquisition Officer, AIR 1966 Mys 66, has taken the same view. It has been held in that case that

bona fide sale transaction cannot be excluded from consideration merely on the ground that it was entered into subsequent to the date of the notification. Further, it has been held that in taking into consideration a subsequent transaction, enhanced values attributable to the very acquisition or to a general increase in the market price should not be overlooked by the Court.

7. There is no evidence in the present case before us that after the publication of the notification under Section 4, the land value was affected one way or the other. In the absence of any evidence showing that the value of land in the locality of the acquired land was affected after the publication of the notification under Section 4, the post notification transaction of sale by the sale deed Exhibit 4C cannot be excluded from consideration in the matter of determining the market value of the acquired land.

8. It appears from Exhibit 4C that a parcel of Bastu 1 land was sold at the rate of Rs. 24,000/- per acre. The land sold is situate very near to the land acquired and it is similar to the acquired land. The learned District Judge was justified in relying upon this transaction of sale.

9. The respondent relied on an estimate of valuation made by a Government valuer at the instance of the appellant, for the purpose of showing that the market-price of the acquired land was much more than what the Collector had awarded. It appears from the estimate (Exhibit 5) that the acquired land was valued at the rate of Rs. 12,000/- per acre. The estimate on the face of it shows that the Collector's valuation is wrong.

10. It has been already stated that the learned District Judge refused to rely on the sale deeds filed by the appellant. Out of these sale deeds Mr. Das Gupta relied on three of them. Exhibit A is dated February 8, 1952, and it shows 3 cottas of home-stead land was sold at Rs. 199/- only, that is, at the rate of Rs. 3,978/- per acre. Bibhuti Bhusan Dhole, who is the Secretary of the Purulia Union Club, says in his evidence that the land sold by the document (Exhibit A) is low land and there is paddy-land adjacent to the same. It appears from the schedule of Exhibit A that the northern and southern boundary of the land sold has been described therein as "Landlord's Khas land." This description supports the evidence of this witness. Moreover, the witness was not cross-examined on the point on behalf of the appellant. In our view, this particular sale cannot be said to be a comparable sale and the learned District Judge was right in rejecting the same.

11. Exhibit A (2) is dated June 27, 1952, and Exhibit A (4) is dated March 16, 1951. By Exhibit A (2), a dwelling house appertaining to 2 cottas of land was sold at Rs. 49/- only and by Exhibit A (4) also another dwelling house standing on 1 cotta of land was sold at Rs. 100/- only. It is inconceivable that even in 1952, dwelling house standing on 1 cotta or 2 cottas of land in the town of Purulia could be sold either at Rs. 100/- or at Rs. 49/-. It is not known under what circumstances the same were sold at such a low price. Moreover, in neither of the documents the house and the land have been valued separately. The learned District Judge was perfectly justified in not placing any reliance on these two documents.

12. For another reason, the sale deeds Exhibits A, A (2) and A (4) cannot be relied on. It does not appear that the Collector in determining the compensation of the acquired land made any enquiry in ascertaining the market value of land on the date of the notification, nor does it appear that the Collector relied on any of the sale deeds filed by the appellant. Even, assuming that the Collector made some enquiry as to the market value of the land at or near about the date of notification under Section 4, it is apparent from the price of the acquired land assessed by the Collector, that the Collector did not rely on the sale deeds Exhibits A, A (2) and A (4). Mr. Dutt, learned Advocate appearing on behalf of the respondent relied on a Bench decision of this Court in Charu Prokash Ghosh v. State of West Bengal 72 Cal. WN 235 = (AIR 1967 Cal. 631) which to some extent lends support to the contention that the transactions of sale which were not relied upon by the Collector could not be relied on by the State in a reference under Section 18 for the enhancement of the valuation. The Andhra Pradesh High Court in Sub-Collector, Ongole v. Yerra Anumanchamma, AIR 1967 Andh Pra 230, also refused to rely on a sale transaction on the ground that the officer who passed the award had not considered that as relevant in awarding the market value. In our opinion, when the Collector who acts as the agent of the Government in assessing the market value of the acquired land, has not relied on particular sale transactions it will not be open for the Government to rely on such transactions. In the instant case, the Collector did not place reliance on the sale deeds Exhibits A to A (7). The same cannot, therefore, be considered in determining the market value of the acquired land. In any event, the sale deeds relied on by Mr. Das Gupta, namely, Exhibits A, A (2) & A (4) cannot be said to be comparable sales.

13. Lastly, it was argued by Mr. Das Gupta that the onus lay on the respondent to prove that the Collector's valuation was erroneous and inadequate. There cannot be any doubt that the valuation made by the Collector is insufficient or inadequate must prove the same (sic). It has, however, been held by a Bench of this Court in *Fink v. Secy. of State for India*, (1907) ILR 34 Cal 599 that when the Collector makes no enquiry or gives no ground for his valuation, the burden of proof on the claimant is nominal. In this connection, we may refer to Clause (d) of Section 19 (1) of the Act which provides that in making the reference, the Collector shall state for the information of the Court, in writing under his hand the grounds on which the amount of compensation was determined when the objection is to the amount of the compensation. In his statement, the Collector has only stated the rates of Bastu I land and Bastu II land. He has not disclosed the basis for the said rates of valuation. In our view, the Collector has not complied with the provision of Clause (d) of Section 19 (1). Where the Collector discloses the basis for his valuation, the Court is in a position to consider the same with reference to the evidence adduced by the referring claimant in discharging the onus that lies on him. Omission by the Collector to state the grounds on which the amount of compensation was determined prevents the Court from such consideration and consequently, the onus of the referring claimant becomes negligible. In such a case, only slight evidence adduced by the referring claimant will discharge the onus. Most respectfully we agree with the principle laid down by this Court in *Fink's case* referred to above. We have already stated that the Collector has not, in his statement under Section 19, disclosed the ground of his valuation. There is no evidence from which the basis for the Collector's valuation can be ascertained. For the reasons aforesaid, the onus of the respondent is negligible and only slight evidence would discharge the said onus. In our opinion, the respondent has been able to discharge their onus that the Collector's valuation was inadequate.

14. The learned District Judge was right in not accepting the claim of the respondent that the acquired land should be valued at the rate of Rs. 1,000/- per cotta or Rs. 60,000/- per acre. At the same time, the learned District Judge could not accept the valuation made by the Collector and after considering the evidence adduced on behalf of the parties, the learned District Judge fixed the market value of the acquired land at the rate of Rs. 24,000/- per acre. We have ourselves considered

the materials on record and we also come to the same conclusion as that of the learned District Judge, that the market value of the land should be at the rate of Rs. 24,000/- per acre.

15. In the result, the judgment and award of the learned District Judge are affirmed and the appeal is dismissed. In view of the facts and circumstances of the case we do not make any order for costs in this appeal.

ARUN K. MUKHERJEA, J.: 16.

I agree.

Appeal dismissed.

AIR 1972 CALCUTTA 228 (V 59 C 41)

S. C. DEB. J.

A. Akooji Jadwat Pvt. Ltd., Plaintiff v. Oriental Fire and General Insurance Co. Ltd. and others, Defendants.

Suit No. 279-A of 1967. D/-16-7-1971.

(A) Marine Insurance Act (1963), Section 55 (1) — Liability of insurer — Nature of.

Where a ship insured against the perils of capture, seizure, detention in consequence of hostilities is captured by an enemy nation and condemned by the Prize Court of that nation, the insurers cannot avoid the responsibility to pay the agreed sum on the ground that there was no formal declaration of war by the capturing State or on the ground that the war and, hence, the condemnation were illegal when the insurers have not protected themselves from the consequence of an unlawful or an undeclared or an informal war and have not taken any of the pleas relating to the character of the war. (Case law discussed). (Para 25)

A capture is an act of State and its legality cannot be questioned in an action for recovery of insured sum. The insurers are bound by the terms and conditions of the policy. The law of Marine Insurance is not concerned with "the existence of war in the formal sense" nor with a formal declaration of war. A total loss whether actual or constructive under this law does not depend on the legality of the capture nor on the legality of the sentence of condemnation. No question of bellum justum nor of bellum unjustum can ever arise between the assured and the underwriter. Where an insured ship is totally destroyed by an enemy action in a lawful war she is an actual total loss and the underwriter must pay her agreed value. (Para 24)

AP/CP/A398/72/SNV.

**(B) Marine Insurance Act (1963),
Section 57 — 'Proximate cause' of loss
— What is**

The loss which is produced by the direct, efficient and predominating cause is the proximate cause of the loss in the law of Marine Insurance. Mere intrusion of a new cause is of no moment so long it does not wither away the efficiency of the direct, efficient and predominating cause. Merely because a cause has intervened, does not make it a nova causa superveniens. The intervening cause must of its own force destroy the efficacy of the existing cause and it must become an independent and a direct, efficient and predominating cause of the loss before it can be said that the loss is proximately caused by nova causa superveniens. (Case law discussed). (Para 37)

**(C) Marine Insurance Act (1963),
Section 60 — 'Actual loss' — What it includes.**

As capture of a ship followed by condemnation by the sentence of a Prize Court of competent jurisdiction extinguishes the title of the owner in the res, it amounts to actual loss to the owner. It is a judgment in rem. Seizure and capture followed by condemnation stand on the same footing and in both the cases the title in the res is vested in the capturing-State. Where the res is restored to its former owner after condemnation it is a gift to him and a new title flows from the date of the grant. AIR 1965 SC 316, Followed. (Case law discussed). (Para 50)

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(1945) 1945-2 All ER 694 = 115 LJKB 141, Athel Line Ltd. v. Liverpool and London War Risks Insurance Association Ltd.	35

(1942) 1942-2 All ER 6 = 1942 AC 691, Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport (The Coxwold)	34
(1942) 1942 AC 50, Rickards v. Forestal Land and Timber and Rly. Co. Ltd.	68
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(1940) 1940-4 All ER 169, Canada Rice Mills Ltd. v. Union Marine and General Insurance Co. Ltd.	33
(1937) 1937-1 All ER 158 = 156 LT 196, Marstrand Fishing Co. Ltd. v. Beer	62
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(1919) 1919 P 264 = 121 LT 517, In re. The Leda	54
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(1915) 1915-1 KB 922 = 84 LJKB 1025, Polurrian S. S. Co. Ltd. v. Young	64
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(1873) 6 HL 83 = 42 LJCP 169, James Rankin v. Lewis Potter	57
(1870) 5 QB 599 = 39 LJQB 214 (CA), Stringer v. English & Scottish Marine Insurance Co. Ltd.	92
(1869) 4 QB 676, Stringer v. English and Scottish Marine Insurance Co. Ltd.	61
(1855) 5 E & B 607 = 119 E R 606, Powell v. Hyde	59
(1836) 43 RR 638 = 3 Bing NC 266, Roux v. Salvador	84, 86, 92
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(1811) 104 ER 387 = 13 East 304, Mullett v. Shedden	65
(1810) 165 ER 1097 = 1 Edw 244, In re. Cornelia	52

(1809) 165 ER 1045 = 1809 Edw 97, In re. The Victoria 52
 (1808) 10 East 329 = 103 ER 800, Bainbridge v. Neilson 67
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 (1799) 165 ER 124 = 1 E Pr C 78, In re. Flad Oyen 10
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Asoke Sen, Ajit Roy Mukherji and Dipak Sen, for Plaintiff; S. K. Roy Chowdhury, Tapas Banerjee, Ashim Ghose and A. Mitter, for Defendants.

ORDER:— Pakistan waged war on India in 1965 and captured "M. V. Shakeela" near Chalna in East Pakistan. She belonged to the plaintiffs and was mortgaged to the last defendant. She was covered by a valued policy of Rs. 10 lacs by the Insurer-defendants against the perils of "Capture, seizure, arrest, restraint or detainment and the consequences thereof or any attempt thereat; and from the consequences of hostilities of warlike operations, whether there be a declaration of war or not". She was condemned as a lawful prize by the Prize Court at Dacca and was made over to the Government of Pakistan in lieu of her sale. Thereafter, a suit was filed in the Court of the subordinate Judge at Khulna in East Pakistan against the plaintiffs by their Pakistani agents claiming over Rs. 2 lacs from the plaintiffs and she was attached in the hands of the Government of Pakistan pursuant to an order of that court. Then an agreement was entered into by and between the two Governments for her exchange with the "Elahi Bux", a Pakistani merchant ship arrested by our Navy during the hostilities, but these two vessels were not ultimately exchanged.

2. In these circumstances the plaintiffs have brought this action on February 7, 1967 against the Insurer-defendants claiming her agreed value on the plea that she was an actual total loss and her loss was proximately caused by the perils insured against. This claim is supported by the mortgage-defendant but it is contested by the Insurer-defendants on the plea that she was available for release and the proximate cause of her loss was not the perils insured against but the attachment made by the Civil Court. In this state of pleadings, the following issues raised by the learned counsel Mr. Subrata K. Roy Chowdhury for the Insurers, were accepted by the learned counsel Mr. A. K. Sen for the plaintiffs and by the learned

Counsel Mr. Mitter for the mortgagee-defendant and were settled by me:

ISSUES

1. Has the plaintiff any right to maintain the suit or to sue the defendants Nos. 1 to 4?

2. Is the plaintiff entitled to claim any sum, and if so, what sum, as trustee for the defendant No. 5 as alleged in paragraph 10 of the plaint?

3. (a) Was the vessel "Sakeela" seized or captured or impounded by Pakistan Authority on or about September 5, 1965 during hostilities between India and Pakistan and in consequence thereof as alleged in paragraph 4 of the plaint? (b) Was the plaintiff irretrievably deprived of the said vessel? (c) Was the said vessel condemned in favour of the Government of Pakistan by the High Court at Dacca in exercise of its jurisdiction as a Prize Court as alleged in paragraph 4 of the plaint?

4. Was the said vessel totally lost as alleged in paragraph 5 of the plaint or at all?

5. Was the said vessel "Sakeela" available for release as stated in paragraph 6 of the Written Statement of the defendants Nos. 1 to 4?

6. Was the said vessel not released to the custody of the plaintiff as a consequence of the facts stated in paragraph 6 of the written statement of the defendants Nos. 1 to 4?

7. On and from June 16, 1966 was the said vessel "Sakeela" under Civil Court attachment?

8. Was the alleged loss or claim for which the suit has been filed covered by the Policy of Insurance?

9. To what relief, if any, is the plaintiff entitled?

3. Mr. Q. M. Jadwat, the Managing Director of the plaintiffs, and Mr. S. K. Bose, the unfortunate Chief Engineer of the ill-fated vessel gave evidence for the plaintiffs. Dr. Nagendra Singh, the reputed Jurist on the Shipping Laws and at present acting as the Secretary of our President, was examined on Commission at Rastrapati Bhavan in New Delhi on the requests of the Insurers, Mr. G. V. Jannah, who was the Deputy General Manager of the first defendant at the material time, gave evidence on Commission in Bombay for the Insurers. The case of the plaintiffs was partly represented by Mr. Sen and partly by Mr. Roy Mukherjee but Mr. Roy Chowdhury alone carried the burden of the Insurers and has raised many a complex and interesting questions of law. They have admirably and with great decorum argued the case and have rendered valuable assistance to me.

4. I will now state the material facts of the case. The "Shakeela" was captured on September 5, 1965 and her

men were detained in jail. Two other Indian merchant ships were also captured by Pakistan. Our Government detained three Pakistani merchant ships. On September 23, 1965 the Indo-Pakistan hostilities came to an end. On October 12, 1965 the plaintiffs claimed her value and the Insurers recorded the claim "without prejudice" on October 16, 1965 and from this day the first defendant acted for all the Insurers in relation to the subject-matter of the suit. On October 18, 1965 she was condemned by the Prize Court at Dacca and the Pakistani Marshal was directed to sell her and to pay the proceeds to the Government of Pakistan. On November 17, 1965 this Order for sale was rescinded by the Prize Court and her possession was made over to Pakistan. The Insurers did not pay the money and requested the plaintiffs and the defendant No. 5 to wait for the final decision of the Representative Committee of the Insurers.

5. On January 4, 1966 the plaintiff sent copies of the proceedings of the Prize Court to the first defendant with a request to settle the claim. On January 5, 1966 our Deputy Custodian of Enemy Properties requested the plaintiffs to deposit with him Rs. 1,70,000/- payable by the plaintiffs to their Pakistani agents but the plaintiffs did not deposit the money. On January 10, 1966 the Historical Declaration was announced from Taskent and by its clause 8 our Prime Minister and their President agreed to discuss the return of all the properties and assets taken by each Government during the conflict. (See Keesing's Contemporary Archives, 1965-66 p. 21187 relied on by Mr. Roy Chowdhury) The Insurers took their stand on this clause and they did not pay her value on the plea that there was a possibility of exchange of the impounded vessels with the Pakistani ships detained by our Government. On May 9, 1966 the plaintiffs, through their Advocate, asked the Insurers to pay her agreed value alleging that there was no hope of recovery of the vessel from the Government of Pakistan but the Insurers did not pay it. The foreign Re-Insurers were vitally interested in the matter and they approached both the Governments and negotiations for exchange of the vessel started through them on foreign diplomatic channels.

6. While these negotiations were going on in which Dr. Singh participated the Pakistani agent of the plaintiffs filed the suit on June 15, 1966 against the plaintiffs and on July 27, 1966 the Subordinate Judge of Khulna attached the vessel by directing the Government of Pakistan not to deliver her to the plaintiffs. Then the two Governments entered

into an agreement for exchanging the vessels through the Insurers after they were surveyed by the Insurers and a Press Note to this effect was issued on August 6, 1966 by our Government. Thereafter, Mr. Jadwat suggested to the Bombay representatives of the foreign Re-Insurers to arrange for her survey and the first defendant wrote to the Solicitors of the foreign Re-Insurers to have the vessel surveyed by the salvors of Lloyds on behalf of the Insurers before the exchange was finalised. The Lloyds insisted that the plaintiffs should authorise them to arrange for the survey which the plaintiffs did.

6. Thereafter the plaintiffs sent the copies of the proceedings of the Civil Suit to the first defendant who returned them by saying that the Insurers were not interested in that suit and in reply the plaintiffs told the first defendant that the exchange of the vessel in suit might be frustrated if the Pakistani agents were not paid off and in view of the prevailing conditions it was not possible for the plaintiffs to remit any money to Pakistan. The Reserve Bank of India did not allow the plaintiffs to send any money to the Pakistani agents and therefore the first defendant took up the matter with the Reserve Bank so that the plaintiffs could send the money to Pakistan and then on October 20, 1966 two other Indian vessels were exchanged with two other Pakistani vessels (See K. C. Archives p. 21716 of November 1966).

7. On October 25, 1966 our Directorate of Shipping informed Mr. Jadwat that the question of releasing the "Shakeela" was taken up by our Government and the result would be communicated to him in due course. On November 7, 1966, the Reserve Bank informed the first defendant that the plaintiffs should take up the matter of sending money to Pakistan with the Union Ministry and before the first defendant could communicate this advice to the plaintiffs, on November 8, 1966 the plaintiffs, through the Director-General of shipping who was an officer under the Union Ministry, wrote to the Reserve Bank to permit the London Correspondent of the first defendant to guarantee the payment of the dues of Pakistani Agents of the plaintiff so that the vessel might be released and on the same day the Civil Court passed the decree against the plaintiffs and directed the attachment of the vessel to be continued.

8. On November 21, 1966 the first defendant communicated to the plaintiffs the advice given by the Reserve Bank and in the meantime the survey of Shakeela was completed. Dr. Singh advised a representative of the plaintiffs to pay off the dues of the Pakistani agents but the plaintiffs were not in a position

to send any money to Pakistan for the reasons stated earlier. The "Shakeela" was to be exchanged with the "Elahi Bux" but the Pakistani owner of this ship did not pay our governmental dues and therefore this ship was not released by our Government. These two ships were not exchanged at all and all correspondence between the parties stopped and this action was brought in this Court.

9. Mr. Roy Chowdhury has challenged the legality of the sentence of condemnation though it was not questioned in the written statement of the Insurers. His contentions have no bearing on the rights and obligations of the parties but in deference to him, I will dispose them off before going into the main questions involved in this action. He drew my attention to the events recorded in Keesing's Contemporary Archives relating to Indo-Pakistan conflict of 1965. He took me through the well-known Paris Pact, the Covenants of the League of Nations and the Charter of the United Nations Organisations. He read out the opinions from Prof. Oppenheim's International Law edited by Dr. Lauterpacht, and from Prof. Brierly's Principles of Public International Law and then from Prof. Brierly's the Law of Nations edited by Sir Waldock. He adopted their opinions and said that an aggressive war was outlawed by the Paris Pact, the Covenants of the League of Nations and by the Charter of the United Nations.

10. He contended that Pakistan has made an aggressive and illegal war on us and, therefore, the sentence of condemnation of the Prize Court at Dacca has no legal sanctity and it should not be recognized by this Court for the reason that illegality of this war has made this sentence illegal under the law of nations. He cited "The Flad Oyen", reported in 165 ER 124 and R. Viswanathan v. R. S. Abdul Wajid, AIR 1963 SC 1 in support of his contention that where a judgment of a foreign court is not in conformity with the well-established practice of mankind or it infringes the rules of the Public International Law it ceases to be a lawful judgment and the courts of other countries do not recognize such a judgment. But the principles laid down in these two decisions cannot be invoked by him in the manner he has endeavoured to do it for the reasons stated later on.

11. In the 17th Century It was Grotius who propounded the theory of lawful and unlawful war, but the Rulers of the nations went against his theory and maintained that the war was a matter of Sovereign Right of every Sovereign State and there was no such thing as *bellum justum* and *bellum unjustum*. And for these reasons Mr. Hall said: 'International law has no alternative but to accept War, independently of the justice of its origin. * * * Hence both parties to every War are regarded as being in an identical legal position, and consequently as being possessed of equal rights' (See his International Law 8th Edn. p. 82).

12. The right to make a war is a Sovereign Right of every State. The Sword that created this Right has legalised it too. But I also find that the contention of Mr. Roy Chowdhury is partially true and the law stated by Mr. Hall requires some qualifications. Pakistan was not born when the Paris Pact and the League of Nations came into existence and, therefore, I will leave their provisions out of my consideration.

13. The Sovereign Right to make an aggressive war was relinquished by the Members of the United Nations Organisations but not by the Non-Members. Therefore, it is not wholly true to say that an aggressive war is legally gone for ever. The non-members have not surrendered their sovereign rights and they are not bound by the charter. An aggressive war by or against a non-member is still lawful, but it is wholly unlawful by and between the members. All disputes in relation to border between the Member-Nations must be settled not by the barrels of the gun but by peaceful negotiation through diplomatic Channels or through the mediation of U. N. O. is the mandate of the Charter. The sovereign right of a Member-Nation to wage an aggressive war on another member-nation is legally gone for ever and resort to arms by a member-nation for an aggressive war against another member is totally outlawed by the law of nations. No member nation is allowed to disturb the peace and tranquillity of the World by waging an aggressive war on another member and if it is done, it must be held to be a *bellum unjustum*. India and Pakistan became members of the U. N. O. and therefore they were and are bound by the Mandate of this Charter. Pakistan has nakedly violated this Mandate but the significant imbecility made the U. N. O. too impotent to condemn it as an unlawful war waged by Pakistan.

14. Before the ink on the agreement in relation to Runn of Kutch was dried up Pakistan started this naked war and we were entitled to throw them out from every inch of our land. But a war, whether aggressive or defensive, is an act of state. No municipal court of any country has any jurisdiction to go into the question of legality of an act of state committed by a foreign State, whether within or outside its own territories, is the law of all civilised nations. This is the pith and substance of the judgment of our Supreme Court in State of

Saurashtra v. Memon Haji Ismail Haji Volimohammed, AIR 1959 SC 1383 and furthermore, in 'The Zamora' reported in 1916-2 AC 77, at p. 96 of the report, Lord Parker said:

"An act, though illegal by international law, will not on that account be justiciable in the tribunals of another Power—at any rate, if expressly authorised by order of the Sovereign on whose behalf it is done."

15. I am wholly debarred from going into the question of legality of the war waged on us by Pakistan and therefore, the principles laid down in "the Flad Oyen" and in Viswanathan's case, AIR 1963 SC 1 cannot help the Insurers. I must take this war as a fact and as an act of State of Pakistan with all its legal consequences. Question of legality of the decision of the prize court at Dacca is interwoven with the question of legality of this war. There is no mid-way between them. They must either stand or fall together. Jurisdiction of every Prize Court flows from the existence of a state of war and the war is an act of State. This Court is wholly incompetent to go into the question of legality of this war and, therefore, the legality of the sentence of the Prize Court cannot be attacked in this ingenious way. And, hence I am unable to hold that the sentence of the Prize Court was illegal due to the illegality of this war.

16. His next contention was that the Government of Pakistan did not issue any Commission, Warrant or Instructions for commissioning the Prize Court at Dacca, and, therefore, that court was not legally competent to act at all and its sentence of condemnation was a nullity. But, whether that Court was commissioned or not is a pure question of fact. The Insurers did not take this plea in their Written Statement and "a decision of a case cannot be based on grounds outside the pleadings and it is the case pleaded that has to be found" is the law laid down by the Supreme Court in *Trojan & Co. v. Nagappa Chettiar*, AIR 1953 SC 235 at p. 240 of the report. No indication of this defence was given at the time the issues were suggested on their behalf. No evidence was adduced by them to show that the Prize Court at Dacca was not at all commissioned. The plaintiffs have closed their case. They were taken by surprise. They had no opportunity to adduce any evidence to meet this point raised at the Bar and therefore the Insurers are debarred from taking this plea.

17. In *Siddik Mohomed Shah v. Mt. Saran*, AIR 1930 PC 57 (1) Lord Dunedin said: "no amount of evidence can be looked into upon a plea which was never put forward" and in *Nagubai*

Ammal v. B. Shama Rao, AIR 1956 SC 593 at p. 598 of the report the Supreme Court said: "The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence." And this law is also against the Insurers and therefore I cannot permit them to take this plea.

18. Moreover, there is no dispute that Pakistan was "at war with India" and it was said to the whole world by the President of Pakistan in his broadcast of September 5, 1965. This declaration was followed by a proclamation of emergency and the capture of "Shakeela". And about 45 days thereafter she was condemned. The sole object of this condemnation was to take away the property of the plaintiff by lawful means, that is to say by obtaining her sentence of condemnation from the High Court at Dacca in exercise of its jurisdiction over the Prize causes. Therefore, this is a case where the maxim "Omina Praesumuntur rite et solemniter acta" comes into play and I do not for a moment hesitate to presume that the Prize Court at Dacca was regularly commissioned by the required official act of the Government of Pakistan "in the absence of evidence to the contrary" as was done by the Judicial Committee in *Jitendra Nath Shaw v. Monmohan Ghose*, 57 Ind App 214 at p. 219 = (AIR 1930 PC 193) in relation to the procedure laid down by Sections 12 and 13 of the Bengal Tenancy Act.

19. And furthermore, in the "Countess of Lauderdale" reported in (1802) 165 ER 613, Lord Stowell at p. 614 of the report, laid down the law that where a captured ship is taken to a port of the Capturing State for condemnation there is a strong presumption that she has been regularly condemned by the Prize-Court of that State and the burden of disproving this presumption lies heavily on the party alleging it to be contrary. The Insurers did not make any attempt to discharge this heavy burden and, therefore, I overrule the contention made on their behalf.

20. An aggressive war being outlawed by the Charter, no member can lawfully declare a war on another member. Hence it was contended that these prohibitions have impliedly taken away the right of commissioning the Prize courts of a member waging an unlawful war. It was also urged that no prize court can lawfully function without a formal declaration of war and in support of this contention an analogy was drawn from a decision of the American Court of Military Appeals in the case of *United*

States of America v. Avertte. A gist of this decision is given in October 1970 issue of American Journal of International Law and in the opinion of the learned Judges forming the majority of that court the expression "in time of war" used in Art. 2(10) of the Uniform Code of Military Justice conferring jurisdiction on the Court below "means a war formally declared by Congress". I do not wish to go into the correctness of this decision nor do I intend to enter into the arena of this highly controversial topic of the day for the reasons sufficiently indicated while dealing with the next contention of Mr. Roy Chowdhury.

21. It was then contended that the vessel in suit was illegally captured by Pakistan for the reason that there was no war between India and Pakistan in the formal sense of that term and therefore her condemnation was also illegal. My attention was drawn to Vol. XXIV of the British Year Book of International Law (1947) at page 172 where it is stated:

"the right of prize derives from the existence of war in the formal sense and cannot be deduced from a state of armed conflict with a foreign power falling short of war. A decision of a prize court affecting the nationals of third states rendered in respect of a capture effected during such a period of armed conflict may be of no international effect; and either would not pass a good title or would give rise to a valid claim for damages before an international tribunal or through diplomatic channels".

22. Here I am not concerned with the right of a neutral and moreover there are many answers to this submission but I will choose only a few out of them. A capture is an act of State and its legality cannot be questioned in this action. The Insurers are bound by the terms and conditions of the policy and they have not protected themselves from an illegal capture nor from an illegal condemnation. The law of Marine Insurance is not concerned with "the existence of war in the formal sense" nor with a formal declaration of war. A total loss whether actual or constructive under this law does not depend on the legality of the capture nor on the legality of the sentence of condemnation. No question of *bellum justum* nor of *bellum unjustum* can ever arise between the assured and the underwriter. Where an insured ship is totally destroyed by an enemy action in a lawful war she is an actual total loss and the underwriter must pay her agreed value. There is no principle on which it can be said that she ceases to be an actual total loss if she is destroyed by an enemy action in an unlawful war. She is an actual total loss under the law of Marine Insurance and

this law has not yet learnt to speak in two different languages. Prof. Hardy Evamy in his *Marine Insurance* (1969 Edn) at pp. 166-67 in relation to the words "taking at sea" said:

"These words include all cases of capture and seizure by an enemy, and the underwriter will be liable for all losses so caused. * * * * Questions as to whether there has been a change of property in the thing captured are wholly irrelevant in an action on the policy, though they may be of importance to the underwriter anxious to secure the salvage and minimise his loss.

A declaration of war is not required in order to bring the capture within the words. Therefore, a ship sunk before any declaration of war, is a loss within a meaning of the term. *Powell v. Hyde*, (1855) 5 E & B 607.

Moreover, it is quite irrelevant to enquire whether the taking be lawful or unlawful for if the assured has suffered a loss by a "taking at sea", he is protected. *Goss v. Withers*, (1758) 2 Burr 683".

23. And in Dr. Arnould's *Marine Insurance* (latest Edn) in Art. 820 at page 776 it is stated:

"Capture is deemed lawful when made by a declared enemy lawfully commissioned, and according to the laws of war; unlawful when it is made otherwise. But its legality or illegality does not affect the liability of the underwriter; whether lawful or unlawful, he is equally liable".

24. Capture of enemy merchant ships during a state of war whether at high seas or within the territorial waters of the capturing State is always a lawful Prize and they are liable to be condemned by the Prize Court. Where the prize is brought within the territory of a capturing state, the Prize Court of that State is immediately vested with the jurisdiction over the prize. Pakistan created a state of war and then captured her during this state of war and she was captured within the territorial waters of Pakistan. She was taken to East Pakistan and the Prize Court at Dacca had ample jurisdiction to condemn her and it is wholly immaterial to decide whether Pakistan waged a formal or an informal war.

25. The Insurers have received premium from the plaintiffs and they have covered "Sakeela" against the perils of capture, seizure, detention in consequence of hostilities and war-like operations irrespective of any question whether there was a declaration of war or not. They did not protect themselves from the consequences of an unlawful or an undeclared or an informal war. On the other hand they are bound by their contract

and they cannot take shelter under the Charter of the U. N. O. nor under the law of nations. Furthermore, they did not take any of these pleas in their written statement and they cannot be heard to say anything which is not stated therein. These questions do not require any further consideration and I overrule the contentions made on behalf of the Insurers.

26. It was also argued that her condemnation was unlawful for the reason that she was condemned after the end of hostilities. The fittest answer is that the jurisdiction of the Prize Court does not come to an end with the end of hostilities and a prize court "is, of course, entitled to continue its functions after the conclusion of the war until all matters which arose during hostilities are finally disposed of" (see International Law of the Sea, 6th Edn p. 625 of Dr. Colombus).

27. In paragraph 4 of the plaint it was pleaded that the "Shakeela" was condemned in favour of the Government of Pakistan as a lawful prize and Mr. Roy Choudhury contended that the plaintiffs have failed to prove this fact for the reason that they have not proved that the Prize Court at Dacca was a court of competent jurisdiction. Now, according to Dr. Arnould's Marine Insurance Art. 821 at page 778: "the condemnation, in order to be legal, must be pronounced by a Prize Court of the Government of the captor, sitting either in the country of the captor or in that of his ally. * * * The Prize Court of a captor sitting in the country of his own sovereign, or of an ally, has lawful jurisdiction over prizes carried into neutral ports, and remaining there at the time of passing sentence".

28. The "Shakeela" was captured within the territorial waters of Pakistan and therefore she became "a prize subject to the jurisdiction of the Prize Court" is the law laid down by Viscount Simon in *Schiffahrt Treuhand v. Her Majesty's Procurator General*, reported in 1953 AC 232 at p. 258 of the report. She was taken to the territorial jurisdiction of the Prize Court at Dacca and hence that Court became a Court of competent jurisdiction to condemn her is a complete answer to this submission. Furthermore, the Prize Court at Dacca being a court of competent jurisdiction her "ground of the condemnation as well as the condemnation itself" must be "regarded as conclusive" (see Halsbury's Laws of England Vol. 30, 3rd Edn, Art. 1268 at page 653).

29. Wherever there is a capture by right of war and the prize is brought to the jurisdiction of the Prize Court of the capturing State that Court is immediately invested with the jurisdiction to decide whether the capture is lawful

or not and once this jurisdiction is attached the onus lies on those who contend its want of jurisdiction. And this law is laid down by the Judicial Committee in the "St. Helena" report in (1916) 2 AC 625. The Insurers have not discharged this burden and moreover the sentence of condemnation was exhibited as an admitted document and it conclusively proves the statements made in paragraph 4 of the plaint.

30. Judgment of every prize court of competent jurisdiction is a judgment in rem. It is internationally recognised and it is valid from one end to other end of the world. In Prof. Cheschier's *Private International Law* (6th Edn) at page 653 it is stated that "where a foreign court of Admiralty condemns a vessel in Prize proceedings it is a judgment in rem and this opinion was quoted with approval in the majority decision of the Supreme Court in Viswanathan's case, AIR 1963 SC 1 (supra) at p. 15 of the Report. "The Zamora" and the "St Helena" are against Mr. Roy Choudhury and Viscount Simon has taken away the foundation of his contentions. His ability has, therefore, failed to bring home his points in favour of the Insurers and I hold that the Prize Court at Dacca was a court of competent jurisdiction and this vessel was lawfully condemned by that court and this sentence of condemnation is a judgment in rem.

31. Before going to the real controversy between the parties it should be recorded here that in view of my finding that the vessel in suit became an actual total loss on October 18, 1965 it is wholly irrelevant to consider the events subsequent to her loss but as the matter was fully argued for a considerable number of days I will deal with all the points in the order they were urged before me. Mr. Roy Chowdhury contended that the vessel was available for release even after her condemnation in view of the agreement between the two Governments and this release was frustrated by her attachment made by the Civil Court and therefore this attachment was the last and the proximate cause of her loss and in any event it was a new cause and had broken "the links in the chain" of events following her condemnation and therefore the plaintiffs must fail in this action. He cited *Fenwick (William France) and Co. v. North of England P. I. Association* reported in 14 Asp. M. C. 92 where a British merchant ship was sunk by a German submarine and thereafter the insured ship ran over the submerged ship and was thereby partly damaged and in these circumstances it was held that the hostile act of the German submarine in sinking the other ship was not the proximate cause of damage of the insured

ship and Bailhache, J. at p. 93 of the report said:

"It must always be remembered that the act of hostility to be looked for must be the proximate cause. It is not sufficient that some act of hostility is one of the links in a chain of causes without which link the accident would not have happened. It must be the effective proximate link in the chain".

He also cited *Fooks v. Smith*, (1924) 2 KBD 508 where the same learned Judge at p. 514 of the report said as follows:

"Where by a peril insured against there is a constructive total loss and no notice of abandonment is given, then if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss—as, for instance, if there is a capture followed by confiscation the underwriter is liable in respect of the total loss. If, however, the ultimate total loss is not the result of a sequence of events following in ordinary course upon the peril insured against, but is the result of some supervening cause, the underwriter is not liable". (underlined portion was relied on by Mr. Roy Mukherjee in connection with the main question discussed later on).

Lastly, Mr. Roy Chowdhury drew my attention to *Becker, Gray and Co. v. London Assurance Corpn.*, 1918 AC 101 where Lord Sumner said:

"Proximate cause is not a device to avoid the trouble of discovering the real cause or the 'common-sense cause', and, though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other (at p. 112) * * * It must be admitted that the terminology of causation in English law is by no means ideal. It would be the better for a little plain English. I think 'direct cause' would be a better expression than *causa proxima*". (at p. 114).

32. Mr. Roy Mukherjee, objected to the expression "links in the chain" of events and drew my attention to *Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd.*, 1918 AC 350 where Lord Shaw of Dunfermline at p. 369 of the report said as follows:

"To treat *proxima causa* as the cause which is nearest in time is out of questions. Causes are spoken of as if they were as distinct from one another as heads in a row or links in a chain, but—if this metaphysical topic has to be referred to, it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net.

To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."

33. In *Canada Rice Mills Ltd. v. Union Marine and General Insurance Co. Ltd.*, (1940) 4 All ER 169, speaking for the House of Lords at page 178 of the report, Lord Wright said

"It is now established by such authorities as *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* and many others that *causa proxima* in insurance law does not necessarily mean the cause last in time, but what is 'in substance' the cause (per Lord Finlay at p. 355), or the cause to be determined by commonsense principles (per Lord Dunedin at p. 362)".

34. In *Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport* (*The Coxwold*), (1942) 2 All ER 6 at pp. 9-10 of the report Viscount Simon said:

"Most results are brought about by a combination of causes, and a search for 'the cause' involves a selection of the governing explanation in each case. The cause of the death of a human being may, I suppose, be scientifically stated to be the failure of the supply of sufficient oxygen to the brain, but when a medical man certifies "the cause of death" he looks for the thing which has predominantly operated to bring death about. * * * It is this sort of practical test which has to be applied, always bearing in mind that the proximity of the cause is insisted upon by the Marine Insurance Act, 1906, Section 55, but bearing in mind also that the proximate cause is not necessarily the one which operates last. * * * It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this: one has to ask oneself what was the effective and predominant cause of the accident which happened, whatever the nature of that accident may be".

And Lord MacMillan, at pp. 11-12 of the report, said as follows:

"The adverb 'proximately' does not greatly assist the solution of the problem, but it at least serves to emphasise that it is the predominant and determining cause that is to be sought. No formula can be devised which will provide universal touchstone for the infinite variety of circumstances which may arise. Each case must be judged in the light of its

own facts and by resorting, not to the refinements of the philosophical doctrine of causation, but to the common place tests which the ordinary business man conversant with such matters would adopt." And, lastly, Lord Wright, at pp. 14-15 of the report, said:

"Once it is clear (as this House finally held in *Leyland Shipping Co. v. Norwich Union Fire Insurance Co.*) that 'proximate' here means, not latest in time, but predominant in efficiency, there is necessarily involved a process of selection from among the co-operating causes in order to find what is the proximate cause in the particular case. * * * "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic-analysis but on a broad view."

35. In *Athel Line Ltd. v. The Liverpool and London War Risks Insurance Association Ltd.*, (1945) 2 All ER 694, Lord Greene M. R. at p. 696 of the report said:

"The legal theory of causation has, in the course of years, had remarkable history, but the point at the moment at which it appears to have come to rest is that which lays it down that this type of question of causation is really a matter for the ordinary common sense and intelligence of the ordinary man."

Section 55(1) of our Marine Insurance Act 1963 was taken word for word from the Marine Insurance Act 1906 of England. It says "subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against".

36. The Act gives a double emphasis on *causa proxima* both from its positive and negative side but their effect is the same. And an insurer is only liable for the loss proximately caused by the perils insured against, is the pith and substance of this section. It rules out all remote causes and the losses not covered by the policy. The concept of causation is a difficult concept and it is one of the most problematic branch in Jurisprudence. And for this reason a simple and practical method is adopted by the Courts and the matter is viewed by the ordinary intelligence of a common man. The matter is simple where the loss is produced by a single cause, but where it is produced by combination of more than

one factors, the investigation is no doubt problematic, but the wisdom of the past has ruled out the factor which is the nearest in point of time to the loss to be the sole criterion for determining the proximate cause.

37. The loss which is produced by the direct, efficient and predominating cause is the proximate cause of the loss in the law of Marine Insurance. Mere intrusion of a new cause is of no moment so long it does not wither away the efficiency of the direct, efficient and predominating cause. Merely because a cause has intervened, does not make it a *nova causa superveniens*. The intervening cause must of its own force destroy the efficacy of the existing cause and it must become an independent and a direct, efficient and predominating cause of the loss before it can be said that the loss is proximately caused by *nova causa superveniens*.

38. Between the two causes, urged before me, which one was the proximate cause of her loss must be determined on the true facts and those facts must be viewed in the light of the surrounding circumstances with the intelligence of a common man. And, therefore, to clear up the position I will straightway dispose of a few unmeritorious contentions and for this purpose I will restate a few important facts here. She was captured and condemned. Her possession was made over to the Government of Pakistan in lieu of her sale under the order of the Prize Court. The hostilities put an end to the normal trade relations between the two countries. No suit was filed by the Pakistani Agent against the plaintiffs immediately with the out-break of the War. She was attached before the High Contract was entered into for her exchange with the 'Elahi Bux' and our Reserve Bank did not allow the plaintiffs to send any money to Pakistan.

39. Mr. Roy Chowdhury contended that her loss was induced by the plaintiffs by reason of the non-payment of the dues of Pakistani agents and, therefore, they must fail in this action, in view of my judgment in *Khalil Adal Khan v. Great American Insurance Co. Ltd.*, (1969) 73 Cal WN 279. There I non-suited the assured for one of the reasons that he having refused to take delivery of the insured cargo had no cause of action against the underwriter but here the plaintiffs were legally incompetent to pay any money to the Pakistani agents and therefore what I have said there has no application here. It is true that plaintiffs did not pay the money to the Indian representatives of the Pakistani agents but they were fully justified in not paying the money in view of the provisions of our Foreign Exchange Regulations Act

and the Defence of India Rules and if any payment was made to them the Directors of the plaintiffs would have committed an offence punishable with imprisonment. The plaintiffs also did not deposit the money with the Custodian of Enemy Properties, but no arrangement nor any agreement between the two Governments was placed before me to show either that the Custodian could have deposited this money in the Civil Court or could have given it to the Government of Pakistan for being deposited in the Civil Court. And I do not know under what law, if any, her attachment would have been automatically removed had the plaintiff deposited this money with our Custodian of Enemy properties.

40. Furthermore, a mere negligence on the part of the assured is no answer to his claim on the policy of Marine Insurance. There must be a wilful misconduct on his part and this misconduct must be the proximate cause of the loss so as to defeat his claim. The Written Statement of the Insurer does not speak of any wilful misconduct of the plaintiffs. No indication was even given at the time the issues were suggested on their behalf. Non-compliance with the mandatory provisions of O. VI, R. 4 of the Code of Civil Procedure stands in the way of Insurers and they cannot be heard to say that the plaintiffs were guilty of any wilful misconduct. Moreover, the matter requires investigation of many facts in view of the provisions of the Defence of India Rules, the Foreign Exchange Regulation Act, and the agreement, if any, between the two Governments for sending money to Pakistan. The burden lies on the Insurers to prove all those facts and they have utterly failed to discharge it and I overrule the contention made on their behalf that the proximate cause of her loss was the negligence or the wilful misconduct of the plaintiffs.

41. The laws of India became the laws of Pakistan under the Indian Independence Act, 1947. The Insurers have not shown to me that Section 60 of the Code of Civil Procedure was altered in Pakistan so as to empower the Civil Courts of Pakistan to attach the properties of the Government of Pakistan for the debts payable by the plaintiffs to their Pakistani agents. The Subordinate Judge was fully aware of the fact that the Shakeela became the property of the Government of Pakistan by the sentence of condemnation of the Prize Court at Dacca and he was fully aware that he had no power to attach her for the reason that she had ceased to be the property of the plaintiffs and he also recognised this legal position in his own order. He has passed this illegal Order knowing it to be illegal. His order of attachment

is not a judgment in rem and it is wholly illegal by the law of these two countries and this Court cannot take any notice of his illegal order.

42. But the fact that she was illegally attached cannot be ignored. The High Contract for her exchange with the "Elahi Bux" was entered into after she was attached by the Civil Court. The Subordinate Judge was bound to remove this attachment if an application was made to him by the Government of Pakistan but no such application was ever made by that Government for the obvious reason that the Elahi Bux was not at all released by our Government for non-payment of the dues by her Pakistani owner. I have said Pakistani owner because this ship was not at all condemned. Furthermore, there is nothing on the record even to suggest that the Government of Pakistan was unwilling to make any application to the Civil Court for vacating her attachment due to the non-payment of the dues of the Pakistani agents by the plaintiffs.

43. The Government of Pakistan was not a creditor of the plaintiffs. There was no term in the High Contract making it incumbent on the plaintiffs to deposit the dues of their Pakistani agents in the Civil Court for removing her attachment before she could be exchanged with Elahi Bux. The Government of Pakistan did not take any steps to remove her attachment and excepting to allow her survey nothing was done by Pakistan to implement this part of the High Contract. Removal of her attachment was a very simple matter for the Government of Pakistan and it could have been done even without depositing any money in the Civil Court because the Government of Pakistan became the owner of this ship and her attachment was wholly illegal even by the law of Pakistan. In other words, removal of her attachment was not an insuperable obstacle so far as the Government of Pakistan was concerned and therefore her attachment was not a cause at all not to speak of a nova causa supervenience. Furthermore, she became an actual total loss, as stated later on, long before her attachment and with no stretch of imagination it can be said that the efficacy of her actual total loss was destroyed by her attachment. No doubt, she was attached but undoubtedly her attachment was of no consequence whatsoever and I overrule the plea that the proximate cause of her loss was her attachment as contended on behalf of the Insurers.

44. Capture did not vest any title in the privateer nor in the Capturing-state. The previous state of law was that the capture made by a privateer

must be brought to the prize court of his country for an adjudication "in order to prevent the right of seizure from degenerating into piratical rapine" and it was said by Lord Stowell in the *Elsebe* (Mass) reported in (1804) 165 ER 738 Capture by privateers was abolished by the Paris Pact but this judgment of Lord Stowell placed above all controversy the paramount right of every Government to release the vessels captured during war before they were finally condemned by the Prize Court in the following terms at page 741 of the report:

"The right of making war and peace is exclusively in the Crown: The acquisitions of war belong to the Crown: and the disposal of these acquisitions may be of the utmost importance for the purpose both of War and Peace. This is no peculiar doctrine of our Constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *Bello partacedunt reipublicoe*. It is not to suppose that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the power to whom it belongs to decide on peace or war, may use it in the most beneficial manner for the purpose of both."

45. The *Elsebe* (Mass), (1804) 165 ER 738 was followed in *Alexander v. The Duke of Wellington*, (1831) 39 ER 308 and there *Brougham L. C.* at pp. 314-15 of the report said:

"That prize is clearly and distinctly the property of the Crown, that the sovereign in this country, the executive Government in all countries, in whom is vested the power of levying the forces of the state, and of making war and peace, is alone possessed of all property in prize, is a principle not to be disputed. It is equally incontestable that the Crown possesses this property plenary, absolutely and wholly without control; that it may deal with it entirely at its pleasure; may keep it for its own use, may abandon or restore it to the enemy, or finally, may distribute it in whole or in part among the persons instrumental in its capture, making the distribution according to whatever scheme, and under whatever regulations and conditions it sees fit."

46. One of the main defences of Mr. Roy Chowdhury was built up on the above statements of the law from the attack of Mr. Sen that the *Sakeela* was an actual total loss by reason of her condemnation. Mr. Roy Chowdhury contended that it was within the power of the Government of Pakistan to restore her possession to the plaintiffs after the end of the War because she was not sold by the Prize Court and remain-

ed in actual control and possession of the Government of Pakistan. He said that it has become the practice of all nations to restore possession of the war-captures after the end of the war. He drew my attention to pages 541-4 of the 'Legal Controls of International Conflict' (1959, Edn.) of Dr. Julius Stone where the history of this international practice is well-discussed. He submitted that in these circumstances, I should lay down that the concept of total loss, be it actual or total, under the law of Marine Insurance is now completely changed and a mere condemnation of the "*Sakeela*" was not an ipso facto loss to plaintiffs.

46. This international practice, this Sovereign Right of the capturing-State to restore the prizes, and the Rules of War and Peace are sought to be introduced by him in the law of Marine Insurance for the first time in the legal history. The history, however, shows that the commercial intercourse between the overseas countries was established by the sea-faring traders. They used to sail in their primitive vessels. Port to port they sold and bought merchandise. They sacrificed their lives in the high waves and hurricanes. They were looted by the pirates and the freebooters. Sudden outbreak of war resulted in capture, seizure, and confiscation of their vessels and merchandise. Protection of their interests and encouragement of overseas trade gave birth to the law of Marine Insurance in Italy in the 13th Century. It was imported by the Lombards in England and the merchants and brokers of the under-writers used to assemble at the Lloyd's Coffee House in London and they used to share the risks of these hazards upon payment of premium by the traders to the under-writers. And, to complete the picture, in the 17th Century this historical place became the 'Lloyds' of today.

47. The Law of Marine Insurance is the law of the sea-faring people. Their maritime adventures and commerce brought into existence and shaped this branch of the law. This law essentially belongs to the Maritime Law and to the law Merchant and no part of this ever belonged to the Public International Law or to the Martial law of any country. The naval warfare is primitive. The prize courts are ancient tribunals. The practice of restoration of the prizes after the end of the war is not a modern innovation. The Sovereign Right of releasing the prize is not a new phenomenon too.

48. The Prize Law and the law of Marine Insurance developed side by side in the 17th Century in England. The maker of the prize law in England was

Lord Stowell and the maker of the law of Marine Insurance was Lord Mansfield. The Prize Law is a part of the law relating to War at sea and the prize court administers the law of nation. The law of Marine Insurance partly belongs to the law of Contract and partly to the Marine Law and it wholly belongs to the Municipal Law of each and every civilized countries. The law relating to prizes though belongs to the Municipal Law of each country but in truth it forms part of the International Law. The legal history of these two laws are different. Their sources are different. They belong to two different systems of law one to the law of nations and the other to the domestic law of the respective countries. This domestic law varies from country to country and an attempt to make it an International Law of Marine Insurance in 1885 in Brussel's conference by the Institute of International Law was a complete failure (See Annurre de L' Institute do droit International Vol. 8, pp. 125-26). These two laws were never allowed to be telescoped with each other and then on what principle it can be said that these rules of War and Peace, this Sovereign Power of restoration of the war-captures after the end of the hostilities and this International practice of the nations relied on by Mr. Roy Chowdhury have signed the death-warrant to the concept of total loss under the Law of Marine Insurance is beyond my conception of the law and I overrule his contention.

49. Furthermore, the loss is total and actual to him who has no control over the situation nor has any means of procuring the arrival of his insured-cargo or the insured-ship to the destination within a reasonable time. I repeat the words "no control" and the word "means". I do not say "the suspension of means", nor I use the words "by the grace of grant" of the capturing-state. War is an act of State. Peace is an act of State. Release of prize is a Sovereign Right and it is an extra-judicial act. Restoration of prize solely depends on the volition and the grace of the capturing-State. Peace, no doubt, puts an end to the hostilities and to the enmity between the former belligerents but no former enemy has any right to have his property restored to him unless his former enemy is totally crushed in the war.

50. Capture followed by condemnation by the sentence of a Prize Court of competent jurisdiction extinguishes the title of the owner in the res. It is a judgment in rem. Seizure and capture followed by condemnation stand on the same footing and in both the cases the title in the res is vested in the capturing-State.

Where the res is restored to its former owner after condemnation it is a gift to him and a new title flows from the date of the grant. The title in the res is also gone by a seizure followed by a hostile confiscation by an enemy State is the law laid down by our Supreme Court in T. R. Bhavani Shankar Joshi v. Somasundara Mooppanar, AIR 1965 SC 316 at p. 319 of the report. Therefore, I am unable to accept as correct the ingenious submissions of Mr. Roy Chowdhury.

51. No doubt, I have rejected what he has said but I do say that the law should change with the changing pattern of the Society. Our law is a living law. Those age-old concepts and the precedents which are wholly unfitted to our modern society or are hampering the well-being of our people must give way to the new thoughts and ideas of the day. The social values of the Victorian age are no longer the social values of this Space age. We have the history of the Second World War before us and we know the laws of jungle destroyed the laws of nations. The submarines, U-boats and bombers played a havoc on the sea trade. The merchant ships were sunk at sight. Even the hospital ships were not spared. Human lives were left to the mercy of the high waves and the sea-animals. But these are the matters of the past. The day now belongs to the nuclear weapons, rockets and guided missiles. If the concept of total loss under the law of Marine Insurance has to be changed it must be changed not in the direction suggested by him but in the light of the modern warfare. And here I will not say a word to fetter my hands but will not deter to lay down the law if and when a fit occasion would arise.

52. Coming back to the point, "The Purissima Conception" reported at page 844 and the "Victoria" reported at page 1045 of 165 of the English Reports were condemned by Lord Stowell in favour of the privateers for the reasons that the title of the British owners were extinguished by condemnation and sale to the neutrals before they were re-captured. Mr. Roy Chowdhury cited these two cases and contended that as the "Shakeela" was not at all sold in execution of the sentence of condemnation she remained the property of the plaintiffs irrespective of the sentence of condemnation because the plaintiffs were not bound by the decision of the Prize Court at Dacca which was then our enemy court in view of the judgment of Lord Stowell in "The Cornelia" reported in 165 ER 1097 where it was said:

"if at the time when this vessel was taken it was clearly in the possession of the enemy, they would have a right

to receive their property again, whether there had been a sentence of condemnation or not; because such sentence operates nothing against the rights of the British owner. But if, under the authority of a sentence in the enemy's Court of Prize there had been a sale of the vessel to a neutral, that sale, which transfers the property to the neutral purchaser, will bar the claim of the original British owners against the neutral holder."

53. "The Cornelia". (1810-165 ER 1097) was followed by Lord Merriman in "The Salerno" reported in 1946 p. 189 cited by Mr. Roy Chowdhury. She belonged to a British owner and was insured against the perils of war. She was captured by Germany and the assured gave notice of abandonment to the underwriter. She was thereafter condemned by a German Prize Court and was afterwards captured by a British privateer. The contest was between the British captor on the one hand and the insurer and the assured combined together on the other hand on the question to whom she should be delivered. Lord Merriman, at page 192 of the report, said: "The right of the owner to restitution is not, in the circumstances of this case affected by the mere fact of condemnation by the German Prize Court (See *The Cornelia*)" and at page 193 of the report further said: The claimant owners were undoubtedly her owners at the time of her capture by the Germans and her subsequent condemnation."

54. Lord Merriman also dealt with the extra-judicial power of the British Crown in the matter of releasing the vessels before they were actually condemned. Mr. Roy Chowdhury also cited "The Leda" reported in 1919 P 264 from p. 271 of the report. He contended that the law is that the assured remains the owner of the vessel so long she is not actually sold to a neutral and condemnation without sale is not an actual total loss for the reason that there remains every possibility of her recapture so long the war continues and on her recapture she would belong not to the Capturing State but to the assured. He further contended that for this reason Professor Cheshire in his *Private International Law* (6th Edition) at p. 110 has said: "If a sale is ordered, judgment operates in rem in the sense that it divests the property in the ship from the owners and confers an absolute title upon the purchaser, good against all persons." But my own Professor did not lay down the entire law on the subject in the quoted statements which is clear from the earlier and the subsequent pages of this treaty.

55. In "The Odessa" reported in (1916) 1 AC 145 Lord Mersey, while de-

livering the judgment of the Judicial Committee at pp. 153-4 of the report, said:

"It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilized nations upto the present time have recognized the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize, enemy ships found on the high seas or in the belligerent's territorial waters and enemy cargoes. But such seizure does not, according to British Prize Law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit in rem, and the function of the Court is to inquire into the national character of the thing seized. If it is found to be of enemy character, the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure and to transfer it as from that date to the sovereign or to his grantees. The thing — the res — is then his for him to deal with as he thinks fit, and the proceeding is at an end. (underline supplied).

As the right to seize is universally recognized so also is the title which the judgment of the Court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of Municipal Law."

56. Why the British Prize Courts move in two diametrically opposite directions in relation to the sentence of condemnation of their enemy counterparts must be properly understood. Why Lord Stowell took two different views and why Lord Merriman followed Lord Stowell in spite of "The Odessa" must be properly appreciated otherwise they are apt to create confusion. Those observations of Lord Stowell and Lord Merriman were made in relation to the domestic law of England and not in relation to the law of nations. This domestic law of Eng-

land does not recognise the extinguishment of the title of the British owner where a vessel is re-captured after the sentence of condemnation by an enemy Prize Court provided however she is not sold to a neutral before her recapture. The undelying principle of this domestic law is that nothing can be said to be taken by an enemy so long the war continues and all enemy properties must be taken and retaken by force. No doubt a condemnation confers an absolute title in the enemy State but this title or the enemy state is not recognised by the British Court so far as the unsold recaptured ships are concerned for the obvious reasons that the British Prize Courts are bound by their domestic law and when they apply this domestic law they depart from the law of nations and do not function as proper Prize Courts as said by Lord Parker in "The Zamora" 1916-2 AC 77 at pp. 91-2 of the report in the following terms:

"The law which the Prize Court is to administer is not the national or, as it is sometimes called, the Municipal Law but the law of nations — in other words, International Law. It is worth while dwelling for a moment on this distinction. Of course, the Prize Court is a Municipal Court, and its decrees and orders owe their validity to Municipal Law. The law it enforces may, therefore, in one sense, be considered a branch of Municipal Law. Nevertheless, the distinction between Municipal and International Law is well defined. A Court which administers Municipal Law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers International Law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the International Law, it is administering not international but Municipal Law."

And then at page 93 of the report Lord Parker further said as follows:

"It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is nonetheless true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving

effect to such provisions would no longer be administering International Law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court."

57. The Prize Court administers the law of nations. The decision of the Prize Court of a competent jurisdiction is a judgment in rem. It is recognised throughout the world as a valid judgment. The prize must be brought to the Prize Court for adjudication except where the destruction of the Prize is lawful. So long the prize is not declared as a lawful prize by the Prize Court it remains the property of the owner. It is well established by the "Henrich B-Jorn" reported in (1886) 11 AC 270 at pp. 276-7 by "The Odessa" 1916-1 AC 145 and by Anderson v. Marten, (1908 AC 334) (Infra) that the condemnation by the Prize Court of competent jurisdiction extinguishes the proprietary interests of the ship-owner and the cargo-owner and the title vests in the capturing state from the date of the capture irrespective of any sale.

58. In no uncertain terms it was laid down by Lord Stowell that this domestic law of England is an exception even to the general law of that country. In "The L' ACTIFF" (Infra). This domestic Law of England cannot even be taken into consideration where the contest is between the assured and the insurer on the question of total loss of the subject-matter of the insurance under the law of Marine Insurance. And this law was laid down by Lord Mansfield in Goss v. Withers, (1758-97 ER 511) (Infra). Furthermore, this domestic law of England was given a statutory recognition by Section 40 of the Naval Prize Act 1864 which expressly provided for the restoration of the recaptured ship to the former British owner provided however she was not sold to a neutral before her recapture nor was used by their enemies as a ship of war. This special domestic law of England relating to prize causes have no bearing whatsoever on the questions involved before me and I am unable to hold that the sentence of condemnation of the Prize Court at Dacca is of no consequence merely because it was passed by an enemy court.

59. Stringer v. The English and Scottish Marine Insurance Co. Ltd., (1869) 4 QB 676 is one of the leading authorities on total loss under the law of Marine Insurance. During the pendency of an appeal filed by the captor from an order of the American Prize Court for restoration of the captured cargoes, covered by the under-writers against the perils of taking at sea, arrest and seizure etc., to the assured they

were abandoned to the under-writers by the assured but the under-writers did not accept this abandonment and thereafter the insured cargoes were sold under an order of the court as neither the assured nor the under-writers deposited a sum which was more than 150 per cent of the value of the insured cargoes nor they furnished any security for that amount as ordered by that Court. In these circumstances the question was whether the assured could succeed on the plea of constructive total loss of the insured cargoes. This case is not an authority on the actual question involved before me because "the sale was not under a condemnation" (see p. 690 of the report) and there, Blackburn, J., as he then was, made the following observations:

"the sale by the Prize Court stands on a very different footing. If, notwithstanding the intervention and opposition of the plaintiff, the Prize Court in America had wrongfully condemned the goods and they had been under that sentence sold, the case would have been identical with that of *Mullett v. Shedden*, reported in 13 East 304, where the very point decided was, that by the sale the property was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away."

60. According to Mr. Roy Choudhury these observations conclusively show that in order to be an actual total loss the condemned vessel must be sold by the sentence of the Prize Court and without a sale there cannot be an actual total loss. On the other hand, Mr. Roy Mukharjee drew my attention to where Lord Blackburn at pp. 688-90 referred to Mr. Phillips' Law of Insurance and said;

"He (Mr. Phillips) expresses an opinion that if an embargo or other detention were, in the result, to turn out much longer than was reasonably anticipated the assured, though he might in the first instance have elected to treat the loss as partial, might, on discovering this, treat it as total, unless something had occurred in the interval to prejudice the underwriters in consequence of the delay, although the detention had never changed its nature, and by condemnation or sale been turned into a total destruction of the thing. We are unwilling to say that this could never be the case."

61. Mr. Phillips said that insured-thing is totally destroyed "by condemnation or sale" and it was not disapproved by the Court and therefore Mr. Roy Mukherjee contended that the law is not what is stated by Mr. Roy Chowdhury. This judgment of Lord Blackburn was upheld by the Court of Appeal in (1870) 5 QB 599 and *Kelly, C. B.* at pp. 603-4 of the report said as follows:

"This loss of the goods arose, though not directly, out of the original capture (which was of itself, if it had been so treated, a total loss), through a series of consequences, viz., the institution, the different steps, and the continuance of the suit until the decree was pronounced; and the sale under the decree was, if I may use the expression, completion of the total loss. It is unnecessary to determine whether an abandonment was necessary at this time, when the goods had been actually sold and never could have been brought into the possession or under the control of the owner again, or, whether that sale did not in itself amount to a completion or perfecting of the total loss of the goods."

Martin, B. at page 606 of the report said:

"In my opinion, when that sale took place, the property in those goods was taken out of the owner, so that it became impossible for him to take those goods, under his original ownership, to the port of discharge; and, upon that taking place, the goods — I will not say were totally lost, because I have complained of that being an ambiguous expression—but were taken entirely from the owner's dominion and control, and were absolutely taken away from him; and in my judgment, after that event took place, the word "abandonment" in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all. ** ** In my judgment, by the sale of these goods under the lawful order of the court of prize, the assured was deprived of all dominion and property in them. They were taken out of his possession. He was deprived of all property in and dominion over his goods; and, therefore, under these circumstances, he is entitled to recover the full amount of his insurance, the under-writers, as I have said being entitled to the proceeds of the sale."

62. Hence, Mr. Roy Chowdhury contended that condemnation is not complete so long the prize is not actually sold and it is by the actual sale that the assured is deprived of the property and therefore there cannot be an actual total loss of the insured res without a sale. He drew my attention to Halsbury's Laws of England, Third Edition, Vol. 22, Art. 282 at page 145 where it is stated "if the subject-matter insured is captured, condemned and sold, there is an actual total loss." And for this statement of law Stringer's case is noted in foot-note (P) where it is also stated "Capture", without condemnation, is not an actual total loss, although it may constitute a constructive total loss. (See *Marstrand Fishing Co. Ltd. v. Beer*, (1937) 1 All ER 158 at p. 163 per por-

ter. J.)" where the ship "Girl-Pat" was insured against the risk of barratry and barratry is an actual total loss under the law of Marine Insurance.

63. The "Girl-Pat" was wrongfully taken away by her master who completely effaced her identity. She was taken from port to port. She was damaged and was arrested in a port of refit but the master managed to escape her but she was ultimately recovered. No doubt, it was an extreme case but Porter, J., as he then was, after considering the balance of probabilities came to the conclusion that it was more likely that she could be recovered at the time the notice of abandonment was given to the insurers and his Lordship at p. 116 of the report said that it was a "case exactly on all four corners with that of the "Pollurian" her recovery being uncertain but not unlikely. If I had been asked to say: 'Is she more likely to be lost than to be recovered?' I should have felt obliged to reply: 'I do not know *** For my part, I am left in complete darkness as to whether the "Girl-Pat" was likely or unlikely to be recovered, and I must hold that she was never a constructive total loss and that her owners cannot recover.' And dealing with the question of barratry Lord Porter, at pp. 163-64 of the report, said as follows:

"First of all, with regard to an actual total loss, it is said that barratry is analogous to capture, and that capture is an actual total loss, though that loss may be redeemed by a recapture. I doubt if this ever was the true question. I think it was always a question of fact whether capture was an actual total loss or merely a possible constructive total loss. Capture followed by condemnation no doubt was actual total loss, but that was because the vessel had in fact been condemned; the war was supposed to last indefinitely, and, therefore, there was no chance within any reasonable time of the ship being restored. *** The case is now governed by the Marine Insurance Act, 1906, Sections 56 to 60. That Act provides in Section 57, amongst its definitions of "actual total loss," "if the vessel be irretrievably lost." In my view, no one could say here that the vessel was irretrievably lost to her owners. Under the Marine Insurance Act, loss by barratry is necessarily an actual total loss, and in this case I find there was no actual total loss."

Lord Porter did not say that an actual sale is necessary to make it an actual total loss nor did he say that condemnation without sale is not an actual total loss. Therefore, the Stringer's case nor the "Girl-Pat" has finally decided

the question involved before me. The quoted passage from Halsbury's Laws of England also do not say that condemnation without sale is not an actual total loss.

64. The "Polurrian" reported in (1915) 1 KB 922 is the first direct authority on constructive total loss as defined by Section 60 of the Marine Insurance Act, 1906. She was captured on October 25, 1912 by a Greek destroyer and the notice of abandonment was given by the assured on October 26 to the underwriter and thereafter she was released by the Greek Government on realisation of the mistake committed by the Greek interpreter in undertaking the English of the master of the ship. This mistake occurred in this circumstance. The master did not know that Greece had entered the war between Italy and Turkey, and he told this fact when asked by the Greek interpreter who however thought that the master had told him that he was aware of that fact and accordingly he said so to the Naval Officer who arrested the ship. There the assured failed in his action on constructive total loss by capture and Kennedy, L. J., after reviewing the previous state of law, said that the assured could have recovered under the Pre-Act law relating to constructive total loss because her release was uncertain when the notice of abandonment was given by him but the Act having altered this law to the disadvantage of the assured by using the expression 'unlikely' she was not a constructive total loss because her release was more likely than unlikely on that day. She was captured but was not condemned and I am not concerned here with a capture simpliciter but with a capture followed by condemnation on which the "Polurrian" is wholly silent.

65. In *Mullet v. Shedden* also reported in (1811) 104 ER 387 the insured cargo was condemned, unshipped and sold under an order of the Court of Admiralty which was reversed on appeal and the cargo was ordered to be restored to the assured or its value paid to him upon payment of the Captor's costs. The assured did not receive the cargo nor its value and he brought the action for a total loss without giving any notice of abandonment. While Mr. Marryat, for the insurers, was contending that notice of abandonment was necessary Lord Ellenborough, C. J. at page 389 of the report said:

"The assured stands upon the actual destruction as to him of the thing insured, which precludes the necessity of any notice to abandon it."

And in delivering the judgment for the Court his Lordship at page 390 of the Report said:

"Then, as to the point of abandonment; if instead of the Saltpetre having been taken out of the ship and sold, and the property devastated and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument, that in order to make it a total loss there should have been notice of abandonment and that such notice should have been given sooner; but there the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away."

66. Mr. Roy Choudhury contended that in this case there was an actual total loss because the title of the assured was extinguished by sale and the cargo was lost by sale. Though the effect on condemnation without an actual sale of the cargo was not an issue in this case, but in Dr. Arnould's *Marine Insurance* at p. 1103, Art. 1130 this case is cited as an authority for the proposition "capture followed by confiscation or by unpreventible sale and unredeemed by any restoration of the goods or their proceeds before action is brought, is, as we have already seen a case of actual total loss on goods, in which no notice of abandonment is necessary. It will be recalled that if the goods subsist in specie, and there is a chance of restitution, notice of abandonment is necessary to establish total loss."

67. *Bainbridge v. Neilson*, (1808) 10 East 329 is a case of recapture of a ship and it was held that the assured was not entitled to convert his partial loss arising out of a capture into a constructive total loss by abandonment. The ship in question was however not condemned and therefore it is unnecessary to discuss this case. The principles laid down in the 'Polurrian' and in the 'Girl Pat' relating to constructive total loss was followed in *C. Czarnikow Co. v. Java Sea & Fire Insurance Co. Ltd.*, (1941) 2 All ER 256 where the condition of the cargo deteriorated between the capture and the recapture of the ship. There the assured succeeded in the action and Viscount Caldecote at p. 263 of the report, said "it was unlikely, — i.e. more unlikely than likely — that cargo-owner would recover his goods" and "there was a constructive total loss of goods proximately caused by the perils insured against."

68. A common judgment was delivered by the House of Lords in *Rickards v. Forestal Land and Timber & Rly. Co. Ltd.*, LR 1942 AC 50 where two different German Merchant ships with English cargoes were scuttled by their Captains for evading their capture in the Allied blockade during the Second World War and another German Merchant ship escaped the blockade the assured cargo-

owners succeeded in their actions both in constructive and actual total loss against the under-writers and the principles relating to constructive total loss laid down in the 'Polurrian' and the 'Girl Pat' approved by the House.

69. Though the principles of constructive total loss were discussed in all these cases and the House of Lords also discussed the principles relating to actual total loss but the true effect of condemnation was neither an issue nor was discussed in these cases and, therefore, no useful purpose will be served in dealing with these cases cited by Mr. Roy Chowdhury. He then cited my own judgment in *Khalil Adal Khan's case* (supra) where the assured was non-suited by me on the facts and circumstances of that case which need not be repeated here. There, the laws relating to total loss, both actual and constructive, and abandonment as they stood prior to the Marine Insurance Act 1963 and its English counter-part were reviewed by me including the classical judgment of Lord Abinger in *Roux v. Shavador* (Infra) and the opinions of Dr. Arnould that were relevant for the purpose of deciding that case. It was not a case on condemnation at all and, therefore, what was said there need not be considered here.

70. In Art. 1054 at pages 1030-31 of Dr. Arnould's *Marine Insurance* under the heading "Effect of partial restoration after confiscation of goods" it is said as follows:

"There are dicta in two old cases which afford some authority for the view that if goods are seized and confiscated by a hostile Government, the restoration of a part of the goods, or their proceeds, before action brought prevents the assured from recovering from a total loss, even though prior to such restoration he might have claimed for an actual total loss. This view was adopted by Arnould. The learned editors of the 12th Edition took the view, however, that if at the time of the confiscation the goods could properly be regarded as irretrievably lost to the assured, so that there was then an actual total loss, the subsequent restoration of a part of the goods by the voluntary act of the Government of the captors could not deprive the assured of his right to claim for such actual total loss (25). In this view the only effect of the restoration of the property under such circumstances would be, that the under-writers would be entitled to the property as salvage. A fortiori, it is submitted that the restitution of a portion of the proceeds of the goods after the goods themselves have been sold, will not alter the nature of the loss.

Apart from these two cases, there does not seem to be any authority for the

proposition that an actual total loss, when once constituted, can ever be defeated by subsequent event".

In foot-note 25 it is *inter alia* stated:

"The present editors considered that this view is, in theory, correct, and the text is therefore left unaltered. The crux of the matter is the premise that 'at the time of the confiscation the goods could properly be regarded as irretrievably lost'; it may be doubted whether any Court would so find, where the goods had been released before action brought. The problem can hardly arise in any case except that of capture".

71. Mr. Roy Chowdhury placed strong reliance on the statements made in this foot-note and he contended that the term "confiscation" has been used here in a wider sense and it includes condemnation and therefore if "Shakeela" was released and restored to the plaintiffs before this action was brought no Court would have held that she was an actual total loss by her condemnation. Mr. Roy Mukherjee on the other hand contended that "confiscation" stands on a different footing from condemnation. He said that confiscation is an act of State whereas condemnation is a judicial act of the Prize Court. Similarly, capture is an act of state but not the condemnation. This article, according to him, therefore deals with confiscation and not with condemnation. But it is not necessary to resolve these two rival contentions for the simple reason that this ship was not restored to the plaintiffs at all. Furthermore, she was an actual total loss on October 18, 1965 and therefore no further question can at all arise.

72. In Halsbury's Laws of England, 3rd Edn. Vol. 30, Art. 1268 at p. 653 it is said: "A sentence of condemnation is necessary in order to vest the property in the captors or in their transferees and is conclusive as regards the property in the condemned ship or goods. The sentence of a prize court of competent jurisdiction condemning captured property is a judgment in rem, giving a good title as against all the World, the grounds of condemnation as well as the condemnation itself regarded as conclusive."

73. The condemned property, at the option of the capturing State, must either be sold or made over to the capturing State by the Prize Court. Even where an order for sale is made but the sale is not yet held the capturing State has a further right to have this order for sale rescinded and is entitled to get back the possession of the Prize. This right of the capturing-State to retain possession of the Prize by the sentence of condemnation of the Prize Court conclusively demolishes the contention of Mr. Roy Chowdhury that the condemnation is not com-

plete until the Prize is actually sold and I am unable to accept that the dictum of Kelly C. B. has held down the entire law on the subject. No doubt, a ship is lost by sale under the Prize-law but no sale is even necessary to make her an actual total loss under the law of Marine Insurance.

74. It was contended by Mr. Roy Mukherjee that her possession was taken away from the plaintiffs by capture and this dispossession was confirmed and continued by the sentence of the Prize Court. He said that this sentence has further extinguished the title of the plaintiffs in the condemned ship and the World no longer recognized the title of the plaintiffs and once the title was gone "It is gone for ever" is the famous saying of Lord Stowell in "The L'ACTIF" reported in 2 Roscoe Pr. C at p. 32 of the report and therefore she was an actual total loss by her condemnation.

75. In the Corpus Juris Vol. 38, paragraph 416 at page 1138 it is stated that a capture followed by condemnation is an actual total loss for the reason that the assured is effectively deprived of the possession and the use of his property. The same law is restated in Vol. 45, paragraph 955 at p. 1149-50 of the Corpus Juris Secundum. In Dr. Arnould's Marine Insurance under the heading "effect of re-purchase of ship by the Master" in Art. 1102 at page 1075 in footnote 2 it is *inter alia* stated: "where there is a lawful condemnation it appears that there would be an actual total loss, which would not be effected by any repurchase by the Master. Notice of abandonment would therefore be unnecessary. See ante, Section 1054. MacLachlan however (6th Ed. p. 1043) took a different view."

76. The Sixth Edition of Dr. Arnould's Marine Insurance edited by Mr. MacLachlan is, however, not available in Calcutta but I have looked into his "Merchant Shipping" (7th Edition) and in footnote 8 at page 17 it is stated:

"Even after the sentence of condemnation, a statutory British rule prescribes the restoration of a ship recaptured from the enemy, on payment of salvage, unless she has been used as a ship of war; Naval Prize Act 1864, S. 40. This provision only applies to British ships. As to salvage for the recapture of a neutral ship, see The Salerno (1946) P 189. In the United States the right to have restoration on recapture is lost when the property has been adopted condemned, and varying rules have been adopted in other countries: See Hall, Int. Law, S. 166, p. 522, 7th ed".

The above statements may be the reason why Mr. MacLachlan took a different view and why the law is thus stated in the Corpus Juris, I will now pass on to

Andersen v. Marten, (1908 AC 334) where the perils of the sea and not risks of capture, seizure etc. covered the ship "Romulous". Her voyage was to a Russian Port. During the Russo-Japanese War she had to deviate her course for avoiding a capture by a Japanese cruiser and was severely damaged by reason of her coming in contact with the ice. She had to proceed towards a Japanese Port of refuge for repairs and before she could reach there she was captured by the Japanese cruiser. While she was being taken by an opposite route to a Japanese Port for being condemned by a Japanese Prize Court she became a total wreck by the perils of the sea and two days thereafter she was condemned by the Japanese Prize Court. In these circumstances the assured, without giving any notice of abandonment, brought the action against the insurers which was tried by Channell, J., as he then was, and his judgment is reported in LR (1907) 2 KBD 248. The question was whether she was lost by the perils of the sea or by her capture followed by condemnation and it was answered in the following terms at pp. 253-5 of the report:

"I think that most people, looking at the matter from a common sense point of view and apart from technicalities, would say that under the circumstances the owner lost his ship by capture, and that the Japanese captors afterwards lost their price by shipwreck. If that is the correct view, then under this policy the plaintiff is not entitled to recover. If the effect of what took place when the Japanese officers came on board and directed the captain to take her down the coast in the opposite direction to that in which she was going, that is to say, towards the Prize Court, was to divest the owner's property in the ship, then he had lost it and could not afterwards lose it again. From that moment he had no insurable interest in the ship. The ship itself was undoubtedly lost by the perils of the sea but the question is whose property was it at that time? If the property had passed from the original owner by the capture, he did not lose it; it was the loss of the Japanese who had taken it. I have examined the authorities on the subject, and I find that it is clear that capture without condemnation does not divest the owner of his property. I say without condemnation, not 'until condemnation, for I think that is the proper way of stating the rule. * * * * * the true law is that, although mere capture in itself when there is no condemnation does not divest the property when there is an adjudication of a prize court, which is an adjudication in rem binding on all the world, it is a decision not merely that the property has passed at the date of the decision, but that it did pass at the time

of the capture, and its effect therefore may be described as relating back. On that ground, therefore I must hold that the plaintiff is not entitled to judgment."

77. This judgment was upheld by the Court of Appeal reported in (1908) 1 KBD 601, and by the House of Lords in 1908 AC 334 and on behalf of the plaintiffs the following relevant portion from the speeches of Lord Halsbury at p. 340 of the report was relied on before me:

"This very question arose just 150 years ago in *Goss v. Withers*, and was argued before Lord Mansfield and he observed that a large field of argument had been entered into, and it would be necessary to consider the laws of nations, our own laws and Acts of Parliament, and also the laws and customs of merchants which make a part of our laws. After taking time to consider, the learned judge, delivering the judgment of the whole Court on November 23, 1758, then decided what would be enough to decide this case. After going through the whole law and discussing the question of how far and to what extent the seizure of the vessel affected the change in property, he says: "But whatever rule ought to be followed in favour of the owner against a recaptor or vendee it can in no way affect the case of an insurance between the insurer and insured The ship is lost by the capture though she be never condemned at all nor carried into any port or fleet of the enemy, and the insurer must pay the value. If after condemnation the owner recovers or retakes her the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract; the insurer runs the risk of the insured and undertakes to indemnify. He must therefore bear the loss actually sustained." * * * Applying Lord Mansfield's words here, it seems to me that it would be a bold thing to argue against a judgment of the full Court of King's Bench presided over by Lord Mansfield and 150 years after it has been accepted as the law during that period by every English tribunal."

77-A. The doctrine of relation back laid down by Sir Arthor Channell was primarily based on *Stevens v. Bagwell*, (1808) 15 Ves 139 (152) where Sir William Grant said: "Though the property was not completely vested in the captors until condemnation, yet after condemnation it is by relation considered as theirs from the time of the capture".

78. It is true that this decision was not concerned with the effect of condemnation on the question of total loss under the law of Marine Insurance but the doctrine of relation back is firmly established by "*The Odessa*" 1916-1 AC

[145 (supra). Sir Arthur Channel and the Court of Appeal were of opinion that the ship was lost by her capture which was followed by her condemnation and Lord Halsbury proceeded on the law laid down by Lord Mansfield in *Goss v. Withers* which is the main source of the doctrine of the constructive total loss. There, the insured voyages were terminated by the capture of the insured ships and after they were recaptured the action was brought by giving notice of abandonment. The ships were not condemned and the contention that their title remained with the assured debarred him from getting the insurance money because of their ultimate arrival after recapture was overruled by Lord Mansfield at pp. 517-8 of (1758) 97 ER in the following terms:

"There is one point which, we are all of opinion is immaterial as between the insurers and insured; viz. 'whether by this capture, the property was or was not transferred to the enemy by the law of nation.' That question can happen but in two cases; namely, (1st) between the owner and a neutral person who has bought the capture from the enemy; (2nd) between the owner and re-captor. If the ship taken by an enemy escapes from the enemy, or is retaken; or if the owner redeems (ransoms) the capture; his property is thereby re-vested; which property in the ship taken was, by the law of nations, obtained by the captor.

The general proposition of writers upon this subject is, that 'quae ab hostibus capiuntur, statim capientium fiunt'; which is to be understood, 'when the battle is over'. Indeed, nothing can be said to be taken, till the battle is over and the battle is not over, till all immediate pursuit has ceased, and all hope of recovery is gone. * * * But whatever rule ought to be followed, in favour of the owner, against a recaptor or vendee, it can no way affect the case of an insurance, between the insurer and insured."

79. Then the law quoted by Lord Halsbury was stated by Lord Mansfield and thereafter at page 519 Lord Mansfield again said:

"No capture by the enemy, though condemned, can be so total a loss as to leave no possibility of recovery if the owner himself should retake at any time, he will be entitled; and, by the Act of Parliament, if an English ship retakes at any time, (before condemnation or after) the owner is entitled to restitution, upon stated salvage. This chance does not suspend the demand, for a total loss, upon the insurer; but justice is done by putting him in the place of the insured in case of recapture".

80. I dare not lift this embargo laid by Lord Mansfield for allowing the Prize Law to intermingle with the law of

the Marine Insurance. And a greater Mansfield is required to do so. *Goss v. Withers*, (1758) 97 ER 511 overrules all the rival contentions made before me discussed upto this stage and it lays down: (1) The law of Marine Insurance is not concerned with the destruction of the title of the assured in the insured ship by a sentence of condemnation of the prize court of an enemy State; (2) Merely because an insured ship is condemned during the continuance of the hostilities is no ground for holding that she is a total loss within the meaning of the law of Marine Insurance; and (3) All hope of recovery is gone for ever with the cessation of hostilities if she remains in the possession of the capturing State and the insurer must pay her agreed value in terms of the policy.

81. A loss, under the law of Marine Insurance, is either partial or total. A total loss is either constructive or actual. An actual total loss of the subject-matter of assurance by reason of the perils insured against occurs in three different situations; (1) Where the res is totally destroyed or is wholly annihilated; (2) Where the res ceases to remain in its original condition; and (3) Though the res is not destroyed and it remains in specie but it is irretrievably lost to the assured.

82. Section 57 of the Act says, "Where the assured is irretrievably deprived of the" subject-matter of the assurance "there is an actual total loss" but it does not say under what circumstances an assured is irretrievably deprived of the subject-matter of the assurance. An actual total loss by irretrievable deprivation can only be understood if the principles relating to constructive total loss are properly appreciated.

83. Where the irretrievable deprivation has not yet taken place but the assured is deprived of the possession of his ship or goods by a peril insured against and it is unlikely that he could recover the ship or goods as the case may be and he has reasonably abandoned them to the insurers it is a case of constructive total loss under Section 60 of the Act. A constructive total loss is not a factual loss. It is a loss presumed by the law. Abandonment is the foundation of every constructive total loss and without an abandonment there can be no constructive total loss. Abandonment must be duly notified within a reasonable time from receiving the intelligence of the accident which must also be made on the true facts though unknown to the assured but it cannot be made on the facts supposed to be true when they are not really true.

84. The doctrine of constructive total loss originated in the cases of capture. It has a long history behind it but

It is not necessary to dip into this vast Ocean. A chance of a recapture within a reasonable time makes the capture a constructive total loss provided the capture is followed by a duly notified abandonment is the law laid down by Lord Abinger in *Roux v. Salvador*, (1836) 43 RR 638 at pp. 649-50 of the report in the following terms:

"there may be a capture, which though prima facie a total loss, may be followed by the recapture which would revert the property in the assured. There may be a forcible detention which may speedily terminate or may last so long as to end in the impossibility of bringing the ship or the goods to their destination * * * in all these cases a party insured may for his own benefit as well as that of the underwriter, treat the case as one of the total loss and demand the full sum insured. But if he elects to do this as the thing insured, or a portion of it still exists and is vested in him the very principle of the indemnity requires that he should make cessation of all his rights to the recovery of it and that too within a reasonable time after he receives the intelligence of the accident, that the under-writer may be entitled to all the benefits of or may still be of any value; and that he may, if he pleases, take measures, on his own costs, for realising or increasing the value".

85. It is not the law that merely because an assured is deprived of his possession of the ship he will be entitled to abandon her to the insurer so as to convert his partial loss into a constructive total loss. Her unlikelihood of recovery must prevail over her likelihood of recovery to entitle him to convert a partial loss into a total loss by abandoning her to the insurer is the underlying principle of the constructive total loss in the law of Marine Insurance. This likelihood or unlikelihood of recovery brings the subjective test into play. It is to be determined on the true facts and the circumstances prevailing at the time of abandonment. The rule is that where the insured ship exists in her original form and her recovery is unlikely the assured is put to an election either to treat her loss as a partial loss or as a constructive total loss. If he chooses to treat her as a constructive total loss he must give a notice of abandonment to the under-writer within a reasonable time from receiving the intelligence of her accident because he cannot by delayed election prejudice the rights of the under-writer to recover her possession for his own benefit. Where the assured exercises his right of abandonment in due time by a proper notice and the circumstance justifies such a course he will get her agreed value.

86. And even where the assured has not abandoned her to the under-writer but by the subsequent turn of events she becomes an actual total loss, during the currency of the policy, by the perils insured against the under-writer must pay her value in terms of the policy to the assured and no abandonment is required from him because there nothing remains to be abandoned for the benefit of the under-writer. In (1836) 43 RR 638 at pp. 643-644 of the report Lord Abinger laid down the law relating to actual total loss in the following terms:

"If the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstances over which he has no control they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods whether his inability arises from their annihilation or from any other insuperable obstacle". Again at page 649 of the report the learned Law Lord said:

"The underwriter engages, that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival he is bound by the very letter of his contract to pay the sum insured".

87. The above statements of law were no doubt made in relation to the insured cargoes but they are equally applicable to the insured ships. Dr. Arnould in Art. 1048 at page 1025 under the heading "What amounts to actual total loss" summarises the law laid down by Lord Abinger and the material portion of it is set out below:

"If in the progress of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the under-writer to procure its arrival, the latter is bound, by

the very letter of his contract, to pay the sum insured.

The great principle, therefore, on which all the cases of actual total loss depend appears to be this: the impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured. If, by reason of those perils, the assured is permanently and irretrievably deprived not only of all present possession and control over it, but of all hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of actual total loss, independently of the election of the assured to treat it as such. Notice of abandonment would in such case be a mere idle formality because nothing remains to be abandoned.

88. The law relating to constructive total loss was altered to the disadvantages of the assured by the Act but the law relating to the actual total loss remains the same. An actual total loss is not a pure question of law. The loss must be actual and the actual loss must be a total loss. An actual total loss does not depend on the treatment, volition or election of the assured whereas the foundation of the constructive total loss is the election of the assured. In actual total loss a total destruction of the insured ship must be proved as a fact. Her conversion into a completely different thing is also a pure question of fact. And every irretrievable deprivation of the ship stands on the same footing. And here there is no scope for applying any subjective test. And all facts, subsequent to an actual total loss are wholly irrelevant for the purpose of determining the rights of the assured and the liabilities of the insurer because once there is an actual total loss it is actual total loss for all time to come under the law of Marine Insurance and it does (not) matter in the least whether the assured or the underwriter have any knowledge of the actual total loss nor their futile attempt to procure her arrival can alter its legal consequence.

89. According to Dr. Arnould: "Every effective deprivation of the spes recuperandi amounts to an actual total loss: if the thing insured be in the hands of the strangers, not under the control of the assured; if, by any circumstances over which he has not control, it can never, or within no assignable period be brought to its original destination, in such cases the fact of its remaining in specie at any forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his property, whether his inability arises from its annihilation or from any other insuperable obstacle." (See Art. 1052 at pp. 1028-9).

90. It is not the universal rule that a capture is always a constructive

and not an actual total loss. The 'Romulus' was lost by capture and not by condemnation. The proximate cause of her loss was her capture and thereafter the assured lost his title by the condemnation under the Prize Law. No doubt, this loss of title related back to the date of her capture by a legal fiction but that does not mean that she became an actual total loss by reason of her condemnation. It is true that the obiter dictum of Bailhache, J. in *Fooks v. Smith*, underlined by me, the acceptance of opinion of Mr. Phillips by Lord Blackburn in *Stringer's case*, the judgment of Sir Arther Channel in *Anderson's case* and the opinions of Dr. Arnould in Art. 1130 and in footnote 2 of Art. 1102 and the law stated in *Corpus Juris* and restated in *Corpus Juris Secundum* are apparently in favour of the plaintiffs but they should be viewed in their proper perspective. It is also true that Mr. Roy Choudhury has not been able to place any direct authority in support of his contentions but I am unable to accept these two diametrically opposite and extreme contentions because an actual total loss is always a mixed question of fact and law and therefore it cannot be said that there is always an actual total loss by a mere sentence of condemnation of an enemy Prize Court.

91. The learned counsel for both the parties have proceeded on the footing that there will be an actual total loss of an insured ship if she is sold under a sentence of condemnation of the Prize Court of competent jurisdiction and therefore, subject to what are stated earlier, I do not propose to express any further opinion on it. But that again does not mean that in order to make her an actual total loss she should be sold to a neutral in execution of a sentence of an enemy Prize Court.

92. A condemnation of an insured ship though she has not been sold is not a mere fact but the most vital fact and should be regarded as of pivotal importance in those circumstances where her condemnation has taken place in such a situation that her destiny can no longer be altered by the assured or by the insurer by any means whatsoever or it has become wholly beyond their power to procure her arrival within a reasonable time to her destination. And in this situation she is then and there an actual total loss by the peril insured against, irrespective of any question as to whether she had been subsequently sold or not to a neutral under the sentence of condemnation of the Prize Court of the capturing state because the assured has already been actually and effectively deprived of his ship and has ceased to have any dominion over her. And here there is no sale and still the loss is actual and total. I repeat that no sale is even

necessary to make her an actual total loss and the loss is actual and total to the assured where his insured ship is placed in such a situation by the perils insured against that he and the insurer have lost all control over her destiny and they have no means of procuring her arrival within a reasonable time to her destination. Lord Abinger, in (1836) 43 RR 638 said and it was reiterated by Lord Blackburn in *James Rankin v. Lewis Potter* (1873) 6 HL 83 at p. 128 that:

"Neither the assured nor the underwriters could at the time when the intelligence arrived exercise any control over the goods, or by any interference alter the consequences".

93. And this is the point where my journey comes to an end and here the spes recuperandi is gone and it is gone forever and the subject-matter of the insurance becomes an actual total loss.

94. The proximate cause of her capture was the Indo-Pakistan War. She was captured on September 5, 1965 while this war was actually going on. Her possession was taken away from the plaintiffs on this day. The war continued and, therefore, there was a faint chance of her recapture for the reason that there was a possibility of war being spread within the territories of East Pakistan in view of the deliberate provocative acts of the Pakistani Air Force in bombing a few places in West Bengal but due to the wisdom of our Government the war did not spread to East Pakistan. This war came to an end on September 23, 1965 under the command of the Security Council and the Military Observers were posted by the United Nations Organisation throughout the cease fire line. And on this day this ship was under absolute control and in unfettered possession of the Government of Pakistan. She was not condemned during the war and therefore she did not become the property of Pakistan but the plaintiffs had no control over her destiny nor they had any means of procuring her arrival to India or to any other destination. And on this day every possibility of her recapture was gone for ever. According to Lord Mansfield she became an actual total loss on this day but Lord Porter has supposed to have whispered the contrary was the contention of Mr. Roy Chowdhury.

95. Assuming, however that she was not an actual total loss on this day and on the further assumption that on this day a new faint possibility arose of her restoration to the plaintiffs within a reasonable time for the reason that she was still in the possession of the Government of Pakistan and she might have been allowed to come back to India by the Government of Pakistan. I will now deal with the subsequent events for ascer-

taining whether she became an actual loss at all and if so on which date. The hostilities came to an end on September 23 and the Government of Pakistan did not take her to the Prize Court upto October 17 but during this period the plaintiffs had no means to recover her possession and the Government of Pakistan retained her as a Prize in exercising of its sovereign right.

96. She was then taken to the Prize Court on October 18, 1965 and why she was taken there? Because the Government of Pakistan wanted to take her away from the plaintiffs forever. She was condemned on this day at the instance of the Government of Pakistan and the Government of Pakistan became the owner of this ship. The Government of Pakistan wanted to deprive the plaintiffs permanently of this ship and it was done long after the cessation of the hostilities and on this day the Government of Pakistan wanted to have her sold so that the plaintiffs could never get her back by any chance whatsoever.

97. The day she was condemned, her men were also taken from jail to a Concentration Camp where they were not only detained but were also tied up with ropes (Bose Q. 25). Her possession was forcibly taken away from the plaintiffs on September 5, and this dispossession was permanently confirmed on October 18, when her title was also taken away from the plaintiffs. They had no control whatsoever over her. They had no means of procuring her arrival. Under no circumstances they could intervene and alter the situation. They could not even go to East Pakistan for securing their rights and furthermore who on earth would have listened to them there? Had any one of plaintiffs gone there by any chance he would have been sent to the same place where her men were detained for meeting the same treatment. The Government of Pakistan took away everything from the plaintiffs so far as the "Shakeela" was concerned and it was done deliberately by the Government of Pakistan. And her destiny was finally sealed and settled on this day so far as the law of Marine Insurance is concerned.

98. These were the insuperable obstacles that stood on the way of the plaintiffs from recovering her and they were irretrievably deprived of the vessel and there can be no doubt that she became an actual total loss to them. The Insurers were in no way in a better position than the plaintiffs. All hope of her recovery was extinguished and the spes recuperandi was totally vanished on October 18, 1965. The "Shakeela" was lost and she was lost forever so far as the law of Marine Insurance is concerned. Her pos-

session was taken away from the plaintiffs by capture on September 5 and this dispossession continued uninterrupted right upto this day and therefore her loss was proximately caused by the perils insured against on this day and on this day she was not under any attachment of any Civil Court whatsoever. And the Insurers must pay her agreed value to the plaintiffs.

99. She was not actually sold and the Order for her sale was rescinded but that does not mean that she ceased to be an actual total loss because once there is an actual total loss it is an actual total loss for all time to come under the law of Marine Insurance. No doubt, there was an agreement between the two Governments for exchanging her with the 'Elahi Bux' but that could not alter the situation because she became an actual total loss long before this agreement was entered between the two Governments. Furthermore, she was not exchanged at all with the 'Elahi Bux'.

100. The plaintiffs were irretrievably deprived of her on October 18, and its effect was not the suspension of a mere chance of her recovery but an absolute and total destruction of all chances and hope of her recovery. They had no remedy against the Government of Pakistan whatsoever. The 'Elahi Bux' was not condemned but 'the Sakeela' was. Had the exchange been materialised she would have belonged not to the plaintiffs but to the Government of India and it was still said that our Government might have given her to the plaintiffs but this gift or grant by the grace of our Government and this act of benevolence cannot alter the law relating to actual total loss and, furthermore, the Insurers could have taken her away as salvage upon payment of the agreed value to the plaintiffs and the plaintiffs would have no say in the matter.

101. The actual total loss that happened on October 18, 1965 continued to be the actual total loss on the date the suit was filed because her possession was never restored to the plaintiffs and the plaintiffs and the Insurers had no means of procuring her arrival to India at any point of time. The agreement relating to her exchange with the "Elahi Bux" or her attachment by the Civil Court cannot by any principle of law be said to have destroyed the efficacy of her actual total loss and the Insurers must pay her value to the plaintiffs in terms of the policy.

102. All relevant facts relating to the "Sakeela" were communicated by the plaintiffs without any loss of time to the Insurers. They took time to consider their own position. They kept the matter hanging for an indefinite period and if they have prejudiced their own rights, if

any, they are to suffer and not the plaintiffs. Furthermore, the question of any prejudice to them can never arise because she was an actual total loss.

103. Price of a ship of her nature had gone up by leaps and bounds and the plaintiffs for this reason were vitally interested in getting her back and for this purpose they have rendered all possible assistance to the Insurers. This assistance was sought to be utilised against the plaintiffs on behalf of the Insurers for showing that the plaintiffs were exercising their right of ownership over her after she was condemned and were still hoping for her recovery and, therefore, she was not an actual total loss. There is no substance in this submission and the complete answer is that her actual total loss did not depend on the behaviour of the plaintiffs and by rendering assistance the plaintiffs did not destroy their rights under the policy.

104. The plaintiffs have paid off the last defendant after the institution of this suit and in view of this payment Mr. Roy Chowdhury expressly abandoned the first two issues raised by him. He and Mr. Roy Mukherjee requested me not to decide these two issues and therefore, I am not answering them and I answer the remaining issues as follows:—

Issues 3 (a), (b) & (c)	Yes.
Issue No. 4	Yes.
Issue No. 5	No.
Issue No. 6	

The vessel was not released but not for the reasons stated in paragraph 6 of the Written Statement.

Issue No. 7	'Yes' but it is of no legal consequence.
Issue No. 8	Yes.
Issue No. 9	Yes, as stated below.

105. The plaintiffs have succeeded in this action and therefore, the suit is decreed in terms of prayer (b) and (f) of the plaint with interim interest and further interest on the decretal amount at the rate of 6 per cent. per annum until realisation. The suit is dismissed as against the last defendant who will get the costs from the defendants Nos. 1 to 4. The plaintiff will also get the costs of two Commissions including the fees paid to their Counsel for appearing in Commissions from the defendants Nos. 1 to 4. Certified for two counsel.

106. The case was opened by Mr. Sen on March 3, 1971 and it was closed by Mr. Roy Choudhury on May 7, 1971. They did not waste a single moment of this Court for which I am grateful to them. I have taken a considerable time at home to consider the complicated questions involved in this action. Hence I suo motu stay the execution of this decree till the 15th December, 1971 to enable the Insurers to test the correctness of this decision, if they are so advised.

Order accordingly.

AIR 1972 CALCUTTA 253 (V. 59 C 42)
A. K. SINHA, J.

Jaidev Jain & Co., Appellant v. The Union of India and another, Respondents.
Matter No. 219 of 1970, D/- 5-7-1971.

(A) Constitution of India, Art. 226 — Necessary parties — Who are — Petition against order rejecting tender — Persons who have participated in the scrutiny and recommended for acceptance of tender are necessary parties — Their non-joinder affects maintainability of petition especially when particulars regarding them were available with the petitioner. (Para 4)

(B) Constitution of India, Art. 226 — Contractual rights — Enforcement of — Breach of rules or regulations in accepting or rejecting tenders — No writ will lie.

Even if there is breach of rules or regulations in accepting or rejecting the tenders that would at best come within the domain of contract and no writ lies for enforcement of contractual rights.

(Para 5)

(C) Constitution of India, Art. 19(1) (g) — Acceptance or rejection of tender — No question as to infringement of Art. 19 (1) (g) or Art. 14 arises — (X-Ref:— Art. 14). (Para 5)

(D) Constitution of India, Article 226 — Natural Justice — Principles of — Rejection of tender — Tenderer whether entitled to opportunity of being heard.

A tenderer cannot claim any hearing before cancellation of his tender where the acceptance or rejection of a tender is not based on any statute or statutory rule. Mere submission of tender does not create any right to property in favour of the tenderer. The fact that the tenderer has quoted the lowest rate also does not entitle him to a hearing especially when one of the terms specified in the tender form is "the Railway

Administration reserved the right to reject any tender without assigning any reason and does not bind itself to accept the lowest or any tender or to assign any reason for doing so". (Para 6)

Cases Referred: Chronological Paras

(1970) Civil Appeal No. 1638 of 1969, D/- 15-1-1970 = 1970 UJ (SC)	
290, D. F. O. South Kheri v. Ram Sanehi Singh	8
(1969) 73 Cal WN 267, Regional Director v. A. S. Bhangoo	5
(1967) AIR 1967 SC 1753 (V 54) = (1967) 3 SCR 636, G. J. Fernandez v. State of Mysore	5
(1963) AIR 1963 SC 786 (V 50) = (1963) Supp 1 SCR 676, Udit Narain Singh v. Board of Revenue	4
(1959) AIR 1959 SC 490 (V 46) = (1959) Supp (1) SCR 787, C. K. Achutan v. State of Kerala	5
(1954) AIR 1954 SC 592 (V 41) = 1955 SCR 305, K. N. Guruswamy v. State of Mysore	6

ORDER:— This Rule is obtained against an order rejecting petitioner's tender and accepting the one submitted by the respondent No. 3.

2. Tenders were invited by the Chief Commercial Superintendent, Eastern Railway, for street collection and delivery of goods and parcels from Calcutta and Baranagore Booking Offices and also from several other stations. The petitioner as also others submitted their tenders in the form and manner indicated by the authorities. On 6th April, 1970, these tenders were opened in the presence of the petitioner when it was found that only two other tenders were received besides the petitioner's one, of respondent No. 3 and the other, of one Ram Kumar Agarwalla. Of these three tenders only two namely those of the petitioner and the respondent No. 3 were found in order but the rates quoted by the petitioner were lower than the rates quoted by the respondent No. 3. It is alleged that the tender submitted by the respondent No. 3 did not moreover conform to the rules contained in clauses (15) and (17) of the tender form. Even so, the respondents Nos. 1 and 2 considered and ultimately accepted the tender of the respondent No. 3 in preference to the petitioner. In spite of repeated representations the respondents Nos. 1 and 2 did not cancel the acceptance of such tender. That is how, in short, the petitioner felt aggrieved and obtained the present Rule.

3. The first point raised on behalf of the petitioner is that the acceptance of the tender submitted by respondent No. 3 on consequential rejection of the petitioner's tender is in contravention of rules and provisions embodied in the form of the tender.

Secondly, it is stated that the rejection of the tender of the petitioner offends against the fundamental rights guaranteed under the Constitution of India, and amounts to illegal discrimination contrary to Article 14 of the Constitution. Thirdly, it is submitted, in any event, cancellation of the petitioner's tender without giving an opportunity of hearing has violated the rules and principles of natural justice but no such ground, I find, was taken in this form in the writ petition.

4. I think, this Rule fails on a preliminary point raised by Mr. Basak on behalf of the respondents. First, it is said in paragraph 3 of the affidavit-in-opposition that at the material time there was no such post of Chief Commercial Superintendent (Development) Eastern Railway, and even no person now is holding such post. The Writ Petition is not maintainable in absence of the Chief Commercial Superintendent, Eastern Railway, who is not a party. Secondly, it is said that the petition is also bad for non-joinder of parties, viz., the members of tender-committee whose names have been disclosed in paragraph 13 of the affidavit. It is stated, that the tender-committee in its meeting held on 23rd April, 1970, considered the tenders submitted by the petitioner and the respondent No. 3 and ultimately recommended for acceptance of the tender submitted by the respondent No. 3 which was accordingly accepted by the Chief Commercial Superintendent. In paragraph 5 of the affidavit-in-reply of the petitioner affirmed on 20th June, 1970, it is however, denied that the petition is defective as under clause (2) of the instructions to tenderers the Chief Commercial Superintendent (Development) has been described as the officer for presentation of the tenders for registration. With regard to the tender-committee it is said in the said affidavit in paragraph 14 that there was no reference of such committee under the instruction clauses in the tender form. I think, both the Chief Commercial Superintendent and the members of the tender-committee are necessary parties. For, before the final acceptance or rejection of the tenders in dispute the whole thing had to pass through a continuous process of scrutiny, recommendation and then final acceptance and rejection. So, not only the Chief Commercial Superintendent but also the members of the tender-committee who participated in the scrutiny and recommended for acceptance of the tender are, in my view, necessary parties for effective adjudication of questions in controversy in the present Rule. The petitioner had all the particulars about the officer and the members of the tender-committee from the affidavit-in-oppo-

sition affirmed by Vasant Vithal Vhedi on 3rd July, 1970; even then, he did not take any steps to bring the Chief Commercial Superintendent, Eastern Railway and the members of the tender-committee on record. It is well known, a writ petition shall fail by reason of non-joinder of necessary parties. See *Udit Narain Singh v. Board of Revenue*, AIR, 1963 SC 786.

5. Even on merits, I think, there is no substance in the petitioner's case. Regarding the first and second points, even if there is breach of rules or regulations in accepting or rejecting the tenders that would at best come within the domain of contract, no writ will lie for enforcement of contractual right. No question also arises as to infringement of fundamental rights under Article 19 (1) (g) or violation of provisions of Article 14 of the Constitution either in acceptance or rejection of tender for obtaining a contract. See AIR 1959 SC 490, *C. K. Achutan v. State of Kerala*, AIR 1967 SC 1753, *G. J. Fernandez v. State of Mysore* and (1969) 73 Cal WN 267, *Regional Director v. A. S. Bhangoo*.

6. On the third point learned Counsel for the petitioner has relied on an unreported decision of the Supreme Court in *D. F. O. South Kheri v. Ram Sanehi Singh*, Civil Appeal No. 1638 of 1969 (SC). It is urged that in any case the petitioner's tender could not be cancelled without giving him an opportunity of hearing. Following the principles indicated in *K. N. Guruswamy v. State of Mysore*, AIR 1954 SC 592, it was held in the above case that even though "the order was administrative and not quasi-judicial the order had still to be made in a manner concerned with the rules of natural justice when it affects the respondent's rights to property." This decision, I do not think, has any bearing to the question involved in the present Rule. For, the acceptance or rejection of a tender was based not on any statute or statutory rules and the authority concerned did not pass any order vested with certain statutory power. Secondly, mere submission of tender did not create any right to property in favour of the petitioner. In any event, therefore, the petitioner cannot claim any hearing before cancellation of such tender. Thirdly, it is stated in paragraph 11 of the affidavit that one of the terms specified in the tender form is that "the Railway Administration reserved the right to reject any tender without assigning any reason and does not bind itself to accept the lowest or any tender or to assign any reason for doing so. The said Administration also reserves the right to accept any tender in part or in whole. The tenderers should note that the charges quoted by them must conform to the rates

and fares sanctioned for the area by the Regional Transport Authority." There is no denial by the petitioner to the correctness of these provisions. Such being the terms of the agreement between the parties no question of giving an opportunity of hearing arises before cancellation of the petitioner's tender just because he quoted, although denied by the respondents, the lowest rate.

7. The result is, the petition fails. The Rule is discharged but there will be no order as to costs.

Rule discharged.

AIR 1972 CALCUTTA 255 (V 59 C 43)

AMIYA KUMAR MOOKERJI, J.

Sm. Pratima Baul, Petitioner v. Indu Bhusan Banerjee, Opposite Party.

Civil Revn. No. 223 of 1971, D/- 21-2-1972.

West Bengal Premises Tenancy Act (12 of 1956), Sections 17-D and 13 (1) (i) — Suit for ejectment of tenant for default — Compromise decree under which tenant agreeing to vacate premises by certain period — Application by tenant under S. 17-D is maintainable.

In a case, where the plaintiff prays for a decree for ejectment on the only ground of default, and by consent a decree is passed, that decree comes within the purview of Section 13 (1) (i) of the Act, and can be set aside under Section 17-D of the Act. Absence of any provision for payment of arrears of rent in the compromise decree does not change the character of that decree and takes it outside the scope of clause (i) of sub-section (1) of Section 13 of the Act. Case law discussed. (Para 11)

Cases Referred: Chronological Paras

- | | |
|--|------|
| (1970) AIR 1970 SC 794 (V 57) = | |
| 1970 Ren CR 375, Ferozi Lal Jain v. Man Mal | 5 |
| (1964) 68 Cal WN 353, Dr. T. S. Gupta v. Kanahilal Ruia | 5 |
| (1949) AIR 1949 Cal 151 (V 36) = | |
| 52 Cal WN 230, Manick Chandra Pal v. Haripada Roy | 8, 9 |
| (1949) 53 Cal WN 859, Haji Mohd. Ekramal Haque v. Rebatil Bhusan Mukherjee | 10 |
| (1946) 50 Cal WN 242, Smt. Parbati Debi v. Dr. S. N. Sen | 8, 9 |
| (1946) 50 Cal WN 245 = ILR | |
| (1946) 1 Cal 462, Sm. Kironasahi Dassee v. Hirendra Nath Das | 8, 9 |
| (1945) 49 Cal WN 700, Mrs. Julie Sen v. Surjendra Mohan Roy Chowdhury | 8, 9 |

Arunendra N. Basu, for Petitioner.

ORDER:— This Rule was obtained by the plaintiff-landlady and it is dir-

ected against an order of the learned Munsif holding that the tenant defendant's application under Section 17-D of the West Bengal Premises Tenancy Act, 1956 was maintainable for setting aside a consent decree.

2. Plaintiff brought a suit for ejectment against the opposite party from a portion of premises No. 21/2, Belgachia Road, on the ground that the opposite party was a defaulter in payment of rent since December 1964. The opposite party in his written statement denied that he was a defaulter. On or about March 12, 1968, the plaintiff and the opposite party filed a joint petition of compromise and in terms of the same, the learned Munsif passed a decree. In terms of the said compromise decree the tenant undertook to vacate the premises within December, 1969. In default, execution might be started for recovery of possession. While continuing in occupation of the premises in suit in terms of the said consent decree, on 6th December, 1969, the tenant opposite party filed an application under Section 17 D of the Act for setting aside the said decree passed in the suit. The petitioner resisted the said application on the ground that it was not maintainable in view of the fact that decree in question was a consent decree and not a decree in invitum. The learned Munsif by his order dated 3rd of December 1970, allowed the opposite party's prayer in preliminary form upon the view that the opposite party's said application under Section 17 D was maintainable. Petitioner, being aggrieved against the said order, moved this court and obtained the present Rule.

3. Mr. Basu, appearing on behalf of the petitioner, contended that as no decree was passed for recovery of possession of the premises in suit on the ground in clause (i) of sub-section (1) of Section 13 of the West Bengal Premises Tenancy Act, the learned Munsif acted illegally and with material irregularity in exercise of his jurisdiction in holding that Section 17-D of the Act was applicable in the instant case.

4. Mr. Basu, further, contended that the consent decree was but a contract with the command of the court super-added to it and the court had no jurisdiction to read into it something which the parties did not agree upon, namely, the defendant being declared a defaulter in payment of rent.

5. The plaintiff brought the ejectment suit on the ground under Section 13 (1) (i) of the Act. The defendant denied that he was a defaulter in his written statement. Except default, there was no other ground for ejectment. A Division Bench of this Court held in *Dr. T. S. Gupta v. Kanahilal Ruia*, (1964)

68 Cal WN 353, that the court had no jurisdiction to pass a decree for ejectment, even by consent of parties. In absence of any of grounds mentioned in Section 13 (1) of the West Bengal Premises Tenancy Act. In *Ferozi Lal Jain v. Man Mal*, AIR 1970 SC 794, the Supreme Court held that the jurisdiction of the court to pass a decree for recovery of possession of any premises depends upon its satisfaction that one or more of the grounds mentioned in the section for ejectment in the Tenancy Act have been proved. The court was not competent to pass a decree solely on the basis of the compromise arrived at between the parties.

6. In the instant case, the only ground for ejectment was default under clause (i) of sub-section (1) of Section 13 of the Act. So, in the instant case the decree was passed under Section 13 (1) (i) of the Act, otherwise, the court was not competent to pass a consent decree for ejectment, in view of the above decision of the Supreme Court.

7. Next point for consideration is, whether a consent decree can be set aside under Section 17-D of the Act. The provisions of Section 17-D are similar to paragraph 9-B (3) of the Calcutta House Rent Control Order 1943, as amended on 29-8-1949. Mr. Basu referred to some of the decisions of this Court under the said paragraph of 1943 Rent Control Order where it was held that para 9-B (3) of the Calcutta House Rent Control Order 1943, has no application to a decree for possession obtained by consent.

8. Mr. Basu in this connection referred to two Bench decisions of this Court, *Manick Chandra Pal v. Haripada Roy*, 52 Cal WN 230 = (AIR 1949 Cal 151); *Mrs. Julie Sen v. Surjendra Mohan Roy Chowdhury*, (1945) 49 Cal WN 700 and two Single Bench decisions, *Smt. Parbati Debi v. Dr. S. N. Sen*, (1946) 50 Cal WN 242 and *Sm. Kironasahi Dassee v. Hirendra Nath Das*, (1946) 50 Cal WN 245.

9. In 52 Cal WN 230 (231) = (AIR 1949 Cal 151), two Single Bench decisions of this Court, (1946) 50 Cal WN 242 and (1946) 50 Cal WN 245 were considered, one of which was decided by *Gentle, J.* and other by *Clough, J.* Both the learned Judges held that a decree for possession passed on consent of the parties is excluded by the language of paragraph 9-B (3) of the Calcutta House Rent Control Order. The Division Bench, however, does not decide the question whether or not paragraph 9-B (3) excludes consent decree altogether. At page 234 of the report, *Mukherjee, J.* (as he then was) observed that the wording of paragraph 9-B (3) of the Calcutta House Rent Control Order does not in

terms exclude a consent decree. In that case an application of the defendant under Section 9-B (3) of the Order to set aside the consent decree was dismissed on the ground that the decree did not attract the provisions of the said paragraph. So, that decision does not help the petitioner. As regards the next Bench Decision referred to by Mr. Basu, (1945) 49 Cal WN 700, in that case the point was left undecided.

10. In *Haji Mohd. Ekramul Haque v. Rebati Bhushan Mukherjee*, (1949) 53 Cal WN 859, a Division Bench of this Court held that the words used in sub-paragraph (3) of paragraph 9-B of the order are quite general and there is no reason for excluding a consent decree from its purview.

11. In a case, where the plaintiff prays for a decree for ejectment on the only ground of default, and by consent a decree is passed, in my opinion, that decree comes within the purview of Section 13 (1) (i) of the West Bengal Tenancy Act, and can be set aside under Section 17-D of the Act. Absence of any provision for payment of arrears of rent in the compromise decree does not change the character of that decree and brings it outside the scope of clause (i) of sub-section (1) of Section 13 of the Act, as I have said before, otherwise the court had no jurisdiction to pass a consent decree for recovery of possession in absence of any of the grounds mentioned in Section 13 (1) of the Act. In the instant case only ground for ejectment was of default. So, the consent decree was passed under clause (i) of sub-section 13 (1) of the Act and as such, provisions of Section 17-D of the Act are attracted.

12. In the result, this rule is discharged but there will be no order as to costs.

Revision dismissed.

AIR 1972 CALCUTTA 256 (V 59 C 44)
AMIYA KUMAR MOOKERJI, J.

Sm. Nirmala Auddy, Petitioner v.
Sm. Monorama Chakraborty, Opposite
Party.

Civil Revn. Case Nos. 330 and 331
of 1971, D/- 8-2-1972.

Calcutta Thika Tenancy Act (2 of
1949), S. 7-A (as inserted by Second
Amendment Act of 1969) — Power of
Controller to set aside order for eject-
ment — Applicability — (X-Ref: Cal-
cutta Thika Tenancy (Second Amend-
ment) Act (29 of 1969), S. 13).

The order of the controller allow-
ing the landlord's application for eject-

CP/CP/B530/72/GDR

ment under sub-section (1) of Section 5, is subject to compliance of sub-sec. (2), in a case where compensation is payable under clause (ii) of the proviso to Section 4. Therefore, even if the order for ejectment passed by the Controller before the date of the commencement of the Second Amendment Act under sub-section (1) of Section 5 is upheld in an appeal, but the question of compensation remains undecided the order cannot be said to have become final. The application for ejectment in such a case still remains pending and the provisions of Amendment Act will apply by virtue of Section 13 of the Amendment Act.

Thus, the order of the Controller rejecting the application by a Thika tenant, made under Section 7-A of the Amendment Act for setting aside the order for ejectment, on the ground that the order has become final before the date of the commencement of the Amendment Act cannot be sustained. Nor can it be said that the application is premature because the question of compensation remains undecided. (Paras 4, 8)

Chandi Charan Mitter, for Petitioner;
Himansu Kumar Bose, for Opposite Party.

ORDER:— These two Rules were obtained by a tika tenant and are directed against the order of the Subordinate Judge, Third Court, Alipore, dismissing the petitioner's application under Section 7-A of the Calcutta Tika Tenancy (Amendment) Act, 1969.

2. The landlady opposite party filed two applications for eviction under Section 5 of the Calcutta Thika Tenancy Act, against the petitioner on the ground of default and her own requirement for the purpose of construction of building on the disputed holdings. The Controller allowed the said applications on 17-9-1966 on the ground of default only; he found that the landlady did not require the land for the purpose of building. On appeal from the said order of the Controller, the appellate court found that the landlady proved her case of requirement. The petitioner moved this Court in Revision against the said appellate order. This Court affirmed the order of the appellate court, sent back the case to the Controller to proceed with the determination of compensation in accordance with proviso (ii) to Section 4 of the Act. In view of West Bengal Ordinance V of 1967, which came into force in the meantime, as a result, further proceedings for determination of compensation was stayed. On 30th October, 1969, the Calcutta Thika Tenancy (Amendment) Act, 1969, came into force. On the date of reopening of the Court after the Xmas Holidays, on January 2, 1970, the petitioner filed applications under Sec. 7-A of the Amendment Act for setting aside the order of ejectment. The controller dis-

missed the petitioner's said application upon the view that those applications were premature because compensation payable under (ii) of the proviso to Section 4 had not been determined as yet. On appeal, the appellate court dismissed the petitioner's applications upon the view that as the appeals from the order made on such applications by the landlady having been disposed of before the commencement of the Amendment Act, the provisions of the said Act did not apply to the instant case. The petitioner, being aggrieved against the said appellate order, moved this Court and obtained the present Rule.

3. The learned Subordinate Judge dismissed the petitioner's applications under Section 7-A of the Second Amendment Act upon the view that the order of the appellate authority allowing the landlady's applications under Section 5 of the Act was final and conclusive in so far as the landlady's prayer for ejectment was concerned. As the appeal from such order had been disposed of before the commencement of the Amendment Act, 1969, the provisions of the said Act did not apply to the instant case.

4. Under Section 5 (1) of the Act, if a landlord wishes to eject a thika tenant on one or more of the grounds specified in Section 3, he is required to file an application before the controller for an order in that behalf. The said section further provides for the procedure to be followed by the controller in dealing with such an application. The order of the controller allowing the landlord's application for ejectment under sub-section (1) of Section 5, is subject to compliance of sub-sec. (2) in a case where compensation is payable under clause (ii) of the proviso to Section 4. If the landlord fails to pay the amount of compensation to the thika tenant or does not deposit the same with the controller, no order allowing his application under sub-section (1) shall be made.

5. In the instant case, it is not disputed that the compensation has not been determined as yet and no order allowing the application under sub-section (1) of Section 5 has been passed in terms of sub-section (2).

6. Under Section 27 of the Act, an appeal may be filed against any of the order of the controller. Therefore it follows, an appeal can be filed against orders passed by the controller both under sub-sections (1) and (2) of Sec. 5 of the Act. In the instant case, an appeal was filed against an order passed under sub-sec. (1) of Section 5. This court confirmed the appellate order and remanded the case to the controller directing him to determine the compensation and if the same is deposited or paid, then to pass an order for ejectment in terms of Section 5 (2) of the Act. So, in my opinion, application for

ejection of the thika tenant is still remaining undecided and pending before the Controller.

7. Provisions of Section 7-A of the Amendment Acts are made applicable in cases where order for ejection of a thika tenant has been made before the date of the commencement of the second Amendment Act, but the possession of the land has not been recovered by the landlord from the thika tenant. Under sub-s. (1) of Section 5 of the Act, an order for, ejection can be passed, but without compliance of sub-section (2) of Sec. 5, a landlord cannot recover possession of the land from the thika tenant. So, the learned Subordinate Judge was in error in holding that the order of the appellate authority allowing the landlord's applications under Section 5 of the Act was final and conclusive. The learned Subordinate Judge ignored the provisions of sub-sec. (2) of Section 5 of the Act as well as the second part of sub-section (1) of Section 7-A of the Amendment Act.

8. In the instant case, both the conditions as laid down in Section 7-A of the Amendment Act have been fulfilled and as the petitioner's application is still pending, the provisions of the Amendment Act are made applicable under Section 13 of the said Act. The thika controller was also in error in dismissing the petitioner's application under Section 7-A of the Amendment Act upon the view that it was premature. So, his order also cannot be sustained.

9. In the result, both these Rules are made absolute. The orders of the learned Subordinate Judge and also of the thika controller are set aside; the case is remitted back to the Controller to decide the petitioner's applications under Sec. 7-A of the Amendment Act in accordance with law. There will be no order as to costs.

10. Let the records go down to the thika controller as early as possible.

Order accordingly.

AIR 1972 CALCUTTA 258 (V 59 C 45)

SANKAR PRASAD MITRA AND S. K. DATTA, JJ.

Nishakar Pan and others, Petitioners v. Mahadeb Ghosh and others, Opposite Parties.

Civil Revn. No. 1290 of 1968, D/- 2-2-1972.

(A) W. B. Non-Agricultural Tenancy Act (20 of 1949), S. 6 — Applicability.

The manner of enjoyment of non-agricultural land prescribed in Section 6 applies to non-agricultural land simpliciter. The rights given by Section 6 have no re-

levance to the enjoyment of a tank.

(Prs. 10, 11)

(B) W. B. Non-Agricultural Tenancy Act (20 of 1949), S. 24 — Pre-emption — Finally published record of rights showing separation of interests of co-sharers — Transfer by one of them of his share — Others have no right of pre-emption. (X-Ref:—W. B. Estates Acquisition Act (1 of 1954), Ss. 6, 44).

Ordinarily persons who were co-sharers before the date of vesting of the land in the State Government under the provisions of W. B. Estates Acquisition Act would become co-sharers in the new tenancy under the State of West Bengal. Where, however, the finally published record-of-rights indicates the splitting up of the tenancies and separation of the interests of the co-sharers, the co-sharers must be held to have ceased to be co-sharers of the land. Hence when one of them transfers his share the others have no right of pre-emption. (1963) 67 Cal WN 848, Distinguished; (1969) 73 Cal WN 742, Approved.

(Prs. 5, 15, 17, 19)

Cases Referred: Chronological Paras

(1969) 73 Cal WN 742, Chakradhar

Ghosh Mandal v. Ram Ratan Pal 18

(1963) 67 Cal WN 848, Dhananjay

Senapati v. Debendranath Senapati 14

J. C. Pal with N. L. Pal, for Petitioners; D. K. Choudhury, for Opposite Parties Nos. 1 and 2.

SANKAR PRASAD MITRA, J. —

This Rule has been obtained against an order of the Subordinate Judge, Asansol made on the 17th January, 1968 in Miscellaneous Case No. 2 of 1967 arising out of Misc. Case No. 20 of 1966 in the court of the Munsif, Second Court, Asansol. By this order the petitioners' claim for pre-emption has been refused. The property in dispute is a tank. It is Dag No. 40, P. S. Kansa, Mouza Aima Biswanathpur, District Burdwan. The petitioners, the opposite party No. 3 and one Nishingha Thakur were co-sharers of this tank having Niskar right. The petitioners had 12 annas share in the tank, the opposite party No. 3 had 2 annas share and Nishingha Thakur had the remaining 2 annas share. On the 14th April, 1954 the West Bengal Estates Acquisition Act, 1953 came into force. In accordance with the provisions of this Act the aforesaid co-sharers retained the tank. In the record-of-rights under the Estates Acquisition Act several Khanda-khatians were made. These Khanda-khatians show that each of the co-sharers above named was to pay a specified portion of the total rent in respect of specified areas of the tank which they had retained.

2. On the 7th July, 1965 the opposite party No. 3, Gopal Chandra Ghosh transferred out of his 2 annas share 5 pice share in the tank to the opposite parties Nos. 1 and 2. On the 28th. February,

1966 the petitioners applied for pre-emption under Section 24 (1) of the West Bengal Non-Agricultural Tenancy Act, 1949. The relevant provisions of this Section are that if a portion or share of land is transferred, the immediate landlord or one or more co-sharer tenants of such land may, within four months of the service of notice issued under Section 23, apply to the Court for such land or portion or share thereof to be transferred to himself or themselves, as the case may be.

3. In the instant case the application under Section 24 (1) was allowed by the Munsif but the Subordinate Judge has set aside the Munsif's order.

4. The Rule was originally issued and heard by a Judge sitting singly of this Court. Mr. Justice Chakravarti who heard the Rule was of the view that the case raised an important point of law, namely, whether a tenancy which had been shown as Prithak in the revisional settlement-operations had actually effected a partition of the tenancy to such an extent that the original co-sharer would cease to be a co-sharer. Mr. Justice Chakravarti has referred this question of law to a Division Bench.

5. We have to observe at the outset that the record-of-rights we have already referred to has now become final. It could have been challenged in accordance with the procedure laid down in Section 44 of the West Bengal Estates Acquisition Act but none of the co-sharers we have named above had chosen to take any steps for its rectification.

6. We have therefore to decide this matter in the context of the finality of the record-of-rights and the entries made in the Khasda-Khatians.

7. Mr. J. C. Pal, learned Advocate appearing for the petitioners does not dispute that when the West Bengal Estates Acquisition Act came into force the disputed property vested in the State and the rights and obligations as between the aforesaid co-sharers and their landlord were extinguished but under Section 6 of the Act these co-sharers were entitled to, and in fact did retain, the disputed property as non-agricultural land. The words 'to retain' in Section 6 mean 'to keep possession' or 'to continue to have possession'. Under Section 6 (1) (c) the intermediary was entitled to retain non-agricultural land in his Khas possession within a certain limit. In the instant case, says Mr. Pal, the non-agricultural land, namely, the tank was in the Khas possession prior to the vesting not of one intermediary but of several intermediaries, in other words, this was a case of joint Khas possession and when they exercised their option to retain that is to say, to keep in possession or to continue to have possession they were doing so jointly. Mr. Pal has invited our

attention to Form B in Schedule B to the West Bengal Estates Acquisition Rules, 1954. This is a form which is used by intermediaries desirous of retaining lands under Section 6 of the West Bengal Estates Acquisition Act. Mr. Pal wanted us to consider particularly Column 4 of Form B. Under this Column the intermediary has to state his share "in the interests written in Column 3 and the date of the document under which interests were acquired". Counsel for the petitioners submits to us that when co-sharers are retaining land they have to specify in Column 4 what their respective undivided shares are. In the case before us Mr. Pal assumes that the co-sharers aforesaid had properly filed in Column 4 of Form B. Neither the original document nor any authenticated copy thereof were however produced before us.

8. Learned Advocate for the petitioners then referred to Section 6 (2) which provides, inter alia, that the intermediary retains land directly under the State subject to such terms and conditions as may be prescribed. He then went on to Rule 4 (2) of the West Bengal Estates Acquisition Rules, 1954 which, according to him, prescribes the terms and conditions of retention. Under this Rule land is retained by an intermediary as a tenant of the State under the provisions of the West Bengal Non-Agricultural Tenancy Act, 1949.

9. We were then referred to Sec. 3 of the West Bengal Non-Agricultural Tenancy Act, 1949. Section 3 (2) of the Act defines a 'tenant'. A 'tenant' means inter alia a person who has acquired from a proprietor or a tenure-holder a right to hold non-agricultural land for any of the purposes provided in the Act. We were then shown Section 6 which prescribed the manner of use of non-agricultural lands. Under this section a tenant holding non-agricultural land is entitled to (a) erect any structure including any pucca structure; (b) dig any tank; and (c) plant, enjoy the flowers, fruits and other products of, and fell and utilize or dispose of the timber of, any tree. Mr. Pal says that if these tests are applied to the tank which is the disputed property in the suit, enjoyment in terms of the Non-Agricultural Tenancy Act is possible only if it is held that it was in the joint possession of all the co-sharers.

10. It seems to us that the manner of enjoyment which Section 6 prescribes applies to non-agricultural land simpliciter. The rights given by this Section have no relevance to the enjoyment of a tank.

11. Mr. Pal then took us to Section 7 (2) of the West Bengal Non-Agricultural Tenancy Act. Under this sub-section if the non-agricultural land comprised in any tenancy has been or is created after the commencement of the Transfer of Property Act, 1882 and has been held for a term of not less than 12 years without any

lease in writing, the non-agricultural tenant would enjoy certain rights specified therein. Mr. Pal contends that if the co-sharers named above were non-agricultural tenants within the meaning of Section 7 (2) they would be entitled to enjoy the property in the manner laid down in Sec. 6 but, as we have pointed out, Section 6 does not in terms apply to a tank.

12. Mr. Pal then invited us to look into the provisions of Section 108 of the Transfer of Property Act and said that the rights and obligations of a lessor and lessee enumerated in that section could not be given effect to if the entries in the Khanda-Khatians herein were accepted as correct. The landlord, argued Mr. Pal, cannot lease out an undivided share in the property because he would be faced with difficulties in making over possession. And if separate possession cannot be given, the rights and obligations contemplated by Section 108 cannot also be enforced.

13. This argument of Mr. Pal would have deserved consideration if the property had been non-agricultural land simpliciter but in the case we do not feel the necessity of expressing our views on this question. The property in this case is a tank and there can be no question of enjoyment of a tank with portions separated for each co-sharer. What kind of difficulties would be created by Khanda-Khatians of the nature we are dealing with in this revision case when the subject-matter is not a tank but a simple non-agricultural land does not call for our decision at the moment.

14. Reliance was placed on behalf of the petitioners on the judgment of Mr. Justice Chatterjee in *Dhananjoy Senapati v. Debendranath Senapati*, (1963) 67 Cal WN 848. At p. 850, the learned Judge has observed as follows:

"By an amendment of the Estates Acquisition Act in 1956, subsequent to this purchase in 1953 the interest of the occupancy raiyats was declared to be deemed to be that of an intermediary. The result was that under Section 4 of the Estates Acquisition Act the interest of the intermediaries would vest in the State of West Bengal free from all encumbrances and, therefore, the interest of the tenants as tenants under the then landlord would cease and the tenancy would cease. Therefore, whatever interest, the parties had, before the vesting under the Estates Acquisition Act, would be extinguished and the original rights of the parties would be gone. The interest of the petitioners by virtue of their purchase in 1953 (before the vesting) as co-sharers of the tenancy then existing would cease, but subsequent to such vesting and as a result of such vesting the persons, who are deemed to be intermediaries, would still be entitled to retain the land and if they retain the land, they would become tenants of a new ten-

ancy under the State of West Bengal on such terms as the State may prescribe. The terms have now been prescribed under the rules and under the rules if the land is agricultural, they would retain the land under the State with the right of an occupancy raiyat. Hence, at the date of the application for pre-emption which was subsequent to the date of vesting or at the date of the transfer in question which was also subsequent to the vesting, the interest of all the co-sharers in the new tenancy was created not by any act of parties nor by any purchase but by operation of law, namely, the provisions of the Estates Acquisition Act and the rules thereunder. Therefore, the opposite party No. 1 and the petitioners ceased to be co-sharers of the Original holding but became co-sharers of a new holding under the State of West Bengal."

15. Ordinarily, there can be no dispute, persons who were co-sharers before the date of vesting would become co-sharers in the new tenancy under State of West Bengal. But in the peculiar facts of our case the position is different. Here we find that when the new tenancy was created it was not a tenancy between the State of West Bengal on the one hand and the co-sharers on the other. On the contrary several new tenancies came into existence between the State of West Bengal as the landlord and the previous co-sharers as the tenants. The original Khatian was Khatian No. 74 which ceased to exist and in its place and stead five separate Khatians came into existence, namely, Khatians Nos. 385, 387, 390, 417 and 424. The rents payable under each of these separate Khatians have been fixed and the shares that each of the Khatian holders would enjoy have also been separately fixed.

16. On these facts we have to consider the provisions of sub-sec. (2) of Section 6 of the West Bengal Estate Acquisition Act 1953 which runs thus: "An intermediary who is entitled to retain possession of any land under sub-section (1), shall be deemed to hold such land directly under the State from the date of vesting as a tenant, subject to such terms and conditions as may be prescribed and subject to payment of such rent as may be determined under the provisions of this Act and as entered in the record-of-rights finally published under Chapter V....."

17. For our purposes, therefore, the finally published record-of-rights is the only relevant document. This record indicates the splitting up of tenancies and separation of the interests of the tenants. The present petitioners do not appear to be co-sharers under the Khatians in respect whereof this application arises.

18. It is relevant to refer in this connection the judgment of Mr. Justice Bijayesh Mukherji in *Chakradhar Ghosh*

Mandal v. Ram Ratan Pal, (1969) 73 Cal WN 742. Mr. Justice Bijayesh Mukherji has said that a Khanda-Khatian means a Khatian which has been cut off from the parent khatian, for a separate tenancy for the land retained by the individual owner up to the prescribed ceiling. And to allow the persons recorded in the parent Khatian to hold lands in Khanda-Khatians carved out thereof is to bring back latifundia to destroy which the Estates Acquisition Act is there all these years. Therefore, the learned Judge has held that, no case for pre-emption under Section 24 of the West Bengal Non-Agricultural Tenancy Act can lie, when the sole recorded tenant in a Khanda-Khatian, necessarily with no co-sharer, sells his land.

19. We are in agreement with this view and if we apply this principle to the facts of the case before us, we find that the petitioners' claim for pre-emption was not maintainable at all. There has been a separation of tenancies as reflected by the Khanda-Khatians. The non-agricultural land we are dealing with is a tank. Physically it is impartible and if any person purchases any portion of this tank he is to enjoy it in collaboration with others. The Khanda-Khatians have not been challenged under Section 44 of the Estates Acquisition Act. They have now become final. Even if the entries therein are wrong, in a collateral proceeding of this nature they cannot be challenged. Since the petitioners on the face of the Khanda-Khatians have ceased to be co-sharers of the tank, they have no right of pre-emption.

20. This Rule therefore is discharged.

21. There will, however, be no order as to costs.

S. K. DATTA, J.:— 22. I agree.
Rule discharged.

AIR 1972 CALCUTTA 261 (V 59 C 46)

B. C. MITRA AND AJAY K. BASU, JJ.

Prem Nath Mayer, Appellant v. Registrar of Trade Marks and another, Respondents.

Appeal No. 191 of 1968, Matter No. 682 of 1968, D/- 28-1-1972.

(A) Trade and Merchandise Marks Act (1958), S. 11 — Registration of trade mark — Proposed mark not likely to deceive or confuse — Onus to prove lies on applicant.

The burden of proving that the trade mark which a person sought to register was not likely to deceive or cause confusion was upon the applicant. The rules under the Act do not enjoin a shifting of the onus from the applicant to the oppo-

nent at any stage of the proceedings.

(Paras 7 and 9)

Failure to discharge the onus debars the claim of applicant to registration of his mark under Section 11 (a). (Para 16)

(B) Trade and Merchandise Marks Act (1958), S. 12 — Prohibition of registration of identical or deceptively similar trade marks.

A question of confusion or deception cannot be decided by comparing the two marks by keeping them side by side and noting the similarities and differences between the two marks. Such a question is to be decided by the Court itself by the impression which is to be gathered by looking at the two marks, and it is the duty of the Court to find out what impression, what association of ideas and what significant feature the purchaser of the object bearing the registered trade mark would carry in his mind. A meticulous scrutiny of the similarities and differences in the two marks is hardly likely to be of any assistance in coming to a conclusion if the new mark proposed to be registered would create confusion or would lead to deception. The question of deceptive similarity of the two marks has to be answered by looking at the two marks, and then deciding if the association of ideas that would be formed in the mind would deceive or confuse, not when two objects bearing the two different marks are produced before a purchaser, but when one object bearing the new mark proposed to be registered is produced before him. This is the correct and only method of approach to be applied in deciding a question of confusion and deception. (Para 22)

Thus where an application for registration of a trade mark consisting of a label containing the image of a Goddess seated on a lion and the words "Ma Durga Brand" in respect of agricultural implements specially for Chaff cutter blades was filed and it was opposed, by a prior user of a registered trade mark in respect of identical goods.

Held, that the essential feature in the registered trade mark of the opposing party was the device of a Lion and the idea that is conveyed to a prospective purchaser is the symbol of the Lion. It is the concept or idea of a Lion that is carried in his mind by an average purchaser of ordinary intelligence. The use of the same mark of a Lion in the applicant's trade mark proposed to be registered, would undoubtedly lead to confusion in the mind of a purchaser. Case law discussed. (Para 21)

(C) Trade and Merchandise Marks Act (1958), S. 109 (5) — Appeal under — Questions of facts can be gone into.

High Court in dealing with the appeal under Section 109 (5) of the Act is not a Court of second appeal under Section 100

of the Code of Civil Procedure, and for that reason, it can go into questions of fact. The provisions of the Act enjoin the High Court to determine questions of deception, confusion and deceptive similarity, and that can only be done by taking into consideration the evidence tendered on behalf of the parties. (Para 33)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Cal 417 (V 52) = 69 Cal WN 947, Singer Manufacturing Co. v. Registrar of Trade Marks 29
- (1963) AIR 1963 SC 449 (V 50) = 1963-2 SCR 484, Amritdhara Pharmacy v. Satya Deo Gupta 5
- (1958) AIR 1958 Bom 56 (V 45) = 59 Bom LR 548, Ciba Ltd. v. M. Ramalingam 23
- (1954) 71 R. P. C. 150, In re Yorkshire Copper Works Ltd.'s application 25
- (1953) AIR 1953 SC 357 (V 40) = 1953 SCR 1028, National Sewing Thread Co. Ltd. v. James Chadwick and Bros. Ltd. 7, 23
- (1951) AIR 1951 Bom 147 (V 38) = 53 Bom LR 556, James Chadwick and Bros. v. National Sewing Thread Co. Ltd. 7, 21, 80
- (1947) AIR 1947 PC 19 (V 34) = 73 Ind App 246, Sm. Bibhabati Devi v. Ramendra Narayan Roy 32
- (1946) 63 R. P. C. 97, In the matter of an Application By Smith Mayden and Co. Ltd. 7
- (1940) AIR 1940 PC 86 (V 27) = 67 Ind App 212, Thomas Bear and Sons (India) Ltd. v. Prayag Narain 27
- (1938) AIR 1938 Pat 38 (V 25) = 4 BR 223, Kunj Bihari Thakur v. Umashankar 30
- (1934) AIR 1934 PC 112 (V 21) = 61 Ind App 163, Secy. of State v. Rameswaram Devasthanam 30
- (1934) AIR 1934 PC 167 (V 21) = 66 Mad LJ 588, Malayam Tobacco Distributors Ltd. v. United Kingdom Tobacco Co. Ltd. 29
- (1932) AIR 1932 PC 28 (V 19) = 59 Ind App 29, Jogesh Chandra Roy v. Emdad Meah. 32
- (1929) AIR 1929 PC 286 (V 16) = 56 Ind App 388, Midnapore Zamindari Co. Ltd. v. Secy. of State 30
- (1924) 41 R.P.C. 423, In the Matter of an application by William Henry Huxley 25
- (1890) 15 AC 252 = 63 LT 6, James Crossley Eno v. William George Dunn 25
- (1889) 41 Ch D 278 = 58 LJ Ch 380, Re: The Australian Wine Importers Ltd. 25
- (1889) 41 Ch D 439, Re: Dunn's Trade Mark 25
- (1882) 7 AC 219 = 46 LT 216, R. Johnston and Co. v. Orr. Ewing and Co. 20

(1880) 13 Ch D 434 = 42 LT 67, Orr

Ewing and Co. v. R. Johnston and Co. 10, 19, 20

I. P. Mukharjee with D. P. Mukherji, for Appellant; A. C. Roy with Amal Kumar Roy, for Respondents.

B. C. MITRA, J.:— On April 28, 1960 the second respondent filed an application for registration, in Part A of the Register, of a trade mark consisting of a label containing the image of a Goddess seated on a lion and the words "Ma Durga Brand in class V", "in respect of agricultural implements specially for chaffcut-ter blades". The application was there-after advertised in the Trade Mark Journal. The application for registration was opposed by the appellant, and the opposition was based on the provisions in Sections 11 and 12 (1) of the Trade and Merchandise Marks Act, 1958, (hereinafter referred to as the Act). The appellants in their opposition claimed that they were the prior users of a trade mark, which was duly registered, under the provisions of the Act, being trade mark No. 12301 registered in Class VII in respect of, inter alia, "Chaffcutter Blades and Knives". The substance of the appellant's contention in the opposition to the registration of "Ma Durga Brand" with the device mentioned above, was that the mark proposed to be registered, resembled the registered trade mark of the appellant and such resemblance would lead to confusion and deception. This part of the opposition is based on Section 12 (1) of the Act which runs as follows:

"Save as provided in sub-section (3) no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods."

The second branch of the opposition is founded on Section 11 (a) of the Act which is as follows:

"A Mark—

(a) the use of which would be likely to deceive or cause confusion,

shall not be registered as a trade mark."

2. By an order dated November 7, 1964, the Deputy Registrar of Trade Marks dismissed the appellant's opposition. Being aggrieved by the Deputy Registrar's order the appellant preferred an appeal to this Court under Section 109 of the Act. This appeal was dismissed by a judgment and order dated April 24, 1968, against which this appeal has been preferred.

3. The foundation and basis of the bar imposed by Section 11 in the Act, against registration of certain marks, is the acquisition of a reputation by other

users of similar marks, to such an extent that the registration of the mark of the applicant would be likely to deceive or cause confusion. In other words, if the Registrar is satisfied that a mark proposed to be registered would deceive or confuse a buyer in the market, because there are similar marks in use by persons who have acquired a reputation with regard to such marks, the Registrar would decline to register the mark.

4. The first question that arises is on whom does the onus lie to prove that the use of the mark would not deceive or cause confusion? Does the onus lie upon the applicant who has made the proposal for registration of the mark? Or does it lie upon the party who has given notice of opposition to the registration of the mark? The provisions in Section 11 of the Act are *pari materia* with Section 11 of the English Trade Marks Act, 1938, which is as follows:—

"11.—It shall not be lawful to register as a trade mark or part of a trade mark in matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a Court of Justice, or would be contrary to law or morality or any scandalous design."

5. The English Courts have held that the onus of proving that the use of a mark would not deceive or cause confusion lies on the applicant. In Kerly's 9th Ed. P. 448 the law is stated to be as follows: "In such cases the onus is on the applicant to satisfy the Registrar that the Trade Mark applied for, is not reasonably likely to deceive or cause confusion, so that refusal to register does not involve the conclusion that the resemblance is such that either an infringement action or a passing-off would succeed." Relying upon these observations in the text book and also on several decisions of the English Courts, and also of the Courts in India, to which I will presently refer, Mr. I. P. Mukherjee, Counsel for the appellant contended that the onus is entirely on the applicant to prove that the registration of his mark would not lead to deception or confusion. In support of this contention reliance was placed by Counsel for the appellant on a decision of the Supreme Court *Amritdhara Pharmacy v. Satya Deo Gupta*, AIR 1963 SC 449. In that case an application was made for registration of a trade name of a medicinal preparation known as "Lakshmandhara". The applicant claimed that the mark known by that name was distinctive to the article, and that there was turnover of a large sum of money. Opposition was filed by a company known as Amritdhara Pharmacy Ltd. It was contended by the opponent that the word "Amritdhara" was already registered as a trade name for medicinal preparation which

had been introduced as early as 1901. The contention of the applicant was that the two names "Amritdhara" and "Lakshmandhara" were distinctively different, and no one could pass off one for the other. The Registrar allowed the registration of the applicant's name, but for the State of Uttar Pradesh only. Appeals were preferred against the decision of the Registrar. The Allahabad High Court held that there was no possibility of confusion and deception, and there was no justification for refusal to register the trade mark "Lakshmandhara" for the whole of India. Against this decision, an appeal was taken to the Supreme Court. Dealing with the question of onus, the Supreme Court held in paragraph 7 of the Report, that on an application to register, the Registrar or an opponent might object that the trade mark was not registrable and in such cases, the onus was on the applicant to satisfy the Registrar that the trade mark applied for, was not likely to deceive or cause confusion. It was also held that where it was thought that there was doubt as to whether deception was likely, the application should be rejected. Dealing with the question of deception and resemblance it was held in paragraph 9 of the Report: "we agree that the use of the word 'Dhara' which literally means 'current or stream' is not by itself decisive of the matter. What we have to consider here is the overall similarity of the composite words having regard to the circumstances that the goods bearing the two names are medicinal preparations of the same description. We are aware that the admission of a mark is not to be refused, because unusually stupid people, 'fools or idiots', may be deceived. A critical comparison of the two names may disclose some points of difference but an unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity of the two names having regard to the nature of the medicine he is looking for with a somewhat vague recollection that he had purchased a similar medicine on a previous occasion with a similar name. The trade mark is the whole thing — the whole word is to be considered." I shall deal with the question of deception or confusion later, but on the question of onus it seems to me that the view of the Supreme Court was that the onus of proof that registration would not lead to deception or confusion, was on the applicant for registration.

6. Let us now test the contention that the onus lies on the opponent and not on the applicant. Supposing in a case there is no opposition at all either from the owner of a registered mark or from the user of a similar mark which is not registered. In such a case, when considering the application what is the Registrar to do? The requirement of Section 11 of the

Act is mandatory in nature. The Registrar may himself raise an objection to registration and if he does, who is to prove that there would be no deception or confusion? As the Registrar has to be satisfied that the mark would not deceive or confuse, he has to be satisfied that such would not be the result if the mark is registered. In such a case the applicant must prove that the applicant's goods when marketed with the mark proposed to be registered, would not lead to deception or confusion among buyers. Supposing again the Registrar does not raise any objection on his own, even then, the mandatory provisions of Section 11 prohibits the Registrar from registering a mark, the use of which would be likely to deceive or cause confusion. The Registrar has to be satisfied on these two points, and such satisfaction can be obtained only when the applicant proves by such evidence as he can tender, that deception or confusion would not be the result of marketing the goods with the proposed registered mark. Looked at either way it seems to us the onus, so far as Section 11 (a) is concerned is upon the applicant for registration.

7. The question of onus also came up for consideration before a Division Bench of the Bombay High Court in *James Chadwick & Bros. v. The National Sewing Thread Co. Ltd.*, AIR 1951 Bom 147. In that case an application was made for registration of a mark in connection with cotton sewing thread. Opposition was filed and the Registrar came to the conclusion that as the mark sought to be registered was likely to deceive and cause confusion, registration was refused. An appeal was preferred to the High Court and the trial Court came to the conclusion that the mark ought to be registered. From this decision an appeal was preferred to the Division Bench. Dealing with Section 10 of the Trade Marks Act, 1940, which corresponds to Section 11 of the Act with which we are concerned, the Division Bench held that the burden of proving that the trade mark sought to be registered was not likely to deceive or cause confusion, was upon the applicant and it was for him to satisfy the Registrar that his trade mark did not fall within the provisions of Section 8 or 10 and therefore it should be registered. This decision went up in an appeal to the Supreme Court. The decision of the Supreme Court is in AIR 1953 SC 357. The Supreme Court upheld the decision of the Division Bench of the Bombay High Court and in dealing with the question of onus, held in paragraph 22 of the Report that the burden of proving that the trade mark which a person sought to register was not likely to deceive or cause confusion was upon the applicant. The English decisions also adhere to the view that in an application for registration of a new mark, the onus is on the applicant to

prove that the mark proposed to be registered is not likely to deceive or confuse. Reliance was placed by Mr. Mukherjee on in the matter of an Application by Smith Hayden & Co. Ltd., (1946) 63 RPC 97. In that case Evershed J., held that the onus lay upon the applicant for registration to satisfy the Court that a negative answer should be given to both questions,

8. This trial Court, however, came to the conclusion that the provisions in the Trade and Merchandise Marks Act, 1958 and the Rules thereunder, show that the onus shifts from one person to the other. We have carefully considered the relevant Rules, and we have compared them with the Rules under the English Act. We find that the Rules under the Indian Act are substantially the same as those under the English Act. In the view of the trial Court, although Rules 37 to 43 indicate that the preliminary onus lies upon the applicant, Rules 51 to 55 indicate that the onus shifts to the opposer to support his grounds of opposition by evidence. Rules 51, 52, 53, 54 and 55 of the Indian Rules correspond to Rules 46, 47, 48, 49 50 and 51 of the English Rules. The English decisions in laying down that the onus lies on the applicant have construed the English Rules and came to the conclusion that it was for the applicant to prove that there would be no deception or confusion if a trade mark was registered.

9. Turning now to Rules 51 to 55 of the Indian Rules, let us see if there is any indication of shifting of onus from applicant to the opposer. Rule 51 deals with notice of opposition and prescribes what is to be included in such notice. Rule 52 deals with counter statement required by Section 21 (2) of the Act. Rule 53 deals with the evidence in support of opposition. It says that within two months from the service of a copy of counter-statement upon him, the opponent shall file with the Registrar such evidence by way of Affidavit as he may desire to adduce in support of his opposition. R. 54 deals with the evidence in support of an application and says that within two months from the receipt by the applicant of the Affidavit in support of the opposition, or of intimation that the opponent does not desire to adduce any evidence, the applicant shall leave with the Registrar such evidence by Affidavit as he desires to adduce in support of his application. R. 55 deals with the evidence in reply by the opponent and says that within a month of receipt by the opponent of copies of the applicant's affidavit, the opponent may leave with the Registrar evidence by affidavit-in-reply. These are the relevant Rules which were considered by the Trial Court and which are to be considered by us in determining if there is any indication that the onus shifts from the applicant to

the opponent at any stage. As I read the Rules I see nothing therein to justify the conclusion that the onus shifts from the applicant to the opponent at any stage. On the contrary, the indication in Rule 54 is clear, that the onus lies upon the applicant because that rule says that even if the opponent does not file any affidavit to adduce evidence in support of the opposition, the applicant has to file within two months from the receipt of copies of the affidavits in support of the opposition, such evidence by way of affidavits as he desires to adduce in support of his application. This Rule, in my view, makes it clear that even if the opponent is unable or unwilling to adduce any evidence by Affidavit in support of his opposition, the applicant must file his evidence by Affidavit in support of the application. The Rules therefore do not enjoin a shifting of the onus from the applicant to the opponent at any stage of the proceedings. The onus of proving, that the mark is registered, will not lead to confusion or deception, is squarely upon the applicant. Furthermore, the question as to on whom the onus lies, has been settled and set at rest by the Supreme Court in the two decisions mentioned earlier, and I do not think it can now be held that the onus lies upon the opponent and that it shifts from the applicant to the opponent at any stage of the proceedings.

10. There is one other decision on the question of onus to be referred to before I proceed to consider the evidence produced by the second respondent in support of his application. That is a decision of the English Court of Appeal *Orr Ewing & Co. v. R. Johnston & Co.*, (1880) 13 Ch D 434. That was an action to restrain the defendants from imitating the plaintiff's trade mark. The plaintiffs were merchants of Turkey red yarn, the business consisting chiefly in the dyeing and exporting of yarn and other fabrics to various countries. Besides selling goods to merchants they exported goods to their own agents in India. Amongst other marks the notable mark on the wrapper of the yarn exported was a golden Crown on each side of which was a golden elephant with its head turned away from the Crown. The defendants were also general merchants and exported to India Turkey red yarn. They used a ticket on the outside wrapper of the yarn, on which was printed in gold the figure of the Goddess Minerva and a tiger. The Goddess had in one of her hands a shield on which the figure of Ganapatty was printed. There were also two golden elephants and a golden banner. The two elephants were placed on each side of Ganapatty with their heads turned towards Ganapatty. The plaintiffs had applied for registration of their two-elephants ticket but their application was refused. The evidence showed that the plaintiff's yarn

had become known in the Bombay market as "The Hathi". The evidence also showed that the defendants' ticket would not deceive the merchants in Bombay who purchased plaintiffs' yarn. Fry J., in the trial Court held that the defendants had taken a large part of the plaintiffs' mark as the two elephants at the top corners of the plaintiffs' ticket were repeated in the top corner of the defendants' ticket. On the question of onus it was held that it was for the defendants to prove that their ticket would not deceive purchasers into the belief that their goods were the goods of the plaintiffs. It was further held that in a case where a party had taken a substantial part of another man's tickets or marks, the onus was upon him to prove that there would be no deception. An appeal was taken to the Court of Appeal from this judgment. The Court of Appeal affirmed the judgment of Fry J. Dealing with the question of onus, Cotton L. J., observed at P. 463 of the report: "Where the addition to the ticket is shown to be such as is calculated to deceive, then a burden is thrown upon them of satisfactorily explaining how and why they made the particular addition. That, I think, is what Mr. Justice Fry meant — not that in all cases where fraud is charged, or in a case of this sort, the burden of proof is not on the plaintiff to make out his case, but that where the defendants do use under suspicious circumstances, a ticket which of itself is calculated to deceive, then the burden of proof is thrown upon them to displace that *prima facie* evidence against them and to show that in fact they were innocent in doing that which is not innocent, because it is calculated to deceive." I shall refer to this decision at greater length in dealing with the question of deceptive similarity under Section 12 (1) of the Act.

11. I shall now proceed to consider the evidence produced by the second respondent in support of his application for registration to see if he had discharged the onus which lay upon him. The Registrar noted that a Bill Book was produced by the respondent containing the Carbon copy of Bill No. 224/16 of January 25, 1960. Keeping in mind the fact that the application was made on April - 18, 1960, it should be seen that this Bill was the only evidence of sale of the respondent's goods and the Registrar came to the conclusion that the respondent's mark was in use prior to the date of his application. Copies of several other Bills, however, were filed with the Registrar but excepting for the one, mentioned above, all of them relate to a period subsequent to the application for registration.

12. In addition to the Bills which were produced by the second respondent in support of his application for registration, he relied on several Affidavits to which I will now refer. The first of these

is an affidavit of Bhagwati Prashad dated December 1, 1962. He is the proprietor of a firm of Commission Agents. He says in paragraph 3 of the affidavit that chaff-cutter blades manufactured by the second respondent were handled by his firm from 1959. He does not say how many chaff-cutter blades his firm handled and on what dates. In paragraph 4 he says that chaff-cutter blades, bearing the mark "Ma Durga Brand" are very popular, and in paragraph 5 he says that customers ask for these blades by that name. He is significantly silent about the names and number of customers who had asked for these blades by that name. In paragraph 6 he says that he received no report of confusion among customers, between the chaff-cutter blades bearing the mark "Ma Durga Brand" and "Lion Brand". This is a strange statement because the deponent does not say that he had dealt, in course of his business, with the blades bearing mark "Lion Brand". The question of confusion can arise only if one deals with the blades bearing the two different marks.

13. The next affidavit is that of Kanhayalal Gupta dated December 8, 1962. He is a trader dealing in hardware goods and had dealings with the firm of the second respondent. He sells chaff-cutter blades manufactured by the second respondent. According to him the blades bearing the mark "Ma Durga Brand" are popular in the market and customers prefer the goods, known as "Ma Durga Brand Chaff-cutters." In paragraph 6 he says that he had not received from his customers any report of confusion between the goods of the appellant and the second respondent. Here again the deponent does not say that he has dealt with the goods of the appellant. For that reason he is hardly competent to give any views on confusion among purchasers of chaff-cutter blades. This deponent again says nothing about the number of blades of the second respondent that he has dealt with or disposed of in course of his business, nor the dates of the transactions.

14. The third affidavit is by Brij Krishna Das dated December 6, 1962. He is the agent of a concern which deals in chaff-cutter blades in Bhagalpur. He says that blades bearing the mark "Ma Durga Brand", manufactured by the second respondent were sold by him and that such blades are popular among Kisans in Bihar. He says nothing about the number of blades of the second respondent that he sold, nor the dates when such sales took place. He goes on to say that the purchasers of chaff-cutter blades do not commit mistakes in the purchase of blades bearing the mark "Ma Durga Brand" and the blades bearing the mark "Lion Brand."

15. The probative value of the three affidavits is altogether insignificant.

None of the deponents said that he had ever seen the blades manufactured by the appellant and bearing the trade mark "Lion Brand". Nor have they said that in course of their trade they have dealt with these blades or have even heard of or seen such blades. The evidence in the affidavits, such as they are is in my view altogether useless for the purpose of establishing that the use of the mark "Ma Durga Brand" would not lead to confusion or deception.

16. In my view the second respondent has wholly failed to discharge the onus that the registration of his proposed mark would not lead to deception or confusion as contemplated by S. 11 (a) of the Act. The onus of proving that there would be no deception or confusion if his mark was registered, was on the second respondent and on him alone. In our view, he has failed to discharge that onus and such failure debars his claim to registration of his mark under S. 11 (a) of the Act. This conclusion would have been enough to dispose of this appeal but we shall now proceed to consider the question of deceptive similarity between the two marks so as to attract the provisions of S. 12 (1) of the Act.

17. Section 12 (1) of the Act prohibits registration of a mark which is identical with or deceptively similar to a mark which is already registered. The appellant's trade mark is a registered trade mark, and this registration, upon renewal from time to time, is still continuing and is in force. It is in this background that the question of deception has to be examined. The first thing to be borne in mind in considering this question, is the possibility of a purchaser being misled into believing that the second respondent's chaff-cutter is that of the appellant's manufacture. We have to consider, if it is likely that a purchaser who wants the "Lion Brand" chaff-cutter of the appellant would be deceived by the lion mark on the second respondent's chaff-cutter or whether the image of the Goddess is such as to caution him that he was not getting what he wanted, namely a chaff-cutter of the appellant's manufacture. A comparison of the two marks, emphasis on the difference between the two, emphasis on the lack of similarity, emphasis on the difference in the combination of words which describe the marks and a visual comparison of the two marks, are not, in our view, the proper approach in deciding a question such as this. The matter to be looked into is the impact on the mind of the purchaser, when he is offered a chaff-cutter bearing the second respondent's mark with the image of a lion and a Goddess seated upon it and the words "Ma Durga Brand" written thereunder.

18. Mr. I. P. Mukherjee, counsel for the appellant contended that it was

for the Court to decide the question of deception upon examination of the two marks. He argued that the purchasers of chaff-cutters are not educated persons who could notice the difference between the words "Lion Brand" and "Ma Durga Brand", but would go by the mark as it appeared on the chaff-cutter. The impression that such a person would get, counsel contended, was that he was getting a chaff-cutter bearing the mark of a lion, and that was all he wanted. In support of this contention reliance was placed by counsel for the appellant on a number of decisions which I now proceed to discuss.

19. The first of the decisions on which the counsel for the appellant relied was (1880) 13 Ch D 434 (supra), to which I have referred earlier in another connection. In the trial Court Fry, J. held, while discussing the question of deception, that the matter to be looked into was whether one of the parties had taken a material and substantial part of the other party's mark. In that case, it is to be remembered, the defendant's mark had two elephants, with the image of Ganapatty printed in gold in between the two elephants. The plaintiff had also two elephants in his mark but instead of the image of the Ganapatty, the plaintiff had a Crown between the two elephants. In these facts Fry, J. held, that upon looking at the two marks a large part of the plaintiff's mark which impressed the eye had been taken by the defendant, and that this mark of two-elephants was a significant mark and further that the image of Ganapatty instead of a crown in the defendant's mark made no difference. In that case also it is to be noticed, there was significant difference, as in the one case there was a Crown, and in the other the image of the God Ganapatty, the plaintiff's mark had no "Howdahs" on the back of the elephants while the defendant's mark had them, and further that the trunks in the two marks were turned in different directions. It was held that it was the mark of the elephant which impressed the eye with a considerable amount of similarity. This decision went up in an appeal and the Court of Appeal affirmed the judgment of Fry, J. In affirming the judgment the observations of James L. J. at P. 453 of the report are significant: "Now, what would have been the only motive which can be suggested to a man of the world by a man of the world of the defendants in doing that, but to do something which was likely to be mistaken for the plaintiff's goods, which would be accepted by the customers of the man who had been in the habit of selling them as being a continuation of the same goods which he had been in the habit of supplying to them? It is not necessary for this case to decide that a man actually intended to tell a lie, or that a lie has

been told. It is sufficient in the language of Lord Kingsdown, that a man who willfully used a part of the trade mark of his neighbour, that part so used being by the user of it, calculated to enable his goods to be passed off for the goods of his neighbour. I am of opinion, independently of the mass of evidence which has been given in support of that probability, that it was probable and probable almost to a certainty that the new ticket of the defendant should tend to enable anybody so minded to represent those goods as being the goods of the same character, proceeding from the same manufacturer, as the goods which have been formerly accepted with confidence under the mark which was a guarantee of the plaintiff's goods." The observations of Cotton, L. J., at P. 461 of the report may also be usefully quoted: "I am satisfied that very few purchasers who asked for 'Two Elephants' yarn would not be misled when the parcel was produced to them having this ticket with the two elephants at the end of it. We must, in dealing with questions of this kind, not look for minute difference, or even that which appears when one hearing the case argued thoroughly with a mind directed to the particular difference, in some respect a substantial difference, but we must see what would be the effect upon the mind of the general class of buyers." Again, at P. 463 of the report it was observed: "Therefore, if we are called upon to give a judgment upon it, although, in my opinion, it is not necessary, I could not arrive at the conclusion that this particular form of ticket was arrived at bona fide by or on behalf of the defendants or without any intention of deception, but I should have said that it was done with the intention of getting for themselves by the ticket the credit which the plaintiffs had acquired in the market."

20. The decision of the Court of Appeal in Orr Ewing and Co.'s case, (1880) 13 Ch D 434 (supra) went up in appeal to the House of Lords and the decision of the latter is reported in (1882) 7 AC 219. The House of Lords affirmed the decision of the Court of Appeal and held that no trader had a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. One important observation of Lord Selborne, L. C., dealing with the question of modification of a trade mark to avoid confusion, may be noticed. It was held that the variations made in the infringing trade mark might not unreasonably be supposed to have been made by the owners of the trade mark themselves for reasons of their own. This dictum, in our view, is a very pertinent and significant one in deciding questions of confusion and deception likely to be caused to an unwary purchaser.

21. On this question I should refer back to the Bench decision of the Bombay High Court AIR 1951 Bom 147 (supra). In that case the appellants were using two registered trade marks for over 50 years; one of the trade marks bore the name "Eagley Sewing Machine Thread". This trade mark had the representation of an eagle. The other trade mark was a mere representation of an eagle without any writing. The goods which were sold under these two marks were known and asked for as "Eagley" or "Eagle". The respondents had used the trade mark which they sought to register in 1943 for about 2 years and they had been selling their goods under that mark. The respondent's mark was the representation of a bird of prey and bore the name "Peerless Quality Vulture Brand Real Thread". It appeared from the evidence that for the 2 years that the respondents used this mark, they called it "Eagle Brand" and while applying for registration they changed the name from "Eagle Brand" to "Vulture Brand". Dealing with the question of confusion, because of similarity of the two marks, it was held that the Registrar had to come to a conclusion independently of any comparison with any registered trade mark. It should be noticed that the Court was considering the provisions in S. 8 of the Trade Marks Act, 1940, which corresponds to S. 11 of the Trade and Merchandise Act, 1958. It was also held that what the Registrar had to decide was whether looking at all the circumstances of the case, the particular trade mark was likely to deceive or to cause confusion. Proceeding further to deal with the question of confusion Chagla, C. J. held that what was important was to find out what was the distinguishing or the essential feature of the trade mark already registered, and what was the main feature underlying the trade mark and if it was found that the trade mark whose registration was sought, contained the same distinguishing or essential feature or conveyed the same ideas, then the Registrar would be right if he came to the conclusion that the trade mark ought not to be registered. On the question of confusion among purchasers it was held at Pp. 152-153 of the Report: "The real question is as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing. It is impossible to accept that a man looking at a trade mark would take in every single feature of the trade mark. The question would be, what would he normally retain in his mind after looking at the trade mark? What would be the salient feature of the trade mark which in future would

lead him to associate the particular goods with that trade mark? Relying upon these observations, counsel for the appellant contended, and we think rightly, that the essential feature in the registered trade mark of the appellant in this case was the device of a Lion and the idea that is conveyed to a prospective purchaser is the symbol of the Lion. It is the concept or idea of a Lion that is carried in his mind, by an average purchaser of ordinary intelligence. The use of the same mark of a Lion in the respondent's trade mark proposed to be registered, would undoubtedly lead to confusion in the mind of a purchaser.

22. The Division Bench of the Bombay High Court thereafter proceeded to consider the evidence in order to find out if the registration of the mark of the respondent in that case would lead to confusion. It was found that it was on record that the goods sold under the trade mark were well-known and commonly asked for as "Eagley" or "Eagle". The Division Bench, upon examination of the evidence, disagreed with the conclusion of the trial Court, which came to the conclusion that the points of difference were so numerous, and the points of similarity so few, that there was no such resemblance as was likely to cause confusion. Chagla, C. J. held that what the learned Judge was to do was not to keep the two trade marks before him, and find out how they differed and how little they resembled, but that he should have decided for himself what was the distinguishing or essential feature of the appellant's trade mark, and then looking at the respondent's trade mark decide for himself whether there was any resemblance in the trade mark of the respondent to that distinguishing or essential feature. The conclusion of the trial Court based on the evidence that the Bird appearing in the respondent's trade mark was different in its posture, in its poise and the position of its head and in the spreading of its wings from that of the appellant's, was also criticized and rejected. It was further held that in a case where only one party sold a class of goods under a particular trade name, instead of several parties dealing in the same class of goods under similar marks any attempt to sell the goods under a trade mark which fix in the mind of the purchaser the association of a particular mark, would not be justified. We respectfully agree with the views of the Division Bench of the Bombay High Court and also the observations relating to the question of confusion arising out of similar trade marks. A question of confusion or deception in our view, cannot be decided by comparing the two marks by keeping them side by side and noting the similarities and differences between the two marks. Such a question is to be decided by the Court itself by the

Impression which is to be gathered by looking at the two marks, and it is the duty of the Court to find out what impression, what association of ideas and what significant feature the purchaser of an object bearing the registered trade mark would carry in his mind. A meticulous scrutiny of the similarities and differences in the two marks is hardly likely to be of any assistance in coming to a conclusion if the new mark proposed to be registered would create confusion or would lead to deception. The question of deceptive similarity of the two marks has to be answered by looking at the two marks, and then deciding if the association of ideas that would be formed in the mind would deceive or confuse, not when two objects bearing the two different marks are produced before a purchaser, but when one object bearing the new mark proposed to be registered is produced before him. This, in our view, is the correct and only method of approach to be applied in deciding a question of confusion and deception.

23. The decision of the Division Bench of the Bombay High Court, mentioned above, went up in an appeal to the Supreme Court and was upheld and approved. The decision of the Supreme Court is reported in AIR 1953 SC 357. In dealing with the question of the duty of the Court in deciding questions of confusion, it was held at P. 363 of the Report: "Moreover, in deciding whether a particular trade mark is likely to deceive or cause confusion, that duty is not discharged by arriving at the result by merely comparing it with the trade mark which is already registered and whose proprietor is offering opposition to the registration of the mark. The real question to decide in such cases is to see as to how a purchaser who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing." Similar observations were also made by a Division Bench of the Bombay High Court in *Ciba Ltd. v. M. Ramalingam*, AIR 1958 Bom 56. In that case it was again held that it was not for a witness to tell the Court whether there was likelihood of deception and that the Court could not abdicate its function which was to decide, on looking at the two trade marks and in considering whether they resembled each other and whether there was likelihood of deception. It was further held that if the resemblance between two marks was clear, it was the duty of the Court to remove from registration the mark which was likely to cause deception.

24. In our view, it is for the Court to decide upon looking at the two marks,

whether the second respondent's mark is likely to deceive a purchaser of average intelligence. It is to be borne in mind, that such a purchaser is not likely to have the appellant's mark before him, when he is offered a chaff-cutter bearing the respondent's mark of a Lion with a Goddess seated upon it. It is true that phonetically the words written under the appellant's mark and those written under the respondent's mark are altogether different. But in judging a question of deception and confusion, it should not be overlooked that a purchaser of goods, such as this may not necessarily be a literate person, able to read and write. In all probability he would go by the marks as they appear on the merchandise. We have had the advantage of looking at the marks as they appear on the two chaff-cutters manufactured by the parties. These two chaff-cutters were produced before this Court upon an order obtained under Order 41, Rule 27 of the Civil Procedure Code. The appellate Court felt and we think rightly, that the question such as this, could not be decided by the Court without looking at the marks as they appeared on the merchandise, and by merely looking at the photographic prints of such marks as printed in the Paper Book. That order was made by a Bench of which I was a member and the order was made because it was felt that in deciding the question of confusion and deception, in an application for registration of a trade mark, the best evidence would be the marks themselves as they appeared on the merchandise of the registered proprietor and also on that of the applicant for registration.

25. Counsel for the appellant next relied upon the decision in *Re: Dunn's Trade Mark*, (1889) 41 Ch D 439. In that case the respondent applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade mark for Baking Powder. The appellant, who had for many years used the words "Fruit Salt" as his trade mark for use in producing an effervescing drink, opposed the application. Kay, J., in the trial Court, held that although the appellant had no monopoly in the use of the words "Fruit Salt", which were descriptive only, and not deceptive, yet under the circumstances they were calculated to deceive the public within the meaning of S. 73 of the Patents, Designs and Trade Marks Act, 1883, and that the trade mark ought not to be registered. The Court of Appeal reversed the decision of Kay J., on the ground that the words "Fruit Salt" were proposed to be used by the respondent for a totally different article namely, Baking Powder which did not interfere with the appellant's trade. This decision went up in an appeal to the House of Lords whose decision is reported in (1890) 15 AC 252. The majority of the House of Lords reversed the decision of

the Court of Appeal and restored that of Kay, J., and in doing so, held that although the words "Fruit and Salt" were in common use in English language, and in combination they had no technical or scientific meaning, the use of the words "Fruit Salt" by the appellant for many years was a material circumstance in considering whether the use of those words by the respondent would be calculated to mislead. It was held that the use of the words "Fruit Salt", although such use was made in connection with a different substance, namely Baking Powder there would be a supposed connection between the two articles in the mind of many persons who would naturally assume that the Baking Powder had been manufactured with the appellant's Fruit Salt and such persons would purchase the Baking Powder in that belief. Although this decision did not deal with the question of a mark or design but a combination of common English words, yet it throws light on the considerations to be taken into account in dealing with the question of confusion and deception. The next case relied upon by counsel for the appellant was in *Re: The Australian Wine Importers Ltd.*, (1889) 41 Ch D 278. In that case an application was made for registration of a trade mark and this was objected to on the ground of its similarity to a trade mark already on the register. The trade mark already registered was for Spirits and it consisted of a representation of a Golden Fleece with the words "Golden Fleece" adding in one case the words "Old Jamaica Rum" and in another "Pure Old Scotch Whisky". The applicant wanted to register a mark, not for Spirits but for Wines and the proposed mark consisted of a Golden Fleece and the words "Golden Fleece, Australian Champagne, Sparkling Verdeillio". It was held that Wines were of the same description of goods as Spirits, and the registration of the trade mark was prohibited by the Act, and also that even if there was no such prohibition, the similarity of the marks was such, as having regard to the similarity of Wines and Spirits, to be calculated to induce the public to believe the goods of the registered owner to be of the applicant and in such circumstances, the Court ought not to direct the applicant's mark to be registered. In this case again, the trade mark consisted partly of a device and a combination of words and though the combination of words was very different, yet because of the similarity of the words and the device, registration was refused. Reliance was next placed by counsel for the appellant on another decision of the House of Lords in *Yorkshire Copper Works Ltd.'s application*, (1954) 71 RPC 150. In that case an application for registration was made for registering the words "Yorkshire". It was contended by the applicant that the words "York-

shire" had lost its geographical significance and had become distinctive of the applicant's mark. The application was refused by the Registrar. It was held that the application was rightly refused. I do not think, this decision is of any assistance to the appellant as the primary question before the House of Lords was whether a geographical name can become a distinctive mark so as to make it eligible for registration. The next case relied on by counsel for the appellant was in the Matter of an application by William Henry Huxley, (1924) 41 RPC 423. In that case an application was made to register a trade mark consisting of 4 pictorial panels intended to represent the history of oil from the well to the consumer. One of the four panels depicted a ship. The application was opposed by a company who was the registered owner of several trade marks consisting of the picture of a ship, and also of a mark consisting of the words "Ship Brand". In holding that the proposed trade mark ought not to be registered, it was observed that although there might be persons who were sufficiently intelligent and well-informed to grasp the significance of the grouping of four pictures in one mark, there might be others equally intelligent who might take a different view of what was presented. It was further held that the four pictures in the proposed trade mark were not combined in such a way as to take away from the picture of the ship, its own individual significance, and for that reason there was probability of confusion. This decision is of great importance so far as this appeal is concerned, because the proposed mark in that case consisted of four pictorial panels, only one of which was a ship. The opponent's registered mark consisted of only the picture of one ship, yet it was held that because there was possibility of confusion, the mark ought not to be registered. In this case, it is to be recalled that the proposed mark was the device of a Lion with a Goddess seated upon it and the registered mark of the appellant was a Lion with a banner above it. Mr. Mukherjee argued, and we think rightly, that if the mark consisting of 4 panels, only one of which was a ship, was refused registration because it might confuse with a registered trade mark which had the picture of one ship only it should be held that the respondent's mark ought not to be registered as it was bound to deceive and confuse.

26. On a careful consideration of the two marks we find that the main feature of the two marks is the figure or mark of the Lion. The appellant's mark is a Lion with a banner covering the entire length of its body, with its tail coiled and turned up. The respondent's mark is a Lion with a Goddess seated upon it. The image of the Goddess is by no means the

image of the Goddess Durga. Anyone familiar with Hindu Mythology would at once see that the image as appearing on the Lion in the second respondent's mark has not ten hands, which is an indispensable feature of the image of the Goddess as is known all over India. As I see the image, it has two hands, with a discus in one hand, and a trident in another. Counsel for the respondent said that the image is that of the Goddess with four hands but all the four hands were not discernible to the eye. In any case, a Goddess is there, seated on a Lion with arms in her hands. To us, it seems that the main feature in the two marks is the figure of the Lion in both. It is to be remembered in this connection that the merchandise over which the marks are used are identical in nature namely, chaff-cutters. The question is, what is the association of ideas which a purchaser of average intellect will have in his mind when he goes into a store or shop to purchase a chaff-cutter of the appellant's manufacture? The only concept, and the only association of ideas that such a person would have in his mind, is the mark of a Lion. If, therefore, he is offered a chaff-cutter bearing the respondent's mark of a Lion with a Goddess seated upon it, would he be deceived? Would he be so confused in his mind as to think that the chaff-cutter with the mark of a Lion and a Goddess seated upon it, is the chaff-cutter of the appellant's manufacture? We think, yes. The purchaser, upon seeking the mark of a Lion on the chaff-cutter would, no doubt, be led into believing that it is a merchandise of the appellant's manufacture. He may, as well, think that the modification of the mark with the image of the Goddess seated upon the Lion is a modification which has been made by the appellant himself. In the mark of the second respondent the dominant feature is a Lion with a coiled and turned-up tail. The figure of the Goddess is so small compared with the size of the Lion as to become almost insignificant. When a purchaser is offered a chaff-cutter of the second respondent's manufacture with the marks mentioned above, there is, every likelihood of his being deceived into believing that he was getting a chaff-cutter of the appellant's manufacture. He will not have the opportunity of comparing the two marks and finding out the difference between the two so as to be aware of the distinction.

27. I will now refer to the cases on which counsel for the respondent relied to repel the contention regarding confusion and deception. Mr. Roy relied upon a decision of the Judicial Committee in *Thomas Bear and Sons (India) Ltd. v. Irayag Narain*, AIR 1940 PC 86. In that case the appellants manufactured and sold cigarette and tobacco described as "Virginia

Bird's Eye" smoked in pipes. These goods were sold in packets bearing a mark, the distinguishing feature of which was the representation of an elephant. The packets and tins of cigarettes bore the designation "Elephant Cigarettes", and on tobacco the representation of the elephant appeared in red. These goods were well-known and asked for as "Elephant Mark", "Hathi Markah" and "Lal Hathi". The defendants had been manufacturing and selling chewing tobacco for a long time and sold the same in packets and tins. The goods in the packet were intended for use with lime. Both packets and tins in which the chewing tobacco was sold bore the picture of an elephant. It was in these facts that it was held that there could be no monopoly use of a mark which was the representation of an animal or any other device, and no objection could be taken to the use of identical marks on different kinds of goods. This case is of no assistance to the respondent, firstly because it was not a case of registered trade mark, and secondly what is of greater importance, is that the marks were used in a different kind of goods, namely, chewing tobacco, which differed widely in appearance and use from cigarette and tobacco used in pipes. But this decision is important for another reason namely, that it affirmed the well-known principle that the test of comparison of marks side by side was not a sound one, since a purchaser would seldom have the two marks actually before him when he makes his purchase.

28. Before proceeding to refer to the other cases relied on by Mr. Roy, I should briefly notice his contention on the question of deception and confusion. It was argued that the animal in the respondent's mark was not a Lion at all, but was some other animal. Secondly, it was argued that the image of the Goddess Durga was the distinguishing feature in the mark proposed to be registered by the respondent. Thirdly, Mr. Roy said any purchaser who could read, would at once see that the respondent's mark with the writing "Ma Durga Brand" was altogether different from the appellant's mark "Lion Brand". In my view, none of these contentions has any merit. As for the animal, it is preposterous to suggest that the Goddess Durga would be seated on an animal other than a Lion. Anyone familiar with Hindu Mythology would be shocked, if told that the Goddess Durga was seated on an animal other than a Lion. Besides, visually the representation of the animal in the mark is quite plainly that of a Lion. The second point about the Goddess Durga, being the distinguishing feature, seems to us to be equally without any substance. As I see the mark on the respondent's chaff-cutter, it is clear to me that the image of the Goddess above the Lion

is insignificant compared to the figures of the Lion in the mark. The concept that catches the eye, as I see the respondent's mark is the figure of the Lion and not that of the Goddess seated above it. It is the animal which is the dominant feature in the respondent's mark and not the deity. The third point made by Mr. Roy about the writing under the rival marks seems to me to be equally without force. It cannot be assumed that in this country everyone who goes to purchase a chaff-cutter would be a literate person and would be able to distinguish between writing of the appellant and the respondent. It is true that some of the purchasers may be able to read the writing under the mark but it is equally true that a large number of them would either not be able to read, and even if able to read, would not care to read the writing under the mark in very small and illegible character.

29. To turn now to the other case relied on by Counsel for the respondent. Reliance was placed upon the decision of the Judicial Committee in *Malayam Tobacco Distributors Ltd. v. United Kingdom Tobacco Co. Ltd.*, AIR 1934 PC 167. That was an action for infringement of trade mark and the ratio of the decision was that no finding of fraud could be made by a Court when there was neither any pleading nor any evidence to support a case of fraud. On the question of confusion in an action for infringement it was held that in the absence of evidence of actual confusion a strong case must be made out to justify conclusion that confusion would result, as a result of the infringement of the mark. We do not see, how this decision is of any assistance to the respondent. Reliance was next placed on a decision of this Court in 69 Cal WN 947 = (AIR 1965 Cal 417). In that case an application was made for registration of the name "sagar" to be used in sewing machines. Opposition was put forward by a company who used the name "Singer" in its sewing machines. It was held that there was no similarity between the words "Sagar" and "Singer" as the former was not deceptively similar to the latter. This decision again has no application to the facts in this case in which we are concerned with both a name and a mark, the device rather than the words being the dominant feature of the mark.

30. Mr. Roy next argued that as this appeal was a second appeal, this Court should not interfere with the finding of facts made by the Registrar and the trial Court. In support of this contention he relied on the decisions in AIR 1929 PC 286; AIR 1934 PC 112; AIR 1938 Pat 38 and AIR 1961 Bom 147.

31. We cannot accept this contention of Counsel for the respondent. In dealing with this appeal this Court is not

a Court of second appeal as contemplated by Section 100 of the Civil Procedure Code. The appeal which this Court is dealing with, is not from the judgment of Court subordinate to the High Court. The trial Court dealt with the appeal as a High Court under Section 109 (2) of the Act and this Court is dealing with the appeal again as a High Court under Section 109 (5) of the Act. Secondly, under Section 109 (6) of the Act, the High Court in dealing with an appeal, has all the powers of the Registrar and can make any order which the Registrar could make under the Act. Then again, in dealing with the question of deception and confusion under Section 11 (a) of the Act and the question of deceptive similarity under Section 12 of the Act this Court must necessarily look into the evidence adduced by the parties in order to determine whether the bar created by Section 11 and Section 12 of the Act can be invoked by a party opposing registration of a trade mark.

32. In repelling the contention of Counsel for the respondent that the Court should not go into questions of fact in second appeal, Counsel for the appellant relied on a decision of the Judicial Committee in *Jogesh Chandra Roy v. Emdad Meah*, AIR 1932 PC 28, in which it was held that finding of a fact based on the failure of a party to discharge the onus of proof which the first appellate Court wrongly held to be incumbent on him, was not a finding on positive evidence and was not binding in second appeal. Reliance was also placed on another decision of the Judicial Committee in *Sm. Bibhabati Devi v. Ramendra Narayan Roy*, 73 Ind App 246 = (AIR 1947 PC 19).

33. We are unable to accept the respondent's contention that this Court in dealing with the appeal under Section 109 (5) of the Act is a Court of second appeal under Section 100 of the Code of Civil Procedure, and for that reason, is unable to go into questions of fact. The provisions of the Act enjoin this Court to determine questions of deception, confusion and deceptive similarity, and that can only be done by taking into consideration the evidence tendered on behalf of the parties.

34. Counsel for the second respondent next sought to raise an altogether new point, namely that the respondent was an honest concurrent user of the appellant's registered trade mark, and as such the Registrar had jurisdiction under Section 12 (3) of the Act to register the second respondent's proposed trade mark. We cannot accept this contention on behalf of the second respondent for more than one reason. In the first place, this point was not raised before the Registrar or before the Court below, and is now sought to be raised for the first time. The question of concurrent use is a question of fact

and a case such as this, has to be pleaded and proved. In compliance with the elaborate provisions in the Act for filing affidavits in support of the application, in answer to the opposition and also in the affidavit evidence, the second respondent nowhere suggested, much less made out a case of concurrent user. Secondly, under Section 12 (3) of the Act, in the case of an honest concurrent user, a mark can be registered, if in the opinion of the Registrar, it is proper to do so. The Registrar in this case has expressed no such opinion. Nor has the respondent filed any cross-objection against the Registrar's order. It is true that this Court has jurisdiction to make any order, which the Registrar could make, under Section 109 (6) of the Act and in exercise of this jurisdiction this Court, in an appropriate case, can make an order on the ground of honest concurrent use. But such an order, in our view, cannot be made having regard to the nature of the evidence such as it is, and also the case made out by the respondent before the Registrar and the Court below. Lastly, even if the second respondent was allowed to make out a case of honest concurrent use, the only evidence of sale of the respondent's chaff-cutter, as noticed by the Registrar, was the sale of a single chaff-cutter as proved by Bill No. 224/16 of January 15, 1960. The other evidence of sale of the respondent's merchandise, namely the affidavits of the traders to which I have referred earlier, is of no assistance in coming to a conclusion regarding concurrent use of the mark by the respondent. The contentions of Counsel for the second respondent regarding honest concurrent use must therefore be rejected.

35. For the reasons mentioned above, this appeal succeeds and is allowed: The judgment and order of the Court below and also that of the Registrar are set aside. The Registrar is directed not to register the mark of the second respondent. The second respondent to pay to the appellant the costs of this appeal and also the costs of the Court below. Certified for two Counsel.

AJAY K. BASU, J.—36. I agree.
Appeal allowed.

AIR 1972 CALCUTTA 278 (V 59 C 47)

ANIL KUMAR SINHA AND SALIL
KUMAR DATTA, JJ.

Sambhu Das Pyne, Petitioner v. Corporation of Calcutta, Opposite party.

S. C. A. No. 44 of 1970, D/- 20-1-1972, for certificate of fitness for appeal to Supreme Court against Judgment of Division Bench of this Court in F.M.A. No. 288 of 1969.

BP/CP/A709/72/LGC

1972 Cal/18 VII G—21

Constitution of India, Art. 133 (1) (c) — Certificate of fitness for appeal — Judgment of affirmance — Petitioner must establish that the appeal involves some substantial questions of law notwithstanding that the requirement of value under Clause (b) is satisfied — Substantial question of law — What is. (Prs. 5, 6)

A question of law either of general public importance or directly and substantially affecting the rights of parties would be substantial question of law. But where the law is practically settled or covered by a decision of the highest court and it is a question of application of general principles, it would not be a substantial question of law. When a question of law is fairly arguable, when there is room for difference of opinion on the point, it would be a substantial point of law. AIR 1962 SC 1314 and AIR 1951 Mad 969, Relied on.

(Para 5)

Where the delegation of authority to revalue "bustee" under the provisions of Calcutta Municipal Act was made by the Executive Officer in his official capacity, the contention that the delegation came to an end with the cessation of his office and at the time of assessment in question there was no valid delegation, is not a fair arguable proposition and is palpably untenable. Accordingly there is no substantial question of law on this question for which a certificate of fitness for appeal to the Supreme Court can be given. (Para 6)

Similarly the contention that where the delegation was about the power to value the basti there could be no delegation of the discretion vested in the Executive Officer to assess the basti, does not involve a substantial question of law as it is well settled that while powers and duties are inter-connected, it is not possible to separate them and the delegation of power takes with it the duties attached to the exercise of the power delegated. (Pr. 7)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 Cal 316 (V 55),
Ramrital Saha v. Sachindra Narayan Roy | 3 |
| (1965) AIR 1965 SC 1440 (V 52) =
(1965) 2 SCR 751, Chittarnal v. Shah Pannalal | 4 |
| (1963) AIR 1963 SC 1581 (V 50) =
(1964) 2 SCR 286, Daluram Pannalal v. Asstt. Commr. of Sales Tax, Indore | 7 |
| (1962) AIR 1962 SC 1314 (V 49) =
(1962) 1 Lab LJ 656, Chunilal Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd. | 5 |
| (1961) AIR 1961 SC 1095 (V 48) =
(1961) 3 SCR 759, Hazrat Syed Shah v. Commr. of Wakfs, W. Bengal | 7 |
| (1960) 1960 AC 336 = (1960) 2 WLR 389, Mungoni v. Attorney General of North Rhodesia | 7 |

(1951) 55 Cal WN 667, Gayadinram
v. A. D. Khan 6
(1951) AIR 1951 Mad 969 (V 38) =
1951-2 Mad LJ 222 (FB), Rimmala-
pudi Subba Rao v. Noony Veeraju 5

Noni Kumar Chakravarti, Manas Nath
Roy, for Petitioner; Subodh Kumar Bhat-
tacharjee, for Opposite party.

SALIL KUMAR DATTA, J.— This is an application for a certificate of fitness for appeal to the Supreme Court against a decision of a Division Bench of this Court in F. M. A. No. 238 of 1969. The appeal arose out of an annual valuation made by the Corporation of Calcutta in respect of a basti situated in premises No. 105/3, Ultadanga Main Road within the Corporation of Calcutta, for assessment of consolidated rates with effect from 3rd quarter of 1951-52. The annual valuation was made departmentally by the Corporation at Rs. 20240/-. An objection was preferred by the owner, the petitioner before us, contending inter alia that the assessment was illegal, exorbitant and without jurisdiction, while the previous annual valuation was Rs. 7420/- from third quarter of 1950-51 as ultimately determined by the Court of Small Causes, Sealdah on May 21, 1954. On objection filed by the petitioner, the Deputy Commissioner (II) reduced the valuation from Rs. 20240/- to Rs. 15304/-. An appeal was preferred by the petitioners to the said Court and the valuation was further reduced to Rs. 7544. On an appeal to this Court by the Corporation this valuation was set aside and the case was sent back on remand for rehearing. After remand the Court of Small Causes, Sealdah affirmed the valuation made by the Deputy Commissioner (II) and dismissed the appeal. Against that decision the present appeal was taken by the petitioner which also was dismissed by the Division Bench of this Court as already stated. Against this decision, the present application has been preferred by the appellant owner.

2. In the present case, the question in dispute is whether the excess valuation made by the Deputy Commissioner (II) and affirmed by the Court of Small Causes, Sealdah as also by this Court has been in accordance with law and within the powers of the Corporation. On the valuation test, Mr. Noni Kumar Chakravarti learned Advocate appearing for the petitioner, has contended that the value of the subject-matter of the dispute in the Court of the first instance and in appeal was and is much above Rs. 20,000/- inasmuch as the property in dispute namely premises No. 105/3, Ultadanga Main Road could be valued at not less than Rs. 1,48,400/- being the capitalised value of the annual valuation of Rs. 7420/- at twenty times of the annual valuation which according to him is the accepted normal standard. Mr. Chakravarti accordingly submitted that cl. (a) of

Article 133 (1) of the Constitution is satisfied in so far as the valuation is concerned. These contentions have been disputed by Mr. Subodh Kumar Bhattacharjee, learned advocate appearing for the Corporation who has contended that the basis of valuation made out by the petitioner is wrong and untenable. According to Mr. Bhattacharjee, the question with which the appeal is concerned was the excess annual valuation of Rs. 15,304/- over the then existing valuation of Rs. 7420/-. The subject-matter of the dispute in all these proceedings is therefore the difference in valuation only and this cannot be stated to be to satisfy the requirement of the said clause (a) of Article 133 (1).

3. As was pointed out in *Ramritlal Saha v. Sachindra Narayan Roy*, AIR 1968 Cal 316 that the value of the property concerned in appeal is something different from the value of the subject-matter in dispute. Though we are concerned with the increased annual valuation of the municipal premises in question the appeal is really not concerned with the property itself but only with the legality and validity of the excess annual valuation. In that view, it could not be proper, in our opinion, to assess the capitalised value of the annual valuation as the value of the subject-matter in this proceeding. Accordingly we are of opinion that the requirement of clause (a) of Article 133 (1) has not been satisfied in the instant case.

4. Even though the clause (a) is not applicable there can be no dispute that the excess valuation as assessed by the impugned judgment will involve and increase the valuation of the entire premises, which even on the existing valuation exceeds the limit of Rs. 20,000/-, thereby attracting clause (b). The Supreme Court in *Chittarmal v. Shah Pannalal*, AIR 1965 SC 1440 considered the ambit of the two clauses (a) and (b) of Article 133 (1) and observed in paragraph 5 as follows:

"To attract the application of Art. 133 (1) (b) it is essential that there must be—omitting from consideration other conditions not material—a judgment involving directly or indirectly some claim or question respecting property of an amount or value not less than Rs. 20,000/-. The variation in the language used in clauses (a) and (b) of Article 133 pointedly highlights the conditions which attract the application of the two clauses. Under clause (a) what is decisive is the amount or value of the subject-matter in the Court of first instance and "still in dispute" in appeal to the Supreme Court; under clause (b) it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. . . . But the property respecting which the claim or question arises must be property in addition to or other than the subject-matter of the dispute. If in a pro-

posed appeal there is no claim or question raised respecting property other than the subject-matter, clause (a) will apply; if there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000/- in addition to or other than the subject-matter of the dispute, clause (b) will apply."

In the present appeal, undoubtedly the subject-matter of the dispute is the excess valuation of Rs. 15,304/- over the existing valuation of Rs. 7420/- and it could be urged that the subject-matter of the dispute is less than Rs. 20,000/-. This enhanced valuation impugned in the appeal however does not stand by itself and on the contrary this valuation impugned in this application involves and affects the premises No. 105/3, Ultadanga Main Road which are not the subject-matter of the dispute, in that it touches and enhances the valuation respecting said premises the value whereof undisputedly is over Rs. 20,000/- even without such enhancement. If there is a reduction of the valuation as claimed by the petitioners, it would involve the said property reducing its valuation. It would thus appear that clause (b) is attracted as the appeal ultimately involves the valuation of the said premises which in turn, as we have seen, is valued much over Rs. 20,000/- apart from the impugned enhancement.

5. The judgment under appeal being one of affirmance, the petitioners must further establish that the appeal involves some substantial questions of law notwithstanding that the requirement of value under Clause (b) is satisfied. A question of law either of general public importance or directly and substantially affecting the rights of parties has been held to be a substantial question of law. But where the law is practically settled or covered by a decision of the highest court and it is a question of application of general principles, it would not be a substantial question of law, as was held in *Chunilal Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.*, AIR 1962 SC 1314. It will not be a substantial question of law if a plea raised is palpably absurd though a decision on the merits of the case would be directly affected by it as was held in the decision in *Rimmalapudi Subba Rao v. Noony Veeraju*, AIR 1951 Mad 969 (FB). It was further observed that when a question of law is fairly arguable, when there is room for difference of opinion on the point, it would be a substantial point of law. These principles have been approved by the Supreme Court in the case cited above.

6. Mr. Chakravarti has contended firstly that the delegation of authority to revalue 'bustees' under Section 12 (1) of the Calcutta Municipal Act, 1923 made by the Executive Officer then in office, came to an end with the cessation of his office

and at the time of assessment in question there was no valid delegation. The judgment under appeal, following the decision in *Gayadinram v. A. D. Khan*, (1951) 55 Cal WN 667, repelled the above contention quoting with approval, the observations in the above case that the delegation was made not in personal capacity but in official capacity and that individuals may go and come but the statutory office remains unless the Corporation itself ceases to exist, and, further, in absence of revocation which could be done, the successor-in-office must be deemed to have accepted and approved of the delegation made by his predecessor. The contention now raised by Mr. Chakravarti is that the question of delegation in the said circumstances raises a substantial question of law calling for a decision by the Supreme Court. The delegation in the present case is by the executive officer in his official capacity (vide the delegation dated 8-4-1924 as follows: "The following powers, functions and duties are delegated by me as the executive officer of the Corporation of Calcutta under Section 12 (1) of Bengal Act, III of 1923 to the officers noted below: Section 131 (2) (a) To Value annually bustees — to Assessor, Dy. Assessor, Sub-assessors"). This proposition about delegation, if accepted, would lead to an intolerable situation as observed by Bose, J. in *Gayadinram's* case cited above. We are also of the opinion for the same reasons that such contention is not a fair arguable proposition and is palpably untenable. Accordingly there is no substantial question of law on this question for which a certificate of fitness for appeal to the Supreme Court can be given.

7. The other question of law of substantial importance involved in this appeal is, as Mr. Chakravarti contended, that the delegation was about the power to value the bustee but there could be no delegation of the discretion vested in the Executive Officer to assess the bustee which was a pre-requisite of assessment of bustee by the Executive Officer or his delegated authority. This Court in dealing with this point, on a construction of the relevant provisions of the statute came to the conclusion that discretion vested in the Executive Officer under clause (a) of Section 131 (2) could not operate as a distinct or separate element from the power to be exercised by him so that when the power is delegated to any municipal officer, it carries with it also the discretion to be exercised by such officer. In support of the proposition, reference was made to the decision in *Mungoni v. Attorney General of North Rhodesia*, 1960 AC 336, approved by the Supreme Court in *Hazrat Syed Shah v. Commr. of Waks, W. Bengal*, AIR 1961 SC 1095, wherein it was observed that while powers and duties are inter-connected, it is not possible to separate

them and the delegation of power takes with it the duties attached to the exercise of the power delegated. Extending the principle, this Court held that discretion under the present case is really an expansion or limitation of his power but always a condition for exercise of such power, so that with delegation of power, the discretion also passes. The Court also relied on the decision in *Daluram Pannalal v. Asst. Commr. of Sales Tax, Indore*, AIR 1963 SC 1581 wherein again it was observed that the duty of being satisfied that sales escaped assessment was inseparably connected with power to re-assess and passed to the delegatee along with it and it was not a duty that could be independently delegated.

8. It is thus obvious that the principles involved about delegation as in the present case are well settled. This Court applied the said principles of law in the circumstances of the present case. That being the position, this point of law urged by Mr. Chakravarti in support of his case for a certificate is also not a substantial question of law as contemplated in Article 133 (1) of the Constitution.

9. The application accordingly fails and is dismissed with costs: hearing fees assessed at 5 Gms.

ANIL KUMAR SINHA, J.— 10.
I agree.

Application dismissed.

AIR 1972 CALCUTTA 276 (V 59 C 48)
SANKAR PRASAD MITRA AND SALIL KUMAR DATTA, JJ.

Kaileswar Singh, Appellant v. Upendra Nath Koyal, Respondent.

Second Appeal No. 1606 of 1962, D/- 19-1-1972.

Civil P. C. (1908), S. 11 — Directly or substantially in issue.

When certain lease was not in issue in previous suit between the same parties, any observation made or decision given with regard to that lease in that suit could not be binding in the subsequent title suit against the lessee. Case law discussed.

(Para 45)

Cases Referred: Chronological Paras

- (1955) AIR 1955 Andhra 194 (V 42) = 1955 Andh WR 285, Kaliseti Subbarayudu v. Pagadala Balaramayya 85
(1954) AIR 1954 Cal 443 (V 41), Jagdish Chandra Roy Choudhury v. Kashba Ballygunje Co-op. Society Ltd. 82
(1953) AIR 1953 SC 33 (V 40) = 1953 SCR 154, Smt. Rajlakshmi Dasi v. Banamali Sen 87
(1953) AIR 1953 SC 419 (V 40) = 1950 SCR 754, Narhari v. Shankar 27

BP/CP/B304/72/SSG

- (1936) 40 Cal WN 1176 = 64 Cal LJ 431, Bahadur Singh Singhee v. Rani Jyotirupa Debi 28
(1929) AIR 1929 Cal 163 (V 16) = 48 Cal LJ 577, Rajani Kumar Mitra v. Ajmaddin Bhuiya 30
(1927) AIR 1927 Lah 289 (V 14) = 28 Pun LR 712 (FB), Mt. Lachhmi v. Mt. Bhulli 26
(1923) AIR 1923 PC 167 (V 10) = 28 Cal WN 568, Raja Bomma-devara Nagamma Naidu v. Ravi Venkatapayya 41
(1917) AIR 1917 Cal 716 (V 4) = ILR 44 Cal 47, Nuri Mian v. Ambica Singh 38
(1915) AIR 1915 Cal 103 (V 2) = 20 Cal LJ 107, Rai Charan Mandal v. Biswanath Mandal 39
(1906) ILR 33 Cal 1101 = 10 Cal WN 934, Marlamnissa Bibee v. Joynab Bibee 22

Saktinath Mukherjee, Sibadas Ghosal, for Appellant; Jitendra Nath Guha, K. G. Mitra and D. K. Das, for Respondent.

SANKAR PRASAD MITRA, J.— This is a second appeal from the judgment of the Additional District Judge, 24 Pargannas dated the 3rd of March, 1962 dismissing an appeal from the judgment of the learned Subordinate Judge, 4th Court, Alipore, who had decreed the suit declaring the plaintiff's title to the disputed property and declaring further that a patta dated the 8th August, 1940 granting a mourasi mokarari right was void.

2. Before we come to the facts it would be convenient to set out a genealogical table which is as follows:—

(See genealogical table on next page)

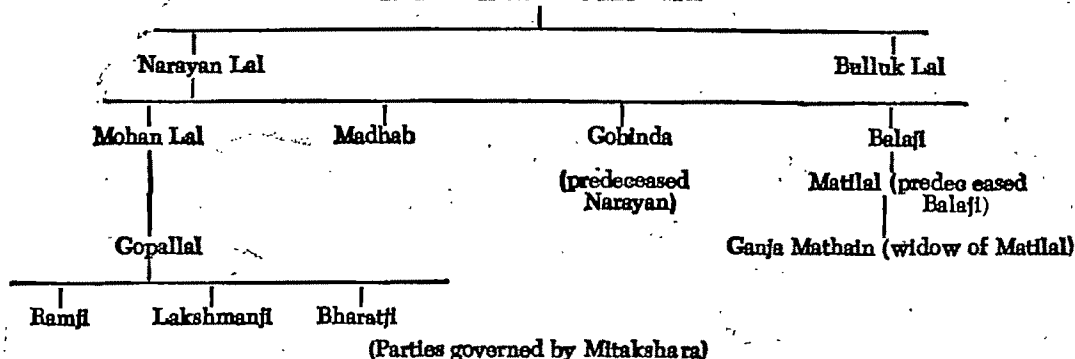
3. Briefly the facts are that the premises No. 17 Jadu Bhattacharya Lane, in Calcutta, consists of about 5 cottahs of land. Out of these 5 cottahs, on the 8th April, 1936, Narayan Lal leased out about 1 cottah to one Ramlagan. And Ramlagan, on the 23rd October, 1940, sold his lease-hold rights to the defendant Kaileswar Singh.

4. There is another lease of about 1 cottah of land which Balaji had granted to the defendant Kaileswar on the 8th August, 1940.

5. In this appeal, therefore, we are concerned with these two leases, namely, the lease of the 8th April, 1936, and the lease of the 8th August, 1940. There is no dispute that the plaintiff Upendra Nath Kayal is now the owner of the entire premises No. 17, Jadu Bhattacharya Lane, Calcutta.

6. In 1948, Upendra instituted in the Alipore Court Title Suit No. 34/48 against Kaileswar for recovery of possession of about 2 cottahs 9 chhattaks and 24 sq. ft. of land being a part of the premises No. 17, Jadu Bhattacharya Lane, Calcutta.

RADHA KRISHNA MAHATA



In this suit, there is no dispute that, the land comprised in the lease granted by Narayan on the 8th April, 1936, the interests whereof were subsequently acquired by Kaileswar, was included. But the parcel of land which was settled by Balaji on the 8th August, 1940, was not included.

7. In 1949, Upendra instituted a partition suit in the Alipore Court. This suit was marked as Title Suit No. 209/49. It was a suit for partition of 4 cottahs 13 chattacks and 22 sq. ft. of premises No. 17, Jadu Bhattacharya Lane, Calcutta. Kaileswar was made a party to the suit as the defendant No. 1. Upendra in this suit asked for partition of the suit properties with Kaileswar provided that Kaileswar was found to have a title to any portion thereof.

8. On the 31st March, 1952, Title Suit No. 34/48 and Title Suit No. 209/49 were both disposed of by the same judgment of the Subordinate Judge, First Court, Alipore. It was ordered: "that Title Suit No. 209 of 1949 be decreed on contest in a preliminary form against defendant No. 1 (Kaileswar Singh) and dismissed with costs against defendant No. 2, defendant No. 1's interest in the suit property as a tenant under the plaintiff is 1/3rd. If the parties fail to amicably partition the property within two months of this date a Commissioner will be appointed to effect partition by metes and bounds having regard to the possession of the parties. Parties will bear their own costs up to this stage."

9. In 1952, Upendra preferred an appeal, being Title Appeal No. 474/52. It was an appeal against the dismissal of Title Suit No. 34/48 but he preferred no appeal at all against the decision in Title Suit No. 209/49. The appeal was allowed. It was held that the defendant Kaileswar did not acquire any interest under the settlement granted on the 8th April, 1936, by Narayan. The operative part of the appellate judgment of the Additional District Judge is as follows:—

"The decision of the trial Court in Suit No. 34 of 1948 is set aside. As the

plaintiff has made the issue cumbrous by bringing suit No. 209 during the pendency of this suit I award no cost to the plaintiff either in the trial Court or in the Appellate Court. Plaintiff's title in the suit land is declared and he shall get khas possession of the suit land by evicting the defendants. The plaintiff shall also get mesne profits from the defendant No. 1 (Kaileswar Singh) which shall be ascertained on plaintiff's application and a final decree shall follow."

10. The result of this appellate judgment, therefore, is that Kaileswar loses his right acquired under the settlement of Narayan in favour of Ramagan on the 8th April, 1936. But the rights conferred on him under the partition suit being Suit No. 209/49 were not touched as there was no appeal against the preliminary partition decree.

11. In the next stage, we come to the suit which is the subject-matter of the second appeal before us. This is a suit by Upendra against Kaileswar for recovery of possession of 1 cottah of land which Kaileswar was holding under the lease granted to him by Balaji on the 8th August, 1940. The allegation is that Balaji's lease was void. The suit was marked as Title Suit No. 31/54 in the 4th Court of the Subordinate Judge at Alipore. The trial Court decreed the suit. Kaileswar preferred an appeal being Title Appeal No. 1169/58 which was dismissed. Thereafter, Kaileswar preferred this second appeal.

12. To complete the picture we may refer to certain additional evidence which we have allowed to be introduced at the hearing of this appeal. In 1961, Kaileswar filed a suit being Title Suit No. 312/61 in the 4th Court of the Munsif at Alipore, against Upendra for a declaration that the decree in Title Appeal No. 474/52 arising out of Title Suit No. 34/48 is null and void and for permanent injunction restraining Upendra from proceeding with Title Execution Case No. 31/58 which Upendra had instituted for executing the decree in Title Suit No. 34/48.

13. The trial Court dismissed the suit. The findings *inter alia*, were (a) there was no fraud on the part of Upendra as alleged, (b) the decree in Title Appeal No. 474/52 nullifies the decree in Title Suit No. 209/49 and (c) the suit was not maintainable because of the bar of Section 47 of the Code of Civil Procedure.

14. Against this judgment Kaileswar preferred an appeal being Title Appeal No. 643/68 to the 5th Court of the Subordinate Judge, Alipore. The appeal has been dismissed.

15. The question which arises for our decision centres round the fate of the lease of Balaji on the 8th August, 1940, on the facts stated above. The appellant's contention is that Balaji's lease still remains unaffected and Upendra cannot get possession of the parcel of the land comprised in that lease. The respondent's contention is that the Courts below have decided that, like Narayan's lease, Balaji's lease is also void.

16. Mr. Mukherjee learned Advocate for the respondent has advanced the following arguments:—

1. In Title Suit No. 34/48, the title of Kaileswar under both the leases, namely, the lease of Narayan and the lease of Balaji were in dispute, and their validity had to be decided before granting the decree for recovery of possession.

2. If two decrees are contradictory and inconsistent, the last decree would prevail and the sanctity of *res judicata* would attach to the last decree.

3. When two suits are disposed of by the same appeal and appeal is preferred against one of them, the bar of *res judicata* does not apply and

4. In the last title suit (Title Suit No. 312/61) the propriety of both the leases was raised and Kaileswar had failed to establish that any of them was validly executed.

17. We are unable to accept the points which Mr. Mukherjee has raised. Firstly, in Title Suit No. 34/48 the validity of the second lease was disputed merely by inference. There were no pleadings and no issues specifically challenging the second lease at all. Naturally, the observations that were made by the Courts below regarding the second lease are not binding on Kaileswar.

18. Secondly, this is not a case where two contradictory or inconsistent decrees were passed; the decree in Title Suit No. 34/48 and the decree in Title Suit No. 209/49, so far as the second lease is concerned, are not inconsistent as there is no identity or community of cause of action or issues in the two suits.

19. Thirdly, the bar of *res judicata* may be inapplicable when two suits are disposed of by the same judgment, but appeal is preferred only against one when

both the suits cover the same issues. But in our case, the second lease was the subject-matter of Title Suit No. 209/49 only. It was not the subject-matter of Title Suit No. 34/48.

20. Fourthly, the observations in Kaileswar's Title Suit No. 312/61 affecting the second lease which the respondent has introduced by way of additional evidence do not assist the respondent inasmuch as the second lease was not the subject-matter of that suit.

21. We now proceed to refer to the authorities on which counsel for the respondent has relied.

22. In *Mariamnis Bibee v. Joy-nab Bibee*, (1906) ILR 33 Cal 1101, M. and J., two Mahomedan co-widows, brought two separate suits for recovery of their dowers from the estate of their deceased husband. A question was raised in these suits, whether two houses belonged to the estate of the husband. By consent of the parties the Subordinate Judge tried both the suits together and disposed them of in one judgment, it being found that the two houses belonged to M as her separate property. But two separate decrees were drawn up in accordance with that judgment.

23. J. preferred an appeal to the District Judge against the decree in her own suit mainly on the ground that the conclusion arrived at by the Subordinate Judge in the suit of M respecting the title of the two houses was erroneous; but no appeal was preferred in M's suit.

24. At the hearing of this appeal a question was raised on behalf of M, the respondent, that the judgment in M's suit not having been appealed against operated as *res judicata*. But it was held by this court that there was no bar of *res judicata* to the hearing of the appeal preferred by J.

25. Clearly, this is a case of common issues. Whether or not the two houses belonged to the estate of the deceased husband, was an issue in both the suits and an appeal against the decision in one of them was sufficient for the purpose of challenging the decision. In our case, the second lease was not in issue in both the suits.

26. The same conclusion was reached by a Full Bench of the Lahore High Court in the case of *Mt. Lachhmi v. Mt. Bhulli*, AIR 1927 Lah 289 (FB) where two widows A and B were jointly in possession of certain land. Each sued the other for declaration that she (plaintiff) was the exclusive owner of that land and that the other (defendant) had no right in it of any kind. Both suits were disposed of by a single judgment which decided that A was the owner, but that B was entitled to hold possession of half the land in lieu of maintenance. A separate decree was drawn up in each suit declar-

ing the rights of the plaintiff according to that decision. B appealed against one of these decrees only, namely, the decree given in the suit in which she was the plaintiff. The Full Bench held that the fact that no appeal had been preferred by B against the decree in the other suit of A could not prevent B's appeal from proceeding.

27. It appears that the Supreme Court has approved of this judgment of the Lahore High Court in *Narhari v. Shankar*, AIR 1953 SC 419 on similar facts.

28. The next decision which Mr. Mukherjee cited was the decision given in the case of *Bahadur Singh Singhee v. Rani Jyotirupa Debi*, (1936) 40 Cal WN 1176. Here, it has been held that when two suits involving common issues are tried together and are disposed of by one judgment and appeal is filed against the decree in one suit but no appeal is filed against the decree in the other, the matter decided in the latter suit does not become *res judicata* so as to bar its re-agitation in the appeal.

29. This case, therefore, reiterates the same principles which the judgments cited earlier had laid down. But the whole point is that both suits must have common issues. In our case there were no common issues.

30. The next case cited by learned counsel for the respondent is the case of *Rajani Kumar Mitra v. Ajmaddin Bhuiya*, AIR 1929 Cal 163 where a Division Bench of this Court has held that when there are two conflicting decrees, the last should prevail on the ground that in the eye of law it is binding between the parties and the previous decree should be taken as pleaded in the latter suit and not given effect to, or must henceforth be regarded as dead.

31. This judgment is of no help to us because in our case there are no conflicting decrees in respect of the second lease granted by Balaji.

32. Mr. Mukherjee then cited the case of *Jagadish Chandra Roy Choudhury v. Kashba Ballygunje Co-op. Society Ltd.*, AIR 1954 Cal 443. It is a decision of a Single Judge and the relevant portion is quoted below:

"After the dismissal of the second execution case on the ground of limitation, the decree was allowed to be executed without objection by the judgment-debtor either on the ground of limitation or on the ground of its execution being barred by *res judicata* by reason of the aforesaid decision."

33. It was held that the actual *res judicata* in the judgment-debtor's favour was thus superseded by a later *res judicata*, though constructive, in favour of the decree-holder. And the plea of *res judicata*

on the basis of the said decision in the second execution case was no longer open.

34. Again this judgment is not relevant for our present purpose inasmuch as in our case there is no identity of subject-matters.

35. Reliance was then placed on behalf the respondent on the judgment of Andhra Pradesh High Court in the case of *Kaliseti Subbarayudu v. Pagadala Balamayya*, AIR 1955 Andhra 194. The Andhra Pradesh High Court observed as follows:

"In cases of judgments '*inter partes*' the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made."

36. There can be no dispute as to the above-mentioned proposition so long as there is identity of title or subject-matter.

37. The last case to which reference was made on behalf of the respondent is the case of *Smt. Rajlakshmi Dasi v. Banamali Sen*, AIR 1953 SC 33. This was a case of a former proceeding for compensation money in respect of some property which was the subject-matter of a subsequent suit, and the Supreme Court has observed that the first test of *res judicata* is the identity of title in the two litigations and not the actual property involved in the two cases. In our case, the second settlement dated 8-8-40 was not at all touched either by the pleading or by the issues in the first suit marked as Title Suit No. 34/48.

38. Finally, Mr. Mukherjee has contended that Kaileswar was given 1/3rd share in the preliminary partition decree on the basis of both the leases of Narayan and Balaji. Since Narayan's lease has been declared to be invalid, a final decree in the partition suit, so far as Kaileswar's share is concerned, would create difficulties unless we hold that Balaji's lease is also invalid.

39. It seems to us that this contention is of no substance. We may conveniently quote the observation of Mookerjee, J. in the case of *Nuri Mian v. Ambica Singh*, ILR 44 Cal 47 = (AIR 1917 Cal 716). The observation which is at p. 55 is as follows:—

"Now, it may be conceded that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this principle is not of universal application, and in a long series of decisions which will be found reviewed in the case of *Rai Charan Mandal v. Biswanath Mandal*, 20 Cal LJ 107 = (AIR 1915 Cal 103) the doctrine has been recognised that there are cases where it is incumbent upon a court of justice to take notice of events which have happened since the institution of the suit and to mould its decree ac-

cording to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties."

40. The position, therefore, is that in Title Suit No. 34/48 only one lease was challenged namely the lease of Narayan dated the 8th April, 1936. The lease of Balaji granted on the 8th August, 1940, was not included in that suit at all. Then in Title Suit No. 209/49 both the leases were involved and a share was given to Kaileswar in the suit property by the preliminary partition decree on the basis that both the leases were valid. By the same judgment Title Suit No. 34/48 was dismissed. Upendra was affected by the judgment delivered in both the suits. He preferred an appeal against the decision in Title Suit No. 34/48 but did not prefer any appeal against the preliminary partition decree in Title Suit No. 209/49. The result has been that by virtue of Upendra's success in respect of Title Suit No. 34/48, the lease of the 8th April, 1936, has been set aside and Kaileswar has lost his interest therein. But the lease of 8th August, 1940 remained unaffected and inferentially by reason of conclusions reached in relation to the earlier lease, the second lease cannot be held to be invalid.

41. In this connection reference may be made to the Privy Council's judgment in *Raja Bommadevara Naganna Naidu v. Ravi Venkatapavva*, 28 Cal WN 588 = (AIR 1923 PC 167). In this case in certain suits by the Zemindar against his raiyats to enforce the acceptance by them of pattas or lease of Faslis 1314 and 1315 which had been tendered to them, the latter pleaded that certain rates had been fixed in Fasli 1292 which alone were recoverable and not the asara or varam rates (produce sharing system) demanded by the Zemindar. The first two courts upheld the tenants' plea but on second appeal the High Court held that the pattas tendered were proper pattas and the tenants must accept them. The decrees of the High Court were reversed by the Privy Council, but during the pendency of the appeal to the Privy Council, the Zemindar instituted similar suits for arrears of rent in respect of 1316 Fasli to 1322 Fasli against the tenants and recovered decrees which he realised in execution. After the Privy Council's decision the tenants, who had made no application for stay of trial of the later suits pending the disposal of the appeal by the Privy Council, sued the Zemindar for refund of the amounts paid by them in excess of the rates determined in the previous suit in

consequence of the Privy Council's decision.

42. The Judicial Committee has held that the decision in the later rent suits was not reversed or superseded by the decision of the Privy Council in the earlier suits and the suits for refund were not maintainable.

43. To our mind, a similar situation has arisen in the instant case. By reason of Upendra's failure to prefer an appeal against the preliminary partition decree in Title Suit No. 209/49, Kaileswar's interest created by the second lease of the 8th August, 1940, has remained intact. By making observations on the validity of the second lease in the other suit or in proceedings, the subject-matter whereof is the first lease only, Kaileswar's interest in the second lease cannot be put an end to.

44. At page 27 of the Paper Book we find that the Additional District Judge has made the following observations:—

"The learned Subordinate Judge heard both the suits together and decreed Partition Suit No. 209/49 in a preliminary form and it was declared that the defendant's tenancy right to the extent of one-third share was to be separated by partition by metes and bounds. The learned Subordinate Judge dismissed the Title Suit No. 34/48. Plaintiff Upendra Nath Kayal thereafter filed an appeal against the judgment and decree passed in Title Suit No. 34 of 1948 and no appeal was preferred by anybody against the judgment and decree in Title Suit No. 209/1949. The appeal against the decree in Title Suit No. 34 of 1948 was allowed and plaintiff's title to the suit land was declared and he was given a decree for khas possession of the land after eviction of the defendants. It may be noted in this connection that the plaintiff did not include lease dated 8-8-40 which is the subject-matter of the present suit granted by Balaji to Kaileswar Singh in Title Suit No. 34 of 1948, though in Title Suit No. 209 of 1949 defendant's title as a co-sharer on the basis of both the leases, namely, the leases of Narayan and Balaji (8-4-36) and (8-8-40) was declared. The learned appellate Court allowed the appeal from the judgment and decree in Title Suit No. 34 of 1948. The learned appellate Court held that defendant No. 1 did not acquire any valid interest in the property by taking lease from Narayan and Balaji. The learned appellate court could not have granted a decree for khas possession to the plaintiff by eviction of the defendants unless the court held that the lease granted by Balaji to Kaileswar Singh was void.... Hence it is evident that though the lease of Balaji in favour of defendant was not directly involved in Title Suit No. 34 of 1948, the decision of the appellate

Appeal No. 474 of 1952..
 finally decided the issue regard-
 ing tenancy right of defendant

In our opinion, the conclusion
 learned Additional District Judge
 cannot be supported. The lease of 8th
 August, 1940, was not in issue in Title
 Suit No. 34 of 1948 or Title Appeal No.
 474/52 and any observation made or de-
 cision given with regard to this lease of
 the 8th August, 1940, in Title Appeal No.
 474/52 cannot be binding on Kaileswar
 Singh.

46. In this view of the matter, this
 appeal is allowed. The judgment and de-
 cree of the courts below are set aside and
 the plaintiff's suit is dismissed.

47. There will be no order for
 costs.

SALIL KUMAR DATTA, J.:—
 48. I agree.

Appeal allowed.

AIR 1972 CALCUTTA 281 (V 59 C 49)
 S. C. GHOSE, J.

Raymon Engineering Works Ltd., Cal-
 cutta, Petitioner v. Union of India, Respon-
 dent.

Award Matter No. 150 of 1970, D/-
 7-1-1972.

Arbitration Act (1940), S. 34 — Stay
 of suit — Plaintiff alleging fraud against
 the petitioner who however desires to have
 the disputes tried by the Arbitrators —
 Suit should not be stayed. (Case law dis-
 cussed). (Para 19)

Cases Referred: Chronological Paras
 (1964) 1964-2-All ER 332 = (1964)

1 WLR 633, Taunton-Collins v.
 Cromic 20

(1963) AIR 1963 Cal 405 (V 50),
 Bengal Jute Mills Co. Ltd. v. Lal-
 chand Dugar 14

(1962) AIR 1962 SC 406 (V 49) =
 (1962) 3 SCR 702, Abdul Kadir
 Shamsuddin Bubere v. Madhav
 Prabhar Oak 18

(1960) AIR 1960 SC 1156 (V 47) =
 (1960) 3 SCR 713, Printers (My-
 sore) Pvt. Ltd. v. Pothan Joseph 14

(1952) AIR 1952 Cal 340 (V 39),
 Basantlal Jagatramka v. Dominion
 of India 15

(1952) AIR 1952 Pat 352 (V 39),
 Pramada Prasad Mukherjee v.
 Sagarmal Agarwalla 12

(1948) 52 Cal WN 858, Bilasrai and
 Co. v. Tolaram Nathmali 17

(1943) AIR 1943 Cal 238 (V 30) =
 46 Cal WN 933, Eastern Steam
 Navigation Co. Ltd. v. Indian
 Coastal Navigation Co. Ltd. 16

(1943) AIR 1943 Pat 53 (V 30) =
 ILR 21 Pat 544, Narsingh Prasad
 Boonna v. Dhanraj Mills 12

BP/CP/B49/72/LGC

ORDER.— This application has been
 made by the Union of India inter alia for
 stay of the suit No. 4009 of 1969 (Ray-
 mon Engineering Works Ltd. v. Union of
 India) instituted in this Court by the res-
 pondent, Raymon Engineering Works Ltd.

2. The said suit was filed by the
 Raymon Engineering Works Ltd. inter alia
 for a declaration that letters dated 17th
 February, 1965, 27th February, 1965, and
 18th November, 1965, mentioned in para-
 graphs 20 and 38 of the plaint are void,
 inoperative and not binding upon the plain-
 tiff. The plaintiff has also prayed for de-
 livery and cancellation of the said letters.

3. The plaintiff in the said suit
 has claimed also a decree for Rupees
 32,33,391.08 P, alternatively an enquiry in-
 to the compensation and damages and
 decree for such sum as would be found
 due. The money part of the claim of the
 plaintiff in the plaint has been made on the
 basis of three several contracts entered
 into by and between the respondent and
 the petitioner whereby the respondent
 agreed to manufacture and supply
 railway wagons of diverse specifications on
 the terms and conditions mentioned in the
 said three contracts. The said contracts
 are contained in three several orders in
 writing bearing Nos. 61/RS(I)/954/1/258
 dated the 14th April, 1961. No. 61/RS
 (I)/954/14/283 dated the 6th February,
 1962 and No. 62/RS(I)/954/15/306 dated
 the 26th October, 1962, respectively. Each
 of the said contracts was subject to the
 terms and conditions contained in the Indian
 Railway Standard Conditions of contract
 known as A5-51 in so far as the said terms
 and conditions were not inconsistent with
 the conditions mentioned in the said con-
 tracts themselves. One of the terms or
 conditions of the said Indian Railway
 Standard Conditions of Contract provided
 as follows:

"In the event of any dispute arising
 under these conditions or in connection
 with the contract (except as to any matter
 the decision of which is specifically provid-
 ed for in these conditions) the matter in dis-
 pute would be referred to two arbitrators,
 one to be nominated by the petitioner and
 one to be nominated by the respondent or
 in the case of the said arbitrators not agree-
 ing then to an umpire to be appointed
 by the arbitrators in writing before pro-
 ceeding on the reference and the decision
 of the arbitrators or in the event of their
 not agreeing, of the said umpire, would
 be final and conclusive and the provisions
 of the Indian Arbitration Act, 1940 and
 the rules thereunder and any statutory
 modification thereof would be deemed to
 apply to and to be incorporated in the
 contracts."

4. The said arbitration clause by
 express agreement formed part of each of
 the said three several contracts.

5. In the suit the respondent has claimed various sums on account of claims in respect of Wages Escalator, Materials Escalator and Sales Tax in respect of the wagons manufactured and delivered by the respondent to the petitioner under the said three several contracts. The respondent in the plaint has pleaded that the petitioner through the Railway Board fraudulently and with the mala fide intention of gaining unfair and undue advantage and making unlawful gain induced and compelled the respondent to accept as condition for extension of due dates of delivery of the said wagons under the second contract by letters dated 17th February, 1965, and 27th February, 1965. The said conditions related to the giving up by the respondent its rights to claim additional sums on account of its claim for Wages Escalator, Material Escalator and Sales Tax in terms of the express contract between the parties.

6. Similarly it is alleged in the plaint the petitioner fraudulently and with mala fide intention of gaining unfair and undue advantage induced the respondent to accept conditions mentioned in the Railway Board's letters dated 16th February, 1965, and 18th November, 1965, for extending the due dates of delivery under the 3rd contract, by fraud, undue influence and/or coercion. Particulars of such fraud, undue influence and/or coercion have been set out in paragraph 21 of the plaint. The respondent seeks to avoid the said modification of the terms of the said contract in so far as it relates to the respondent's claim on account of Wages Escalator, Materials Escalator and Sales Tax as specified in the above mentioned letters on the aforesaid grounds of fraud, undue influence and/or coercion.

7. It appears from the affidavit-in-opposition filed by Manish Chandra Roy affirmed on 31st August, 1970, that Union of India filed a suit against the respondent being suit No. 842 of 1969 for a declaration that the respondent is holding number of wheel sets and other components for manufacturing wagons as well as 1973 Tons of Steel and a prototype wagon for and on account of the Union of India and for return of the same and also for damages suffered by the Union of India under a similar contract between the parties. Union of India has also filed another suit being suit No. 3042 of 1969 against the respondent for the recovery of Rupees 3,86,991.10 p. in respect of another contract. Both the aforesaid suits filed by the Union of India are in respect of contracts consisting similar arbitration clauses.

8. From the nature of affidavit evidence it seems to me that the claims in the suit No. 4009 of 1969 are in respect of contracts which contained valid and subsisting arbitration agreement and the subject-matter of the suit including the

plaintiff's claims that the matters are within the terms relating to claims of Wages Escalator, Materials Escalator and Sales Tax mentioned in the aforesaid letters were void and not binding upon the plaintiff are matters agreed to be referred under the arbitration clause set out in the earlier part of this judgment. The said clause is a valid and subsisting arbitration clause and binding upon the respondent as well as the petitioner who are parties to the said arbitration agreement. There is nothing on record to show that at the commencement of the suit No. 4009 of 1969 the petitioner in the instant case was not ready or willing to do everything that was necessary to be done for the conduct of the arbitration in terms of the arbitration agreement between the parties. It is apparent also that the disputes which have arisen are matters agreed to be referred under the arbitration clause mentioned above.

9. Two grounds have been urged in opposition to this application by Mr. Rudra. First, the most important dispute between the parties involved in the suit is as to whether the plaintiff was induced to agree to abandon its claims on account of Wages Escalator, Materials Escalator and Sales Tax in terms of the contract between the parties by fraud or undue influence and/or coercion perpetrated and/or exercised by the petitioner. The said issue as to fraud or undue influence and/or coercion should be decided by the Court and should not be allowed by the arbitrators to decide.

10. Secondly, Mr. Rudra contended that the suit No. 842 of 1969 and suit No. 3042 of 1969 of the Union of India on similar contracts are pending in this Court. The subject-matters of the said suits are similar and if the present suit be stayed, there will be a possibility of giving inconsistent decisions by two tribunals of competent jurisdiction, one this court and the other, the arbitrators on similar questions of fact and law. On that ground, also this suit should not be stayed.

11. Mr. Rudra referred to various decisions. I shall deal with the said decisions hereinafter.

12. The first decision mentioned by Mr. Rudra is Pramada Prasad Mukherjee v. Sagarmal Agarwalla, AIR 1952 Pat 352. In the said case it was observed that "when the suit is independent of the contract, the allegation of fraud in the plaint is enough to oust the jurisdiction of the arbitrators and stay should be refused. Even if the contract be admitted and the application arising on the breach of the contract be repudiated on the ground of fraud, stay should be refused if a prima facie case of fraud is made out". Similar was the view of Harries, C. J. in Narsingh Prasad Boobna v. Dhanraj Mills, ILR 21 Pat 544 at p. 569 = (AIR 1943 Pat 53).

13. In Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406, the Supreme Court held that where serious allegations of fraud were made against a party and the party charged with fraud desired that the matter should be tried in open court, that would be a sufficient case for the Court not to order an arbitration agreement to be filed and not to make reference. But in the instant case the party charged with fraud is the petitioner. Therefore, this case does not help Mr. Rudra.

14. In Bengal Jute Mills Co. Ltd. v. Lalchand Dugar, AIR 1963 Cal 405 it was held by a Division Bench of this Court that whether a contract containing an arbitration clause or not was denied, the defendant in a suit based on such a contract alleged fraud, collusion and conspiracy on the part of the plaintiff, the suit should not be stayed. It was laid down that it was the right of the party charged with fraud or other serious misconduct to have his character vindicated in open court. Such was the decision also of the Supreme Court in Printers (Mysore) Pvt. Ltd. v. Pothan Joseph, AIR 1960 SC 1156 (See paragraph 8 of the said judgment).

15. In Basantlal Jagatramka v. Dominion of India, AIR 1952 Cal 340, relied on by Mr. Rudra it was decided that where the whole existence of the contract was challenged on the ground of fraud an arbitrator was not a suitable tribunal to decide such a question. Thus where such an allegation is made in a suit, such suit should not be stayed. That case, in my opinion decided that where the existence or validity of the main contract containing an arbitration agreement is challenged, the arbitrators have no jurisdiction to decide the said question. The said question must be decided by a Court and the suit wherein such an issue is involved should not be stayed. That case also does not in my view help Mr. Rudra.

16. The next case relied on by Mr. Rudra is the case of Eastern Steam Navigation Co. Ltd. v. Indian Coastal Navigation Co. Ltd., 46 Cal WN 933 = (AIR 1943 Cal 238). That case decided that if a charge of fraud of misconduct is made against any of the parties to a suit and the (sic) has to make such charge a fact in issue then if that party desires that such charge should be investigated not by a domestic tribunal like arbitrators, but by a court of law in public, the suit should not be stayed.

17. The last case relied on by Mr. Rudra is the case of Bilasrai and Co. v. Tolaram Nathmall, (1948) 52 Cal WN 858 lays down that where the contract is void, on the plea of fraud or misrepresentation the Court should not stay the suit as it ousted the jurisdiction of the arbitrators. That is not the case here. In the instant

case the party charged with perpetration of fraud has applied for stay of the suit. It must be noted here that the fraud as pleaded in the plaint does not specify any person who perpetrated the fraud; Union of India, or for that matter, the Railway Board, is not a person in that sense.

18. In England now, under Section 24 (2) and (3) of the Arbitration Act, 1950, if a dispute involving a charge of fraud arises under an arbitration agreement the Court has the power to order that the agreement ceases to have effect and to refuse the stay of an action brought in breach of the agreement. In India that is not the position and we are governed by the position prevailing in England prior to the enactment of the said statutory provision. In the instant case the charge of fraud is levelled against the petitioner who however desires to have the disputes tried by the Arbitrators.

19. For the reasons stated above and on the basis of the aforesaid authorities I am unable to accept the contention of Mr. Rudra that the allegation of fraud as pleaded by the plaintiff is a sufficient cause why this suit should not be stayed. This contention of Mr. Rudra must, therefore, fail.

20. The second contention of Mr. Rudra in regard to the possibility of conflicting decisions must also fail. No particulars have been pleaded to show that the same issue of fact or law arises in different proceedings mentioned in paragraphs 37 and 54 of the said affidavit of Manish Chandra Roy. There is nothing to show that identical or even similar facts are involved in this suit being suit No. 842 of 1969 and the other suits viz. suit No. 1866 of 1969 and No. 3042 of 1969. Thus in my opinion the ratio decidendi in Taunton-Collins v. Cromie, (1964) 2 All ER 332 does not apply to the facts and circumstances of the instant case. Thus both the contentions of Mr. Rudra fail.

21. This application must succeed. There will be an order in terms of prayer (a) to the petition.

22. The costs of the application must abide by the result of the arbitration proceedings.

Application allowed.

AIR 1972 CALCUTTA 283 (V 59 C 50)
HAZRA, J.

Sisir Kumar Chandra and another,
Petitioners v. Sm. Monorama Chandra and
others, Respondents.

Suit No. 183 of 1971, D/ 7-1-1972.

(A) Succession Act (1925), S. 283 —
Probate proceedings — Probate Court cannot pass decree in terms of private agreement between parties.

BP/CP/B46/72/SNV

A Court of probate is a Court of conscience which is not to be influenced by private arrangements of the parties. Either it grants probate to a Will or it rejects such grant. For such a Court there is no middle path for a happy compromise. The rule of law is that there can be no probate by consent. Either it is a grant or refusal. The Court has to be satisfied in each case whether the Will proposed is truly the Will of a capable testator or not. It is not concerned with any other arrangement. There is no such thing as conditional probate or an amended probate. But nevertheless, the Court has formulated a practice, consistently followed, almost without exception, of making the terms of such agreement not a rule of the Court but a record on the file of the Court. That, however, does not mean that these terms become a part of the grant or refusal of the probate or executable as such. But it only means this that the records of the Court will show that the interested parties had arranged to dispose of the property according to such agreement when it reaches their hands, but then such agreement does not thereby become executable as a decree of Court but can only be enforced by independent proceeding or suit in the ordinary way as an agreement. AIR 1961 Cal 359 and (1943) 48 Cal WN 294, Followed; AIR 1940 Cal 236 and AIR 1944 Cal 385, Distinguished. (Paras 16, 21, 23)

(B) Specific Relief Act (1963), S. 34 — Relief of declaratory decree, when available.

A judgment, order, decree can be challenged as nullity by proving fraud or collusion on the part of adverse party. S. 34 is not exhaustive of the cases in which a declaratory decree may be made and the Court has power to grant such a decree independently of the requirement of the section. (Paras 26, 27, 28)

(C) Specific Relief Act (1963), S. 34 — Declaratory suit — Application for injunction — Maintainability.

Discretion to grant injunction is not affected by delay where the Court granting decree had no jurisdiction to pass decree. (Para 30)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 823 (V 56) =

1969-3 SCR 92, Official Trustee, W. Bengal v. Sachindra Nath Chatterjee 24

(1961) AIR 1961 Cal 359 (V 48), A. E. G. Carapiet v. A. Y. Derderian 15, 22

(1954) AIR 1954 SC 340 (V 41) = 1955 SCR 117, Kiron Singh v. Chaman Paswan 30

(1948) Testamentary Suit No. 10 of 1946, D/- 7-9-1948 (Cal). 26

(1944) AIR 1944 Cal 385 (V 31) = 48 Cal WN 751, Kailash Chandra v. Nanda Kumar 19, 20

(1943) 48 Cal WN 294, Jagadish Chakravarty v. Upendra Chandra Chakravarty 22

(1940) AIR 1940 Cal 236 (V 27) = ILR (1940) 1 Cal 14, Rai Bahadur Pannalal v. Lala Hansraj Gupta 19, 20

(1935) AIR 1935 PC 203 (V 22) = 63 Ind App 61 = 40 Cal WN 185, Secy. of State for India in Council v. Smt. Parijat Debi 22

(1910) 12 Cal LJ 91 = 6 Ind Cas 913, Sarada Kanta Das v. Gobinda Mohan Das 22

(1907) 9 Cal LJ 19 = 1 Ind Cas 573, Kamal Kumari Devi v. Narendra Nath Mukherjee 22

(1904) ILR 31 Cal 357 = 8 Cal WN 197, Monmohini Guha v. Banga Chandra Das 22

M. B. Sarkar, for Petitioners; P. K. Mullick, for Respondents.

ORDER:— Two brothers Sisir Kumar Chandra and Manick Lal Chandra have made this application for injunction restraining their step-mother Sm. Monorama Chandra from selling premises No. 21 Dr. Jagabandhu Lane Calcutta in execution of the decree dated September 7, 1946 passed by this court in Testamentary Suit No. 10 of 1946 (Shyamlal Malakar v. Sm. Monorama Chandra). The petitioners are praying that the order dated March 11, 1969 for sale of premises No. 21 Dr. Jagabandhu Lane, obtained by Sm. Monorama Chandra in execution of the decree dated September 7, 1946 be stayed pending the hearing of the suit.

2. The suit in which this interlocutory application has been made was filed by the petitioners on April 29, 1971 against Sm. Monorama Chandra and others, inter alia, for a declaration that the consent decree dated September 7, 1948 passed in Testamentary Suit No. 10 of 1946 by this Court is a nullity and not binding upon the petitioners and the same be set aside or cancelled, stay of execution of the decree, injunction receiver, costs such further or other reliefs.

3. In order to decide the question whether I shall in the exercise of my discretion grant temporary injunction, pending the hearing of this suit the circumstances under which this suit has been instituted and this application has been made have to be appreciated.

4. One Kristo Chandra, a Hindu governed by Dayabhaga School of Hindu Law died on May 1, 1946. Before his death he executed a Will on 2nd Baisakh 1863 B. S. corresponding to April 15, 1946. He married thrice. His first wife Matibala died long ago leaving a daughter Parul Bala who is married. He married second time Sm. Elokeshi Bala and had three sons by the second wife, viz. Raj Kumar, Sisir Kumar and Manick Lal. His second wife died. He married third time. His third wife is Sm. Monorama Chandra, the

defendant No. 1 in this suit. He had a daughter Sm. Arati Bala by the third wife

Sm. Monorama Chandra. The relationship of the parties will appear from the geneological table set out hereunder:—

Kristo Lal Chandra (D. 1.5.46)

Matl Bala
1st wife (D)

Elokeshi Bala
2nd wife (D)

Monorama
3rd wife (Df. 1.)

Parul Bala
(married)

Arati Bala

Raj Kumar
(Dft. No. 3.)

Sisir Kumar
(Pl. No. 1.)

Manick Lal
(Pl. No. 2.)

5. By and under his Will dated April 15, 1946 the testator Krishna Lal Chandra appointed his friend Shyamlal Malakar, as the executor and his third wife Sm. Monorama as the executrix.

6. I am quoting hereunder the relevant provisions of the Will:

"In all I have got five children. By my first wife there is Sm. Parul Bala Dassi who is married. By my second wife I have got three sons: 1st. Raj Kumar Chandra, 2nd Sisir Kumar Chandra, 3rd Manick Lal Chandra. After my death the aforesaid three sons of mine shall get an equal share, i.e., a third share each in all my movable and immovable properties with rights of transfer (like sale, gift etc.) and shall go on holding and enjoying the same down to their sons, sons' sons and heirs in succession and shall be competent to divide their respective shares amicably or with the help of proper court.

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"By my third wife my daughter's name is Arati Bala Chandra. When she reaches the age of marriage my three sons shall contribute equally the amount of Rs. 200/- out of the income derived from my estate.

"My third wife Srimati Monorama Chandra shall get her maintenance and clothings if she lives in my house. On no account shall my sons be entitled to stop her maintenance and clothes. If however my wife has differences of opinion with my sons and if she wishes to live elsewhere, then she shall be entitled to an allowance of Rs. 20/- per month. If she lives with my family then my sons shall bear the expenses of maintaining and clothing her equally but if she takes to bad way then she will get nothing of my property. If my wife treads the path of immorality then she shall get nothing.

"I make my wife Sm. Monorama Chandra and Sri Shyamlal Malakar the guardian of my three sons and one daughter. One will not be entitled to act when the other dissents. As long as my son Mr. Raj Kumar Chandra remains a minor, I appoint these two persons the executrix and executor of all my movable and immovable properties till my son attains majority, but after my son becomes a

major no one shall continue to be the executor."

7. The will also provided that no executor shall be competent to do anything with regard to these properties until his sons attain majority. On attaining majority his sons shall take possession of their shares. With the consensus of the three brothers they can do anything they like. The properties of the testator Krishna Lal Chandra consisted of his dwelling house at No. 21 Dr. Jagabandhu Lane, Calcutta and premises No. 27 Gopi Bose Lane and also several shares in Calcutta Tramways Company, which the testator valued at Rs. 30,000/-.

8. After the death of the testator Shyamlal Malakar, one of the executors of the Will applied in this Court for probate of the Will of Krishna Lal Chandra. The executrix, Sm. Monorama Chandra however, contested the application for probate on the ground, inter alia, that the testator lost the balance of his mind at the time of the making of the Will. The said application for probate was set down as a contentious cause and marked as Testamentary Suit No. 10 of 1946 with Shyamlal Malakar as the plaintiff and Sm. Monorama Chandra as the defendant.

9. The said Testamentary Suit was called on for hearing on July 28, 1948 before N. C. Chatterjee J. The suit was part-heard and during the pendency of the suit three sons of the testator, namely, plaintiffs and defendant No. 3 Raj Kumar were added as defendants presumably for the purpose of settling the suit. The sons of the testator were all minors. Mr. Dhananjay Roy a Solicitor of this Court was appointed Guardian-ad-litem of the three sons. Sm. Arati Bala the daughter of the defendant Sm. Monorama was also added as a party and Sm. Monorama was appointed as her guardian-ad-litem.

10. The suit was dismissed on August 6, 1948. On September 4, 1948 the suit was mentioned for fixing a date for the purpose of proving the Will and for putting the terms of settlement.

11. Thereafter on September 7, 1948, the learned counsel appearing for the executor informed the Court that the suit has been settled between the parties

and the terms of settlement have been signed by the parties. Certain witnesses were called but there was no cross examination. Certain terms of settlement were filed in Court. Shyamal Malakar gave an undertaking to Court that he will administer the estate in accordance with the terms of settlement. Thereafter on September 7, 1948 the Court revoked the decree dated August 8, 1948 dismissing the suit and granted probate in terms of settlement put in. Leave was granted to the guardian-ad-litem to enter into compromise and it was certified for benefit of minors. Thus a consent decree was passed in the Testamentary suit. The minutes of the Court dated September 7, 1948 are relevant for the purpose of this application. I am setting out hereunder the minutes of the Court:

"Tuesday the 7th September 1948.

Before

The Hon'ble Mr. Justice Chatterjee (Court sits at 10.40 a.m.)

Mr. B. K. Ghose — appears for the executor.

Mr. S. K. Basu (with Mr. A. K. Bhat-tacharjee) — appears for the defendant.

Mr. B. N. Roy Choudhury — appears for the minors.

Mr. Ghose informs the Court that the suit has been settled between the parties and the T/S have been signed by the parties to propose to prove the will before the T/S are put in.

Calls Dunilal Dawn and examines him in chief.

Shown and tendered original Will annexed to the petition. (Ex. "A")

No cross-examination.

Calls Shamlal Malakar and examines him in chief to prove that he has signed the T/S

No cross-examination.

The Court — Shamlal Malakar gives an undertaking to the Court that he will administer the estate in accordance with the Terms of Settlement he has signed.

Mr. Basu calls Monorama Chunder and examines her in chief regarding her consent to the T/S.

No cross-examination.

The Court—The decree dated 8-8-48 dismissing this suit is revoked and set aside. Probate granted in terms of the Terms of Settlement put in. Leave granted to the G/A to enter into compromise. Certified to her for the benefit of the minors. Parties are directed to act in accordance with the terms of settlement put in."

The consent decree dated September 7, 1948 as drawn up is as follows:

"This cause coming on this day for final disposal before the Honourable Nirmal Chandra Chatterjee, one of the Judges of this Court in the presence of the advocates for the parties and upon hearing the

evidence given in this suit on behalf of the parties and this court being of opinion that it would be for the benefit of the infant defendant that the following decree should be made and granting leave to the guardian-ad-litem of the infant defendant to compromise the suit upon the terms of settlement set forth in the schedule hereto annexed and marked "A". And the adult parties and the guardian-ad-litem of the infant defendant having agreed to the said terms of settlement, it is declared with the consent of the adult parties and of the guardian-ad-litem of the infant defendant by their respective advocates that the said terms ought to be carried out and the same are ordered and decreed accordingly. It is ordered that the caveat entered by the defendant in the goods of Kristo Lal Chunder in the pleadings in this suit mentioned (hereinafter referred to as the said testator) be and the same is hereby discharged. And it is further declared with the like consent that the said testator while living and of sound mind memory and understanding rightly and duly made as and for his last Will and Testament the writing in the Bengali Language and character and dated the second day of Baisakh 1353 Bengal Style corresponding to fifteenth day of April, 1946 exhibited and pleaded in this suit and did, will, give, bequeath, devise, dispose and do all things as therein contained. And it is further ordered and decreed with the like consent that the probate of the last Will and testament of the said testator with a copy thereof annexed be granted and issued to the plaintiff as the sole executor therein named limited to the province of West Bengal subject to and as modified by the said Terms of Settlement."

12. The relevant provisions of terms of Settlement which was filed in Court are as follows:

"1. Probate granted of the Will of Krishnalal Chunder. The estate will be administered as follows:

2. Mr. T. K. Ghosh is appointed valuer to value the premises No. (a) 21 Dr. Jagabandhu Lane (b) 20 Ordinary shares in Calcutta Tramways Co. Ltd., and (c) 5 Pref. shares in the said company (d) Gold Necklace Weighing 14½ tolas. He will be paid Rs. 300/- altogether. Sm. Monorama Chunder will be entitled to one fourth of the above properties on the basis of the valuation made by the Surveyor and of the balance sale proceeds of No. 27 Gopi Bose Lane (after meeting the expenses as hereinafter mentioned) in full payment of the right of maintenance and residence on herself and her daughter Arati. She will get the said one-fourth share absolutely.

3. Mr. P. Mullick, Solicitor for the plaintiff do sell the premises No. 27 Gopi Bose

Lane, Calcutta by public auction or private treaty at a price not below Rupees 21,000/- and out of the sale proceeds thereof pay:

(a) In the first instance the costs of sale and of Registration of this decree and costs of the parties of the suit including pending application, notwithstanding any order for costs already made. The costs of the defendant Sm. Monorama Chunder, and of the Guardian-ad-litem are assessed at Rs. 3,000/- and Rs. 250/- respectively and the assessed costs of Sm. Monorama Chunder to be paid to her attorney Mr. B. K. Mukherjee. Costs of Mr. P. Mallik be taxed as between attorney and client.

(b) Costs of redeeming the said necklace.

(c) One-fourth of the total value arrived at by the surveyor in respect of the items of the property mentioned in cls. (2a) (b), (c) and (d) and of the balance of the sale proceeds of No. 27, Gopi Bose Lane to Sm. Monorama Chunder. Sm. Monorama Chunder and Sm. Arati Debi do vacate the premises No. 21, Dr. Jagabandhu Lane upon such payment.

(d) The balance of the sale proceeds, if any, of No. 27, Gopi Bose Lane will belong to the three minors, Raj Kumar Chunder, Sisir Kumar Chunder and Manik Lal Chunder absolutely in terms of the Will.

(e) Premises No. 21, Doctor Jagabandhu Lane are charged with the payment of sum of Rs. 5000/- for the marriage expenses of Sm. Arati Debi daughter of the testator and of Sm. Monorama Chunder and also the deficit, if any, payable to Monorama Chunder in case the sale proceeds are insufficient to pay the amount payable to her under these terms. Three months before marriage of the said Sm. Arati the said sum will be paid by the Executor or the three minor sons of the testator to Sm. Arati herself. In default of such payments the official receiver who is hereby appointed receiver will take possession of the said premises and sell the same and out of the sale proceeds pay the costs of the sale and his commission, and pay the deficit, if any, payable to Sm. Monorama Chunder as hereinbefore stated and Rs. 5000/- to Sm. Monorama Chunder or in her absence the guardian of Sm. Arati. The said premises subject to the said charges as also the properties mentioned in 2 (b), (c) and (d) shall belong to the three sons of the testator, absolutely in terms of the Will.

4. The Official Receiver who was appointed Administrator-pendente lite under order dated November 21, 1946 is hereby discharged and he do deliver over possession of the properties to the executor. He do pass his accounts and do pay half the money in his hand to Mr. P. Mullick, Solicitor, and the balance half to Mr. B. K. Mukherjee towards part-payment of their

costs as mentioned in clause 4 (a) aforesaid.

5. Liberty to apply."

13. On February 5, 1969 Arati was married to one Sri Anil Kumar Roy. The defendant No. 1 Sm. Monorama Chandra applied for execution of the said consent decree for realisation of Rupees 5000/- by sale of premises No. 21, Dr. Jagabandhu Lane, Calcutta. On March 11, 1969 Sm. Monorama Chandra obtained an order for sale of premises No. 21, Dr. Jagabandhu Lane, Calcutta from this Court. From the affidavit of Sm. Monorama affirmed on 14th July 1971, it appears that one Shri Bhupendra Kumar Dey, Supreme Court Advocate wrote a letter on February 17, 1969 that he had instructions to oppose the application on behalf of his clients Raj Kumar Chandra, Sisir Kumar Chandra and Manick Lal Chandra. Directions were given by this Court for filing of affidavit-in-opposition to the application for sale of premises No. 21, Dr. Jagabandhu Lane, Calcutta by Sm. Monorama Chandra but Sri Bhupendra Nath Dey did not appear or file any affidavit or oppose the application and the said order for sale was passed ex parte.

14. The case of the petitioners in this application, is that on August 12, 1969 the petitioners came to know the consent decree dated September 7, 1948 on searches made after Sm. Monorama threatened to sell premises No. 21, Dr. Jagabandhu Lane. The petitioners stated that they were minors at the time when the consent decree was passed. The petitioner Sisir Kumar attained majority on or about November 28, 1956 and the petitioner Manicklal attained majority on or about August 16, 1959. They say that premises No. 21 Dr. Jagabandhu Lane is their residential house and if the said premises is sold in execution of the said consent decree which is impugned in this suit the petitioners would be dispossessed from their family dwelling house and the purpose for which the present suit has been instituted will be defeated. According to the petitioner unless an order for injunction restraining Sm. Monorama Chandra from selling the premises No. 21 Dr. Jagabandhu Lane is passed, the petitioners will suffer irreparable loss and injury and the suit would become infructuous.

15. Mr. M. B. Sarkar, the learned Advocate appearing for the petitioners relied on the judgment of the Court of appeal presided over by P. B. Mukharji, J. (as he then was) and H. K. Bose J. reported in AIR 1961 Cal 359 (363) (A. E. G. Carapiet v. A. Y. Derderian) and submitted that the consent decree as passed on September 7, 1948 is a nullity because a Court of Probate being a Court of conscience cannot grant probate by consent. He states that the terms of settlement may be

annexed to the records of the probate proceedings but no decree could be passed on the terms of settlement. To enforce the agreement or the right, if any, under the agreement other independent proceedings are necessary. The testamentary suit cannot be decreed in terms of settlement filed in Court nor such a decree could be executed.

16. He placed before me the following portions of the said judgment which is set out hereunder:

"A point of probate practice of great importance, however, remains to be disposed of. The learned counsel for the parties appear to have agreed to certain arrangements for disposal of the estate of the testator. These terms, which are described as terms of settlement, are supposed to be signed by all the interested persons. We are asked to keep these terms on the records of this Court. A Court of probate is said to be a Court of conscience which is not to be influenced by private arrangements of the parties. Either it grants probate to a Will or it rejects such grant. For such a Court, it is said, there is no middle path for a happy compromise. The rule of law is stated to be that there can be no probate by consent. Either it is a grant or refusal. The Court has to be satisfied in each case whether the Will proposed is truly the Will of a capable testator or not. It is not concerned with any other arrangement. It has been said over and over again that there is no such thing as conditional probate or an amended probate. It is either all or nothing. That seems to be sensible enough law.

"The Court, however, has a way of softening the austerity and rigour of this procedure. The practice of the Court has discovered on such way in this regard. In England, such terms of settlement are allowed to be filed and are made what is said to be a "rule of the Court". See In the Estate of Cook (1960) 1 All ER 689 where the Court pronounced for the Will in solemn form and the terms of compromise were made a Rule of Court. The testamentary rules and probate practice in this Court do not seem to indicate that there is such a procedure available here for making such terms of settlement a rule of the Court. But nevertheless, it has formulated a practice, consistently followed, almost without exception, of making the terms of it, not a rule of the Court but a record on the file of the Court. That does not mean that these terms become a part of the grant or refusal of the probate or executable as such. But it only means this that the records of the Court will show that the interested parties had arranged to dispose of the property according to such agreement when it reaches their hands, but then such agreement does not thereby become executable as a decree of Court but can only be enforced by independent pro-

ceeding or suit in the ordinary way as an agreement. The procedure as adopted may be justified rationally by suggesting that this gives a certain amount of authenticity and solemnity to the agreement. In practical effect, the procedure helps nobody because the filing of the agreement does not help in the execution nor does it conclude any possible question on the validity or enforceability of such agreement. The Court only allows to be filed with its records a written declaration by the parties themselves that the parties have between themselves come to a certain arrangement and nothing more. But this does not mean that the Court makes a declaratory decree in terms of the agreement filed. It does nothing of the kind. The Court expresses no opinion whatever on such agreement. The Court's task is over by its judgment in refusing or as in the case by granting the probate independently of whatever agreement the parties may have arrived at."

17. Relying on this decision Mr. Sarkar submitted that the consent decree dated September 7, 1948 granting probate was without jurisdiction and a nullity. According to him his clients who were minors did not and/or could not make such an agreement. He quoted the affidavit of Shri Dhananjay Roy affirmed on July 12, 1971, where it was stated that Dhananjay Roy did not take part in the settlement. He submitted that his clients are challenging the consent decree as nullity. His clients are also challenging the consent decree on the ground of fraud. He further submitted that his clients are very much affected by the decree and the order for sale. They were minors. They are illiterate fishermen. Their father bequeathed the residential house to them by a Will. But their step mother is now seeking to sell the property for payment of Rs. 5,000/- for her daughter's marriage under the terms of the said consent decree. His case further is that the petitioners never gave any instructions to the Supreme Court Advocate and in any event the said Bhupendra Kumar Dey did not appear on behalf of his clients or point out before the executing Court that the decree was a nullity and not executable.

18. Mr. P. K. Mullick, the learned Counsel appearing for Sm. Monorama Chandra strenuously contested this application. The first point taken by Mr. Mullick is that this suit is not maintainable and does not lie. In any event, he submitted that the suit is barred by limitation.

19. In this connection Mr. Mullick relied on two cases, namely, reported in AIR 1940 Cal 236 (Rai Bahadur Pannalal v. Lala Hansraj Gupta) and AIR 1944 Cal 385 (Kailash Chandra v. Nanda Kumar), and submitted that a suit for revocation of

a grant of probate does not lie and the proper remedy would be to file an application under Section 263 of the Indian Succession Act. Mr. Mullick invited my attention to Section 263 of the Indian Succession Act and illustration (1) of Sec. 263 and submitted that the grant of probate may be revoked or annulled if the Court by which the grant was made had no jurisdiction. Mr. Mullick further submitted that Manick Lal attained majority in 1959 but this suit had been filed on April 30, 1971 and therefore this suit is barred by the law of limitation. Mr. Mullick further submitted that even if the suit lies there is no cause of action in the instant suit. Further there was great delay in making this application. As such no order should be passed on this application.

20. In my view the two cases relied on by Mr. P. K. Mullick which are in AIR 1940 Cal 236 and in AIR 1944 Cal 385, do not apply under the facts and circumstances of the instant case. The ratio decidendi of the aforesaid two cases are that the judgment of a Court of probate is a judgment in rem and binds all the world. A judgment in a Civil suit is a judgment in personam and is operative only between the parties to the suit. A judgment in rem cannot be revoked or set aside by a judgment which is only conclusive between the parties. Therefore the proper remedy of the party who wants revocation of a grant of probate is to apply to the probate court under Section 263 of the Indian Succession Act, and not to file a Civil Suit. To revoke the grant of probate the exclusive remedy should be an application under Section 263 of the Indian Succession Act.

21. But what do I find in the instant case? I find that though some evidence was given but probate was granted by consent of the parties. It appears from the decree that the testamentary capacity of the testator was also decided by consent. Certain terms of settlement were filed in Court and a decree was passed in terms of settlement. It was not simply a decree granting a probate but a composite decree by which probate had been granted by consent and also a decree by consent on the terms of settlement filed in the Probate Court. It is well established that probate decides merely on the factum of the Will. The agreement arrived at between the parties is a different matter altogether. This agreement can be kept in the records of Court and the parties can take such steps as they think best by independent proceedings on the agreement. But in the instant case there was a decree in terms of the settlement filed in Court and grant of probate by consent.

22. The whole question is whether this can be done? It seems to me that the attention of the Court was not drawn

to the case reported in (1943) 48 Cal WN 294 (Jagadish Chakravarty v. Upendra Chandra Chakravarty) when the consent decree dated September 7, 1948 was passed. It was held by this Court in (1943) 48 Cal WN 294 at p 299 as follows:

"That a Court exercising probate jurisdiction cannot grant or refuse probate of a Will by consent and without taking evidence is settled law. When a Will is actually put before such a Court, the parties to the proceedings cannot say to the Court, that the probate be granted without proof of the due execution of the Will or probate refused without any evidence being led. This principle is well established and has for its basis the fact that a probate or an order refusing probate operates as a judgment in rem. Monmohini Guha v. Banga Chandra Das, (1904) ILR 31 Cal 357 and Sarada Kanta Das v. Gobinda Mohan Das, (1910) 12 Cal LJ 91. When a Will is put before the probate Court for proof, the parties before the Court can, however, enter into an agreement which changes the terms of the Will and say that probate be granted. The effect of such an agreement will be the withdrawal of the objections to the proof of the Will in consideration of the division of the estate in the manner agreed upon. In such a case the probate Court will have to take evidence about the Will and if it comes to the conclusion that the Will is valid must grant probate of the Will, as it stands and unmodified by the terms of the agreement but should make the agreement arrived at between the parties an annexure to the decree. The parties agreeing would be bound to regulate their rights inter se according to that agreement, and if any of them refuse, the others will be entitled to bring a suit against the party in breach, Kamal Kumari Devi v. Narendra Nath Mukherjee, (1907) 9 Cal LJ 19 or may compel the executor to distribute the estate in accordance with that agreement by filing an application in the probate Court under Section 302 of the Indian Succession Act, in cases in which that section applies. Secy. of State for India in Council v. Smt. Parijat Debi, (1935) 63 Ind App 61 = 40 Cal WN 185 = (AIR 1935 PC 203) The principle of law laid down in (1943) 48 Cal WN 294 (299) was accepted as correct by the more recent division Bench judgment of this Court in AIR 1961 Cal 359 (Carapiet's case).

23. In view of the above principles of law and procedure as to probate practice, it seems to me, that by passing the consent decree dated September 7, 1948, the Court of probate has exercised a jurisdiction which it could not do.

24. In course of the argument I drew the attention of the learned Advocates appearing for the parties to a recent case of the Supreme Court reported in

AIR 1969 SC 823 (Official Trustee, West Bengal v. Sachindra Nath Chatterjee). In the Supreme Court case, it was held by their Lordships that "before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties. The Supreme Court in this case accepted the principle that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination.

25. Thus one must be careful to distinguish between exercise of jurisdiction from existence of jurisdiction. Even if there is existence of jurisdiction the question may still arise whether the Court has exercised the jurisdiction in an illegal or irregular manner. Questions may arise wherefrom the Court got the power or authority to pass the decree or order. Certain non-compliance of the law and/or procedure may not be mere irregularity but may amount to illegality and thus destroy the effect or validity of the proceedings or the decree or order passed by it.

26. In my view these matters would arise for consideration in the instant suit filed by the petitioners. This suit filed by the petitioners is not a suit for declaration that the grant of probate be revoked but a suit for declaration that the consent decree dated September 7, 1948 passed in Testamentary Suit No. 10 of 1948 by this Hon'ble Court is a nullity and not binding upon plaintiffs. In the suit the petitioner also prayed for a declaration that the consent decree be set aside and cancelled on the ground of fraud. The suit has been filed under Section 34 of the Specific Relief Act 1963. In any event Section 34 of the Specific Relief Act, 1963 is not exhaustive of the cases in which a declaratory decree may be made and the Court has power to grant such a decree independently of the requirement of the section.

27. Any party to a suit or other proceedings may show that any judgment, order or decree which was proved by the adverse party was delivered by a Court not competent to deliver it. Any party to a judgment or decree may avoid a judgment or decree by proving fraud or collusion by the adverse party. In other words, a decree can be challenged as nullity on the above grounds. This can be done by a separate suit.

28. Therefore I think this suit is, *prima facie*, maintainable.

29. With regard to the point of limitation raised by Mr. Mullick in my view there is no question of limitation because in this suit the consent decree has been challenged as nullity and void. There is also the question of fraud. In the plaint it has been pleaded that the petitioners came to know the consent decree on August 12, 1969. This is a question of fact to be tried in the suit.

30. The other point raised by Mr. Mullick as to delay in making this application will not affect the exercise of my discretion to grant an injunction in the instant case because from the facts placed before me, it appears that the probate Court was not competent to pass the consent decree. If all these points which are now raised before me were placed before the executing Court, there may not have been any order for sale at all. It has been held by the Supreme Court that even at the execution stage or at any stage the Court can take into consideration the point that the Court which passed the decree which is sought to be executed was not competent to pass it. (See AIR 1954 SC 340 at p 342, Kiron Singh v. Chaman Paswan). Therefore the question of delay in this case is not of much importance.

31. In the premises, I think that there is sufficient *prima facie* case to go to trial and all the matters raised by the petitioners would be finally decided in the suit.

32. During the pendency of the suit I cannot allow the residential house of the petitioners to be sold in execution of the consent decree passed by the probate Court. The daughter of Sm. Monorama Chandra has already been married. The property if sold would cause irreparable loss and injury to the petitioners because it is their residential house and if it is sold they would be turned out from their residential house.

33. In view of the above matter there should be an order for injunction restraining the respondent Sm. Monorama Chandra from selling the said premises No. 21, Dr. Jagabandhu Lane, Calcutta in execution of the decree dated September 7, 1948 pending the disposal of the suit.

34. Accordingly there will be an order in terms of prayers (a) (c) and (d) of the petition.

Sm. Monorama Chandra shall pay the costs of this application to the petitioners. The other parties except respondent No. 2D. Roy Solicitor shall pay and bear their own costs. The cost of respondent No. 2D. Roy will abide by the result of the suit.

Order accordingly.

AIR 1972 CALCUTTA 291 (V 59 C 51)

S. C. GHOSE, J.

Benarasi Prosad Sharma and others,
Petitioner v. Bhagwan Choudhury and
others, Respondents.

Matter No. 400 of 1971, D/- 7-1-
1972.

Civil P. C. (1908), S. 24 — Transfer
of suit — Grounds. (Para 11)

Where a party to a suit participated for quite a period in the proceeding and obtained benefit of orders of adjournment, condonation of delay in filing written statement as well as setting aside *ex parte* decree, the Court refused to transfer the suit to another court on ground that identical questions are involved in two suits before different courts. (Para 11)

ORDER:— On or about December 19, 1968, a suit was filed in this Court by the respondent, Bhagwan Choudhury, against the petitioner, Smt. Fulla Devi Sharma and Basdeo Prosad Sharma, as partners of a firm Shree Ganesh Electric Works as well as the said Shree Ganesh Electric Works *inter alia* for the specific performance for an alleged agreement entered into by the defendants partners of the said firm, to sell the said firm to the respondent at and for the sum of Rs. 40,000/-. In the alternative the respondent claimed in the same suit refund of the sum of Rs. 10,000/- being earnest and/or consideration paid under the said contract for sale of the said firm together with interest at 12% per annum and damages and other reliefs. The said suit has been numbered as suit No. 3243 of 1968 (Bhagwan Choudhury v. Shree Ganesh Electric Works & Ors.). The petitioner duly filed his written statement denying the contract for sale of the said business but admitting the receipt of the sum of Rs. 10,000/- as and by way of temporary accommodation.

2. The respondent in March, 1969, filed a Money Suit being Money Suit No. 123 of 1969 in the City Civil Court for the recovery of Rs. 5,200/- alleged to have been advanced to the petitioner by the respondent. According to the petitioner, the said sum of Rs. 5,200/- was a part of the aforesaid sum of Rs. 10,000/- paid as and by way of temporary accommodation. The petitioner duly filed his written statement in the said Money Suit No. 123 of 1969 in the City Civil Court on or about 18th July, 1969, after the time to file written statement had expired and after obtaining an order from the City Civil Court condoning the delay in filing written statement. In the written statement the petitioner alleged that the said sum of Rs. 5,200/- formed part of the aforesaid sum of Rs. 10,000/-.

3. On or about 18th September, 1969, the petitioner's application for stay

of the said Money Suit No. 123 of 1969 under Section 10 of the Code of Civil Procedure in the City Civil Court was dismissed.

4. On the 11th September, 1970, hearing of the suit was adjourned by the City Civil Court at the instance of the petitioner until 12th November, 1970, and then again at the instance of the petitioner until 16th December, 1970. On 16th December, 1970, the hearing was adjourned until 29th January, 1971. On 29th January, 1971, the petitioner again applied for adjournment of the suit. The said application was dismissed and the suit was heard *ex parte* and decreed on 30th January, 1971.

5. On 1st March, 1971, the petitioner applied for setting aside of the *ex parte* decree under Order 9, Rule 13 of the Code of Civil Procedure. On the 5th June, 1971, the *ex parte* decree dated 30th January, 1971, was set aside and the suit was directed to be heard on 18th of June, 1971 when it was adjourned as the Learned Judge was presiding over a Sessions trial. The suit again appeared for hearing on the peremptory list on 21st July, 1971 when it was adjourned to 17th August, 1971 at the petitioner's instance. On the 17th August, 1971, it was again adjourned until 10th September, 1971, at the instance of the petitioner.

6. On the 9th September, 1971, this application was filed by the petitioner for transfer of the said Money Suit No. 123 of 1969 (Bhagwan Chowdhury v. Benarasi Prosad Sharma) pending in the City Civil Court, Calcutta to this Court for disposal thereof.

7. It is apparent from the records that the main issue involved in the said suit in the City Civil Court i. e. as to whether the payment of the said two several sums of Rs. 1000/- and Rs. 4,200/- aggregating Rs. 5,200/- formed part of the aforesaid total sum of Rs. 10,000/- being the subject-matter of the High Court Suit No. 3243 of 1968.

8. The ground for transfer of the said suit, besides the aforesaid, is stated to be the fact that the Trial Judge of the City Civil Court has dealt harshly and without discretion and that the petitioner would not get a fair trial in the City Civil Court. Except the bald allegation no particular has been furnished to corroborate or prove the aforesaid allegation that the petitioner will not get a fair trial in the City Civil Court. I am also unable to hold that a *prima facie* case has been made by the petitioner that the respondent instituted the said Money Suit No. 123 of 1969 in the City Civil Court *mala fide* or that the said suit is an abuse of the process of the Court.

9. It is true that if identical facts or issues are involved in two separate suits pending in two different tribunals of com-

petent jurisdiction, one of them may be stayed or removed from one tribunal to the other wherein the other suit is pending in order to prevent possibility of conflicting decision on identical facts or issues by two different tribunals of competent jurisdiction. In the instant case in my opinion the Money Suit No. 123 of 1969 pending in the City Civil Court should not be transferred to this Court on the aforesaid ground of possibility of conflicting decisions by the two Courts for the reasons stated hereinafter. The said ground has not been pleaded even specifically in the instant petition.

10. From the facts stated hereinabove it is clear that the petitioner participated in the said suit, filed an application under Section 10 of the Code of Civil Procedure in the said suit for stay of the said suit and took the chance of having the said suit stayed by taking proceedings in the said suit itself. Moreover, the petitioner applied for condonation of delay in filing his written statement and obtained an order from the said Court condoning such delay and filed his written statement in the said suit. Between 11th September, 1970, and 29th January, 1971, the petitioner from time to time obtained adjournment of the hearing of the said suit in the City Civil Court. Then again, when the said suit was heard and decreed ex parte on 30th of January, 1971, as stated earlier, the petitioner applied to have the said decree set aside in the said suit itself. The petitioner obtained the order in the said suit setting aside the said ex parte decree and then got the said suit adjourned from time to time from the beginning of June, 1971 until 10th September, 1971.

11. For the aforesaid reasons and specially in view of the fact that the petitioner for more than one and half years took part in different proceedings in the said suit in the City Civil Court and obtained benefit of orders of adjournment, condonation of delay in filing written statement as well as setting aside of the said ex parte decree made in the said suit by the said court, no relief should be granted to the petitioner as asked for.

12. For the reasons aforesaid in my opinion it would not be in the interest of justice to have the said suit removed now from the City Civil Court to this Court.

13. In the premises this application must fail and is dismissed with costs.

Petition dismissed.

AIR 1972 CALCUTTA 292 (V 59 C 52)
GUPTA AND AMIYA KUMAR
MOOKERJI, JJ.

Sk. Aslam and others, Appellants v.
Union of India, Respondent.

A. F. O. D. No. 471 of 1961, D/-
25-8-1971.

Requisitioning and Acquisition of
Immovable Property Act (1952), S. 8 (3)
(b) — Acquisition of land — Compensation
to be determined.

Where acquisition is made under the
Act which is passed in 1952 before the
4th amendment to the Constitution the
value of the acquired land should be assessed
as on the date of acquisition under
S. 8 (3) (a) and not under clause (b) which
was declared ultra vires. (X-Ref.— S. 8
(3) (a).) AIR 1968 SC 377 and AIR 1954
SC 170 and AIR 1969 SC 634, Rel. on.

(Paras 2, 4)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 634 (V 56) =

1969-3 SCR 341, State of Gujarat

v. Shantilal Mangaldas 4

(1968) AIR 1968 SC 377 (V 55) =

1968-1 SCR 463, Union of India

v. Kamlabai Harjivandas Parekh 2, 4

(1954) AIR 1954 SC 170 (V 41) =

1954 SCR 558, State of West

Bengal v. Mrs. Bela Banerjee 4

Amarendra Nath Gupta, Durgesh Prasad Das, Purnendra Banerjee and Rathindra Nath De, for Appellants; Homendra Chandra Sen and Nani Gopal Das, for Respondent.

AMIYA KUMAR MOOKERJI, J. —

This appeal is by the referring claimant and it arises out of a reference under Section 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952 (hereinafter referred to as the Act).

2. On May 13, 1944, C. S. Plot Nos. 801, 805, 994, 998 (p), 1025, 1026, 1029, 1030, 1033, 1148 and 1149 of mouja Digla in the district of 24 Parganas, were requisitioned under Rule 75A (1) of the Defence of India Rules. Thereafter on November 4, 1959, these plots measuring about 3.69 acres were acquired under Section 7 of the Act. On November 9, 1959, the Land Acquisition Collector awarded compensation at the rate of Rs. 1,000/- per bigha with respect to lands in the above C. S. Plot except plot No. 1149 which is a doba and the same was assessed at Rs. 500/- per bigha. As no agreement was reached between the parties with regard to the assessment made by the Land Acquisition Collector, an Arbitrator was appointed by a notification dated 17th of May, 1960, and a reference was made to him on 29-6-60. The claimant claimed Rs. 4,000/- per bigha as fair compensation for the lands and Rupees 2,000/- per bigha for the doba. The

claimant contended before the Arbitrator that clause (b) of Section 8 (3) of the Act was ultra vires and the Arbitrator should award compensation under clause (a) of Section 8 (3) of the Act. The learned Arbitrator rejected the claimant's contention and awarded compensation of the lands at Rs. 1400/- per bigha and the doba at Rs. 700/- per bigha, being double the rate that was prevalent at the time of requisition. The claimant, being aggrieved against the said award of the learned Arbitrator, preferred this appeal in this Court.

2A. Mr. Gupta, the learned Advocate appearing on behalf of the claimant, contended that as clause (b) of Section 8 (3) of the Act had been declared ultra vires by the Supreme Court in *Union of India v. Kamalabai Harjivandas Parekh*, AIR 1968 SC 377, the value of the land should be assessed as on the date of acquisition.

3. Mr. Sen, the learned Advocate appearing on behalf of the State, contended that after the Constitution (4th Amendment) Act, 1955, under Art. 31 (2) of the Constitution inadequacy of compensation is not justiciable and when Parliament has expressly enacted that no law shall be called in question in any court on the ground that the compensation provided is not adequate, it was intended clearly to exclude from the jurisdiction of the court an enquiry as to whether the amount fixed or determined by the application of the principles stated in the statute is 'a just equivalent' of what the owner of the land is deprived of. In other words, the argument is, that neither the principles prescribing the 'just equivalent' nor the amount awarded as 'just equivalent' can be questioned by the Courts on the ground of inadequacy of compensation.

4. *Union of India v. Kamalabai*, AIR 1968 SC 377 was decided by the Supreme Court following the principle stated in *Mrs. Bela Banerjee's case*, AIR 1954 SC 170 in respect of the Acts enacted before the Constitution (4th Amendment) Act, 1955. The Amendments made in Article 31 of the Constitution are not given retrospective operation. The result is, that in a case where acquisition was made pursuant to a statute enacted before April 27, 1955, the law declared in *Bela Banerjee's case* and followed by *Kamalabai's case* would continue to apply (*Vide, State of Gujarat v. Shantilal Mangaldas*, AIR 1969 SC 634 at p. 649). The Requisitioning and Acquisition of Immovable Property Act, 1952 (Central Act XXX of 1952) was enacted on March 14, 1952. The Supreme Court in *Kamalabai's case* decided the vires of the said Act on the anvil of the Constitution as it stood before the fourth amendment.

Therefore, the amended provisions of Article 31 (2) of the Constitution are not attracted to the present case, in view of

the fact, that the Central Act, XXX of 1952, was enacted prior to the date when the Constitution (4th Amendment) Act, 1955, came into force.

5. The learned Arbitrator passed the award in the instant case on the basis of clause (b) of Section 8 (3) of the Act and so he did not come to any finding as to what was the value of the land on the date of the acquisition. Mr. Sen submitted that we should remit the case to the learned Arbitrator for determining the valuation on fresh evidence. We find there is sufficient material on record which makes it possible for us to come to a reasonable assessment of the value of the lands of the land on the date of the acquisition.

6. Ext. I (c) is a kobala executed on the 12th February, 1959, which would be relevant for ascertaining the rate of the market value near about the date of the acquisition. In that kobala lands were sold at the rate of Rs. 10,950/- per bigha. The acquired lands are situated within the Dum Dum Municipality. It is only five miles from Calcutta. Many industries, — big and small have grown up in and around the locality. The claimant however has claimed only Rs. 2,800/- per bigha. Considering the nature of the land and the evidence on record, we are of opinion that the valuation of the land cannot be less than Rs. 2800/- per bigha as claimed and on that basis the value of the doba (C. S. Plot No. 1149) also cannot be less than Rs. 1400/- per bigha.

6A. In the result, this appeal is allowed. We order that a sum of Rs 15,542.19 calculated on the basis of Rupees 2800/- per bigha of the lands including the 'doba' be paid to the claimant-appellant in addition to the sum which had already been paid to him. The claimant is also entitled to interest at the rate of 6% (six per cent) per annum on the compensation money till the date of payment.

There will be no order as to costs.

GUPTA, J.:— 7. I agree.

Appeal allowed.

AIR 1972 CALCUTTA 293 (V 59 C 53)

AMIYA KUMAR MOOKERJI, J.

Kutubuddin Ahammed and others, Petitioners v. Kashim Ali and another, Opposite parties.

Civil Revn. No. 902 of 1969, D/- 10-8-1971.

(A) West Bengal Land Reforms Act (10 of 1956), S. 8 (2) (a) — Heba-bil-ewaz — Consideration not money but some other commodity — Transaction is an exchange which is excepted under S. 8 (2)

CP/CP/B306/72/MVJ

(a) — Application for pre-emption not maintainable.

A Heba-bil-ewaz is a sale when the consideration is only money. If the consideration is not money but some other valuable consideration it may be an exchange or a Barter but not a sale. AIR 1968 SC 200, Followed. (Para 8)

Thus an application for pre-emption is not maintainable under S. 8 (1) where a transfer is by an exchange or barter under Heba-bil-ewaz as it is within the exception provided for in S. 8 (2) (a) of the Act.

(Para 8)

(B) West Bengal Land Reforms Act (10 of 1956), S. 8 (2) (b) — Heba-bil-ewaz — Whether a gift. (X-Ref:— T. P. Act (1882), S. 122).

A gift is a transfer without consideration. Therefore a Heba-bil-ewaz is not a gift and does not come within the exception under S. 8 (2) (b) of the Act. (Para 7)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 200 (V 55) =
1967-3 SCR 876, Commr. of Inc.
Tax, Andhra Pradesh v. Motors
and General Stores (P.) Ltd. 5, 6
(1955) ILR (1955) 1 Cal 144, Jerafat
Mondal v. Kamrezvan Bibi 4
(1932) AIR 1932 Cal 625 (V 19) =
36 Cal WN 486, Satyendra Nath
Roy Choudhury v. Fulsom Bibi 4, 8
(1927) AIR 1927 Cal 808 (V 14) =
ILR 54 Cal 754, Sariffuddin Mohd.
v. Mohiuddin Mohd. 4, 8
(1909) 13 Cal WN 160 = 4 Ind Cas
466, Abbasali v. Karim Baksh 4
(1876) 3 Ind App 291 = ILR 2 Cal
184 (PC), Ranee Khujooroomissa
v. Mst. Roushen Jehan 4

B. C. Roy and Mrs. Diptikana Bose,
for Petitioners; Sudhanshu Bhushan Sen,
Miss Archana Roy and Nemai Chandra
Kumar, for Opposite Parties Nos. 1 and 3.

ORDER:— This Rule was obtained
by the petitioners against an appellate
order of the learned Munsif, rejecting the
petitioners' application for pre-emption
under Section 8 (1) of the West Bengal
Land Reforms Act, 1955.

2. One Hazi Fakiruddin, since deceased, the father of the petitioners Nos. 1-7 and husband of petitioner No. 8, was a co-sharer tenant with respect to the land in khaitan No. 235 in mouja Chandpur in the district of Malda. The opposite party No. 4, another co-sharer, on 5th of April, 1965, transferred. 22 $\frac{3}{4}$ th acre of land out of the lands in the aforesaid khaitan to opposite party nos. 1-3, who are neither co-sharers nor riyats possessing adjoining land of the said khaitan, for a consideration of a copy of Holi koran, under a deed described as "Heba-bil-ewaz". For the purpose of registration the said deed was valued at Rs. 1,000/-. The said Hazi Fakiruddin, thereafter, made an application on 11th of June, 1965, to the Revenue Officer praying pre-emption under

Section 8 (1) of the West Bengal Land Reforms Act (hereinafter referred to as "the Act"), with respect to the above transferred land and deposited Rs. 1,000/- together with 10% interest. On 2nd of September, 1967, the Revenue Officer dismissed the said application upon the view that Heba-bil-ewaz is a gift for consideration, it may be a sale in reality but it is a gift in form. The pre-emptee took an appeal against the said order of the Revenue Officer. During the pendency of the said appeal, the said Hazi Fakiruddin died and the petitioners were substituted in place and stead of the deceased pre-emptee. The learned Munsif by his order dated 30th November, 1968, dismissed the petitioners' appeal holding that the transaction was a gift and as such, it was exempted from pre-emption under sub-section (2) (b) of Section 8 of the Act. The petitioners, being aggrieved, against the said order of the learned Munsif, moved this Court on an application under Art. 227 of the Constitution and obtained the present Rule.

3. Mr. Roy, the learned Advocate, appearing in support of the Rule, contended that the learned Munsif and the Revenue Officer were in error in holding that Heba-bil-ewaz was a gift, pure and simple; and, therefore, the transfer under such a deed, was exempted from pre-emption under the exception in sub-section (2) (b) of Section 8 of the Act. Mr. Roy submitted that Heba-bil-ewaz as understood in India, is nothing more than a sale as has been held by the Judicial Committee of the Privy Council as well as many of the decisions of this Court. In support of his contentions Mr. Roy referred to a number of decisions.

4. It is submitted that a Heba-bil-ewaz, as distinguished from a Heba or a simple gift, is a gift for consideration. It is in reality a sale, and has all the incidents of a contract of sale. As a sale, it also gives rise to the right of pre-emption (Vide, Satyendra Nath Roy Choudhury v. Fulsom Bibi, 36 Cal WN 486 = (AIR 1932 Cal 625)). Where the property covered under a Heba-bil-ewaz is immovable and is of the value of Rs. 100/- and upward, it must be affected by a registered instrument as required under Section 54 of the Transfer of Property Act which relates to sales. (Vide, Abbasali v. Karim Bash, (1909) 13 Cal WN 160). The true characteristic of Heba-bil-ewaz has been explained in Saraffuddin Mohd. v. Mohiuddin Mohd., ILR 54 Cal 754 (757) = (AIR 1927 Cal 808). It is observed at p. 766, that the transaction falsely termed in India as Heba-bil-ewaz is not governed by the Mohammadan Law of Heba, but is amenable to the General Law in India relating to the contracts and the Transfer of Property. The Judicial Committee of the Privy Council, in Ranee Khujooroo-

nissa v. Mst. Roushen Jehan, (1876) 3 Ind App 291 (PC) observed at p. 308, that a consideration for Heba-bil-ewaz may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration. In *Jerafat Mondal v. Kamrezvan Bibi*, ILR (1955) 1 Cal 144, it is held that a Heba-bil-ewaz should be regarded as a sale, whatever might be the value given in exchange of the property transferred. Koran Sarif, a string of bed or a carpet is a good consideration for a Heba-bil-ewaz. Accordingly, Mr. Roy submitted that a copy of *Holi Koran* in the instant case, is a good consideration for a Heba-bil-ewaz, it should be regarded as a sale and not a gift within the exception under sub-section (2) (b) of Section 8 of the Act. Therefore, the Tribunals below illegally exercised its jurisdiction in rejecting the petitioners' application for pre-emption.

5. Mr. Sen, the learned Advocate appearing on behalf of the opposite party, contended that a copy of *Koran* or a carpet might be a valid consideration for a Heba-bil-ewaz but unless the consideration was in the term of money, there could not be a sale, and when there was no sale, provisions of Section 8 (1) of the Act are not attracted. In this connection Mr. Sen referred to a decision of the Supreme Court, *Commr. of Income-tax, Andhra Pradesh v. Motors and General Stores (P.) Ltd.*, AIR 1968 SC 200, wherein the Supreme Court has laid down the essential elements in a transaction of sale. Mr. Sen further contended that Heba-bil-ewaz is a gift for a consideration. So it is a kind of gift. The exception provided in Section 8 (2) is for a gift without any qualification or restriction. The expression "any pecuniary consideration" occurring in sub-section (e) of Section 26F (1) of the Bengal Tenancy Act includes and Connotes all consideration either in the shape of cash money or other materials having a pecuniary value but such expression is absent in Section 8 (1) of the Act. The said section provides that on deposit of consideration money, an application for pre-emption can be made. So the word "transfer" occurred in Section 8 (1) of the Act must be a transfer for consideration of money and not a transfer for any other consideration.

6. In AIR 1968 SC 200, the Supreme Court held that the presence of money consideration is an essential element in a transaction of sale. If the consideration is not money but some other valuable consideration it may be an exchange or a Barter but not a sale.

7. The chief characteristic of a gift is, that it is a transfer without consideration. Gift is defined in Section 122 of the Transfer of Property Act, as "the transfer of certain existing movable or immov-

able property made voluntarily and without consideration". So, Heba-bil-ewaz is not a gift and therefore, in my opinion, it does not come within the exception under sub-section (2) (b) of Section 8 of the Act.

8. The next point that remains for determination is, whether Heba-bil-ewaz is a sale. It is well settled that Heba-bil-ewaz is a sale when the consideration is money. In ILR 54 Cal 754 (757) = (AIR 1927 Cal 808) there was a deed by Mohammadan lady purporting to transfer certain property in consideration of donee's paying her a fixed annual sum of maintenance. It was held that the transaction was one of a sale and not a "Heba" in any form. In another case referred to by Mr. Roy, 36 Cal WN 486 = (AIR 1932 Cal 625), Heba-bil-ewaz was executed in consideration of donee's executing in favour of the donor another deed by which the donee agreed to pay Rs. 5/- per month for donor's maintenance, the transaction was held to be a sale so as to attract the provisions of S. 26F of the Bengal Tenancy Act. The cases of pre-emption under Section 26F of the Bengal Tenancy Act, may be distinguished from Section 8 of the Act, because "any pecuniary consideration" occurring in that section might include consideration in kind. But in the instant case, considering the nature of the transaction, it cannot be said that the said transaction was a sale because admittedly there was no consideration of money. In view of the above decision of the Supreme Court, the transaction is either an exchange or a Barter. A transfer by exchange is exempted under sub-section (2) (a) of Section 8 of the Act. A Barter is also to give in exchange for some other commodities, it is another name of an exchange. Therefore, I hold that the petitioners' application for pre-emption is not maintainable under Section 8 (1) of the Act as the transfer in the instant case is by an exchange under a Heba-bil-ewaz and it is within the exception provided for, in sub-section (2) (a) of Section 8 of the Act.

9. In the result, this Rule is discharged.

10. There will be no order as to costs.

Petition dismissed.

AIR 1972 CALCUTTA 295 (V 59 C 54)
RAMENDRA MOHAN DATTA, J.

Life Insurance Corporation of India,
Applicant v. M. L. Dalmia and Co. Ltd.,
Respondent.

Award Case No. 150 of 1971, D/-
81-1-1972.

(A) Arbitration Act (1940), S. 2 (a) —
Arbitration agreement — Dispute.

BP/DP/C2/72/SSG

Where a building contractor sought to claim damages from its employer on the basis of delay for non-supply of steel and cement and that claim directly flew from the contract for breach thereof, the employer having himself directed the contractor to make reference to arbitrator under the arbitration clause could not later on challenge the jurisdiction of the arbitrator to decide this claim. The arbitrator did not act in excess of his jurisdiction by entertaining such a claim. 1942 AC 356 and AIR 1952 SC 119 and AIR 1969 SC 488, Followed. (Paras 22, 25)

(B) Arbitration Act (1940), S. 30 — Misconduct of arbitrator — Determination — Appreciation of evidence by arbitrator if relevant consideration.

The weight or the appreciation of the evidence by the arbitrator should not be considered by the Court in coming to the finding as to whether there was legal misconduct or not. The arbitrator is the only judge of the quality or the quantity of evidence and it will not be for Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence that Court might have arrived at a different conclusion than the arbitrator but that by itself is no ground of setting aside an award of an Arbitrator. (1949) 53 Cal WN 828. Distinguished AIR 1951 Cal 230, Followed. (Para 28)

Cases Referred: Chronological Paras

AIR 1969 SC 488 = 1969-2 SCR 224, Union of India v. Salween Timber and Construction Co. (India) 21
AIR 1960 SC 588 = (1960) 2 SCR 793, Alopi Parshad and Sons Ltd. v. Union of India 13, 23
AIR 1956 Cal 11, National Fire General Insurance Co. Ltd. v. Union of India 34
AIR 1952 SC 119 = 1952 SCR 501, Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar 20
AIR 1951 SC 9 = 1950 SCR 792, A. M. Mair and Co. v. Gordhandas Sagarmull 19
AIR 1951 Cal 230 = 85 Cal LJ 176, Haji Ebrahim Kassam Cochinwalla v. Northern Indian Oil Industries Ltd. 28
AIR 1949 Cal 179 = 52 Cal WN 137, Johurmull Parasram v. Louis Dreyfus and Co. Ltd. 18
(1949) 53 Cal WN 828, Chhogmal Rawatmal v. Sankalchand G. Shah 27, 28
1942 AC 356 = 1942-1 All ER 387, Heyman v. Darwins Ltd. 19
(1854) 14 CB 685 = 139 ER 273, Peterson v. Ayre 69
Basu, for Applicant; Bhabra, for Respondent.

1971 be declared null and void and/or be set aside.

2. The facts are that on or about 1955 the then National Life Insurance Company Limited (hereinafter called the said company) accepted the tender of the respondent for the construction of a building at New Delhi. The work orders were issued and the respondent was asked to commence the work on the understanding that the formal contract would be issued in due course. In the matter of the said agreement the petitioner's architects Messrs. Ballardie, Thompson and Matthews acted as the agent of the petitioner all throughout. The petitioner from time to time made various payments against the running bills submitted by the respondent on the certificate of the said architects in terms of the said agreement. In 1958 the Life Insurance Corporation of India came into existence and the said Corporation duly took over the said contract on behalf of the said National Insurance Co. Ltd.

3. The building was admittedly completed in April, 1959. On or about October 7, 1959 the respondent made out the final bill wherein it claimed for the balance price of work by calculating the price of the additional work and the deviations and described the said claim as their claim under category "A". The respondent also put forward another claim by describing the same as claim under category "B". As stated above, under the terms of the said agreement the said architects were to give a certificate to enable the respondent to receive payment. On or about June 1, 1960 the said architects issued a certificate for payment of Rupees 3,70,632.44 paise in respect of the claim under category "A" and in respect of the claim under category "B" the said architects recommended the sum of Rupees 1,14,385.06 paise. The said architects recommended payments in respect of various items which were mentioned in their letter dated June 1, 1960 addressed to the petitioner. Out of the total sum so recommended for payment the petitioner agreed to pay a sum of Rs. 3,50,107.00 and actually paid a sum of Rs. 3,50,000.00 by leaving a balance sum of Rs. 107.00 but refused to pay the balance sum of Rupees 20,632.44 paise claimed under category "A". As regards category "B" the petitioner did not act in terms of the said recommendation of their architects and rejected the entire claim of Rs. 1,14,385.06 paise.

4. The formal contract was executed by and between the parties herein on or about October 28, 1960, i.e., long after the work was completed. The said formal contract provided various terms and conditions including the arbitration clause as follows:—

ORDER:— This is an application for an order that the award dated April 29,

"30. Provided always that in case any dispute or difference shall arise between the employer, or the architects on his behalf, and the contractor, either during the progress of the works, or after the determination, abandonment or breach of the contract, as to the constructions of the contract or as to any matter or thing arising thereunder (except as to the matters left to the sole discretion of the architects under clauses 1, 4, 5, 16, 19, 19A and 29, and as to the exercises by them under clause 18 of the right to have any work opened up) or as to the withholding by the architects of any certificates to which the contractor may claim to be entitled, then either party shall forthwith give to the other written notice of such dispute or difference, which notice shall specify the matters which are in dispute, and such dispute or difference of which such notice has been given, and no other, shall be and is hereby referred to the arbitration and final decision of the chief engineer C.P.W.D. department, Government of India if he is able and willing to act, otherwise to some person to be mutually agreed upon between the contractor and the architects, and the award of such arbitration shall be final and binding on the parties. Such reference shall not be entered upon until after the completion, or alleged completion, of the works, or until three weeks or more shall have elapsed after the practical cessation of the works arising from any cause unless with the written consent of the employer or architects and the contractor. The arbitrator shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice, save in regard to the said matters, expressly excepted above, and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid. Upon every and any such reference the costs of, and incidental to, the reference and award respectively, shall be in the discretion of the arbitrator who may determine the amount thereof, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act, 1899, and any statutory modification thereof for the time being in force. The employer and contractor hereby also agree that arbitration under this clause shall be a condition precedent to any right of action under the contract with regard to the matters hereby expressly agreed to be so referred to arbitration."

5. Under the said contract the petitioner was described as the employer and the respondent was described as the contractors. Clauses 3 and 4 of the formal contract, inter alia, provided that the architects under the conditions of contract

would mean Messrs. Balardie, Thompson and Matthews or such other person as might be named for this purpose by the employer at any time. The employer agreed that cement and steel as would be required to execute the said contract would be supplied to the contractors on their requisition duly certified by the said architects. The amount of money involved for such a purchase by the employer would be deducted and recovered at the rate of Rs. 100/- per ton for cement and Rs. 500/- per ton for steel inclusive of sales tax delivered at site. Under clause 7 of the conditions of contract the contractors were required upon the request of the said architects to (furnish?) them with all the invoices, accounts receipts and other vouchers that they might be required in connection with the said contract. Clause 22 of the said conditions provided, inter alia, that the work would be completed not later than April 30, 1959. Clause 23 of the said conditions provided, inter alia, to the effect that if the contractors would fail to complete the work by the date mentioned in clause 22 or within any extended time and if the architects would certify in writing under conditions mentioned therein to the effect that the works could reasonably have been completed by an earlier date than when it was so completed then the contractors would pay a sum of Rs. 500/- per week as agreed and liquidated damages for the period during which the said work would remain unfinished. Under clause 27 of the said conditions the contractors would be entitled to payment under the certificates to be issued by the said architects to the contractors in the manner as provided therein. Under clause 29 (a) of the conditions the contractors would be at liberty to determine the contract by notice in writing to the architects in case of non-payment of its dues under the certificate to be issued by the architects under certain conditions mentioned therein.

6. By their letter dated August 9, 1961 the respondent's solicitors claimed a total sum of Rs. 2,34,674.99 paise as the balance amount due in respect of category "A" and for the entirety of the claim in respect of category "B" viz., Rs. 1,14,385.06 p. On or about September 13, 1961 the petitioner paid a sum of Rs. 1,00,000.00 in full payment against the respondent's claim under category "A". Thereafter on October 27, 1961 the petitioner by their letter to the architects rejected both the balance claim of Rs. 20,632.44 under category "A" and the entire claim of Rupees 1,14,385.06 paise under category "B". A copy of the said letter was sent to the respondent.

7. Thereafter various correspondence were exchanged between the parties and sometime on or about July 6, 1964 the respondent's solicitors requested the

architects to concur in the appointment of one Sri S. Bandopadhyaya as the sole arbitrator in terms of the said arbitration clause. The respondent filed its statement of claim before the said arbitrator. Again a series of correspondence passed between the parties. Sometime on or about June 24, 1968 Sri S. Bandopadhyaya declined to act as arbitrator unless both the parties would agree to the appointment. On or about October 3, 1969 the respondent made an application, inter alia, for the appointment of an arbitrator. In the said application various points were urged on behalf of the petitioner. Inasmuch as the same related to the jurisdiction of the arbitrator and the parties' right to go to arbitration, Masud, J. after hearing the parties delivered a judgment thereon and appointed Sri S. C. Mitter, Barrister-at-Law, as the sole arbitrator.

8. The said arbitrator held about 19 effective sittings and made and published his award dated April 29, 1971 which provided as follows:—

"Whereas I, S. C. Mitter, Barrister-at-Law of No. 19, Camac Street, Calcutta was by an order made by the Hon'ble High Court, Calcutta, dated 17th day of July, 1970, appointed Arbitrator in respect of the disputes and differences between the parties to the above arbitration and whereas I having taken upon myself the burden of the reference of the said arbitration and whereas my time to make the said award has been extended by the Hon'ble High Court until 30th day of April, 1971 and whereas I having considered the statements, documents, records and papers filed on behalf of the parties before me and having heard and considered the submissions made on behalf of the parties I do hereby make my award as follows:

(A) I award and direct that the respondents Life Insurance Corporation of India do pay to the claimants M. L. Dalmia and Co. Ltd. a sum of Rs. 1,34,674.99 paise (Rupees One Lakh thirty four thousand six hundred seventy four and Paise ninety nine only) in full satisfaction of its claim against their final bills including category "A" and category "B".

(B) The claim of the claimants for interest is not justified and hence rejected. I award and direct that the respondents Life Insurance Corporation of India shall pay Rs. Nil to the claimants M. L. Dalmia and Co. Ltd.

(C) I award and direct that the respondents Life Insurance Corporation of India do pay to the claimants M. L. Dalmia and Co. Ltd. a sum of Rs. 19,000/- (Rupees Nineteen thousand only) as cost of this arbitration including the cost of High Court proceedings resulting in Order dated 17th July, 1970.

(D) I award and direct that the Stamp Duty for the publication of the award shall

be borne by the claimants M. L. Dalmia and Co. Ltd. As the Arbitrator had initially purchased the stamp paper of the value of Rs. 100/- (Rupees One hundred only), on which the original award is published, it is directed that the claimants M. L. Dalmia and Co. Ltd., should pay the said sum of Rs. 100/- (Rupees One hundred only) to the Arbitrator in repayment of the amount so spent by the Arbitrator,

Sd/- (S. C. Mitter)
ARBITRATOR.
29-4-71."

9. It would appear that the said arbitrator has allowed the entire claim except only a little amount as claimed in the statement of claim filed by the respondent herein.

10. Mr. Basu, learned counsel, appearing on behalf of the Life Insurance Corporation of India the petitioner herein, argued several points for setting aside the said award.

11. According to the learned counsel the award in so far as the claim under category "B" was concerned, was wholly outside the scope of the contract and as such the same was outside the scope of the arbitration clause in the contract. From the said letter dated June 1, 1960 written by the said architects to the petitioner it was pointed out that although the said architects assessed the sum of Rupees 1,14,385.06 paise as the amount payable to the contractors against the category 'B' yet no final certificate for payment was issued because the nature of the claims put forward under category 'B' would reveal that the same were outside the scope of the said contract. It was also pointed out to Court that a certificate was given in so far as the claim under category 'A' was concerned by the certificate dated June 1, 1960 because the said claim was within the scope of the said contract. The petitioner too considered the said claim under category 'B' as outside the scope of the said contract and as such rejected the same.

12. It was also pointed out by the learned counsel that under paragraph 15 of the statement of claim the respondent claimed the said amount under category 'B' on the basis that the petitioner had taken benefit of the works done by the respondent contractor and the claim under category 'B' arose in the process of execution of and out of the said agreement and the work thereunder; and the petitioner was liable to compensate and/or to pay the said sum to the respondent claimant. On the basis of the said pleading it was contended that the respondent was claiming the amount under Section 70 of the Indian Contract Act. On the basis as aforesaid it was argued that the claim under Section 70 of the Indian Contract Act was outside the purview of the con-

tract and as such outside the scope of the arbitration clause contained in the said contract.

13. Mr. Basu relied on the case of *Johurmull Parasram v. Louis Dreyfus and Co. Ltd.*, AIR 1949 Cal 179 for support of his proposition that a claim under Section 70 of the Indian Contract Act would be outside the scope of the arbitration agreement if the arbitration clause provided that the dispute "under the Contract" was to be decided by the arbitrator, as was the case here. Mr. Basu also relied on the case of *Alopi Parshad and Sons Ltd. v. Union of India*, AIR 1960 SC 588 for the proposition, *inter alia* that the claim on account of excess price paid due to rise in prices were matters which could not affect the contract.

14. On behalf of the respondent Mr. Bhabra referred to the arbitration clause, the opening words whereof signified that any dispute under the contract would be covered by the arbitration clause. The arbitration clause, accordingly, was wide enough to cover the claim made under category 'B'. It is submitted that the claim under category 'B' is based on non-supply of steel and cement by the employer i.e. the National Insurance Co. Ltd. Mr. Bhabra referred to condition No. 4 of the said formal contract which spoke of supply of steel and cement by the employer. The learned counsel also referred to the said letter dated June 1, 1960 written by the said architects to the petitioner recommending payment of the said sum to the said contractor, being the respondent herein. In the said letter each item of claim had been discussed and it would appear therefrom that the said claims were in respect of damages arising out of breach of contract committed by the said employer due to non-supply of the said steel and cement. As a result of such breach of contract delay was caused in supplying steel and cement with the result that the respondent suffered heavy damages for which the respondent asked for damages. The said claims were dealt with itemwise in the said letter of the said architects and the recommendation was for the following items and for the following amounts:

1. Deterioration of shuttering, balli crops etc.

On this heading the following writings appear:

"This deterioration was due to stoppage of work in the first instance from March to August, 1956 when cement, steel were not available and then again from September to November, 1957 after the nationalisation of the Insurance Company before it was definitely decided as to the course of action to be taken with regard to the construction of the building. The contractor's claim for this item is as follows:—

Statement "A"
"B"

Rs. 63,100/-

Rs. 44,888/-

Rs. 1,07,988/-

Against this, we assess that an amount of Rs. 78,949/- as shown in detail in the bill is reasonable."

In respect of the second item it is provided as follows:—

"2. Idle establishment charges (Statements A and B).

The extra costs incurred owing to the stoppage of work for the reasons mentioned above for the following periods:—

(a) March to August, 1956 — 6 months
(b) 3rd September to 18th

November, 1957 — 2½ months

The establishment charges asked for in the first stage are as follows:—

Staff salary	Rs. 1,000/- per month
Watchmen	Rs. 200/- do.
Mechanics	Rs. 300/- do.

Rs. 1,500/- per month.

Total for six months Rs. 9,000/-.

The establishment charges asked for in the second stage was as follows:—

Staff salary	Rs. 2,500/- per month
Mechanics and Drivers	Rs. 350/- do
Watchmen	Rs. 250/- do

Rs. 3,050/- per month.

Total for 2½ months Rs. 7,625/-.

The increase in the establishment charges in the second stage is due to extra staff employee on the job.

We have verified the actual payment from the books of the contractor and are in a position to recommend that the amounts charged by the contractor totalling Rs. 16,625/- are in order."

15. As regards the other items Nos. 3 to 9 the same relate to matters arising under the contract. Some of those items have been rejected and in respect of some other the architect has recommended lesser amount than claimed. At the conclusion of the said letter it is provided as follows:—

"On the above basis we assess that an amount of Rs. 1,14,385.06 is payable to the contractor against category "B". But we wish to have your final view before the final certificate for payment is issued. If desired, we should discuss the details with you at your convenience when the contractor should also be requested to be present with all records so that any further information required can be furnished by him."

16. Mr. Bhabra also contended that in paragraph 15 of the statement of claim filed by the respondent herein it has been categorically stated that the claim arose out of the agreement and accordingly it is not correct to say that the claim under category "B" was founded on Section 70 of the Indian Contract Act.

17. In my opinion, Mr. Bhabra's contentions should be accepted and I have no hesitation to come to the finding that the claim under category "B" was made under the contract and the damages were sought to be claimed on the basis of delay for the non-supply of the steel and cement and accordingly, damages claimed under category "B" directly flew from the contract for breach thereof and accordingly this was a claim under the contract. Furthermore, by the letter dated November 30, 1962 the Zonal Manager of the petitioner addressed a letter to the solicitors for the respondent whereby he indicated that the respondent might refer the matter to arbitration under the terms of the contract if so advised. It was stated categorically therein that no Court of law had jurisdiction to entertain the claim of the respondent in the face of the arbitration clause in the agreement. That being the position, the petitioner themselves had admitted that this matter was within the scope of the arbitration clause. This letter was written in reply to the respondent's solicitors' letter dated November 20, 1962 wherein the claims both under category "A" and under category "B" for payments were made. It follows from the said letter that the want of a certificate in respect of category "B" could not stand in the way of the arbitrator deciding the dispute in respect thereof (sic) because the petitioner itself asked the respondent to refer the said dispute to arbitration.

18. Furthermore, it would appear from the said arbitration clause itself that only such matters in disputes and differences in respect whereof notice would be given and no others would be referred to the arbitration by the parties herein. Before Masud J. this question was agitated as to whether such notice was actually given in respect of categories "A" and "B". Masud J. was satisfied that such formal notice was given. In any event, the petitioners having suggested the arbitration themselves cannot be allowed to maintain that the formal notice should have been sent.

19. In the case of *A. M. Mair & Co. v. Gordhandas Sagarmull*, AIR 1951 SC 9 the Supreme Court relied on a passage quoted in *Heyman v. Darwins Ltd.*, 1942 AC 356, where Lord Dunsedin propounded the test in the following language:—

"If a party has to have recourse to the contract, that dispute is a dispute under the contract."

20. In the case of *Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar*, AIR 1952 SC 119 at p 121, it was observed:—

"The question to be decided is whether the point on which the parties are in dispute is a difference arising out of the policy in terms of Clause 7 of the policy. The test for determining such a question

has been laid down in a series of cases and is a simple one. The test is whether recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction."

21. Reliance was placed on the case of *Union of India v. Salween Timber and Construction Co.*, (India), AIR 1969 SC 488, where the Supreme Court made similar observation regarding the test to be applied in respect of an arbitration clause which provided the determination of the dispute, inter alia, under the contract.

22. In my opinion, the contentions of Mr. Bhabra on this point should be accepted by the Court to the effect that in this case the claim under category "B" related to a dispute under the contract for which due notice was given to the petitioner. In respect of category "B" the petitioner having asked the respondent to go to arbitration cannot now be allowed to contend about the want of jurisdiction of the arbitrator to decide such dispute. In the final bill, it was pointed out by Mr. Bhabra, the price of steel and cement had actually been credited to the petitioner.

23. At the reply stage Mr. Basu wanted to raise another point by relying on the case of AIR 1960 SC 588. It is argued that by allowing the claim made under category "B" the arbitrator in effect has increased the rates mentioned in the contract and accordingly, the same was beyond the scope of the arbitrator's jurisdiction. In the case before the Supreme Court the persons who supplied ghee to the agents appeared before the arbitrators and produced extracts from their books showing the amount actually due to them from the latter. The arbitrators were satisfied that the statement produced by the suppliers reflected a general rise in prices and cost of labour. Taking into consideration the fact that the other persons were buying ghee at rates considerably in excess of the stipulated rates the arbitrators held that the agents were entitled to be reimbursed to the extent of Rs. 11,27,965-11-3. But the terms of the contract, stipulating the rate at which the financing and overhead charges were to be paid remained binding so long as the contract was not abandoned or altered by mutual agreement and it was observed by the Supreme Court that the arbitrators had no authority to award any amount in excess of the amount expressly stipulated to be paid. Mr. Bhabra argued that in the case before the Supreme Court the arbitrators expressly increased the rate and gave reasons for the same but in the case before this Court no reasons have been given by the arbitrator and the Court is not in a position to conclude that the arbitrator increased the rate as stipulated in the con-

tract. In any event Mr. Basu's argument cannot be accepted because the increase in the total amount, if any, is on the basis of the damages suffered by the contractor as mentioned in the particulars of category "B" in the letter of the said architects.

24. Mr. Basu then argued that Masud J. was not called upon to decide the question of jurisdiction in the application before him & as such the judgment of Masud J. cannot operate as *res judicata* in this proceeding because the observation of Masud J. in that connection were obiter. Mr. Basu relied on several cases on that point. Mr. Bhabra did not dispute the propositions of law and the principles involved therein but contends that in the application before Masud J. the said point relating to jurisdiction was directly mooted.

25. That being the position, in my opinion, the arbitrator did not act in excess of his jurisdiction by entertaining the claim of the contractor in respect of the claims referred to them for category "B".

26. The second point that is argued by Mr. Basu is that the arbitrator was guilty of legal misconduct in arriving at the compensation without any evidence. It is argued that any reasonable man acting in such position could not have come to the conclusion he has arrived at without the required evidence to substantiate the items in the statement of claim. In paragraph 14 of the petition the disputed items in category "A" have been indicated. The total amount in respect of category 'A' is to the extent of sum of Rs. 20,632.44 p. which was rejected by the said National Insurance Co. Ltd. Since the said items were disputed hence evidence was to be adduced in order to enable the arbitrator to arrive at the figure if the same was to be awarded. The letter dated October 27, 1961 would show that there was a conference at New Delhi between the contractor, the architects and the petitioner. The petitioner gave its decision in that conference. Thereafter no further recommendation was made by the said architects. Accordingly, it is argued that there was no documentary or oral evidence to justify the arbitrator to give his finding unless the writing containing the provisional recommendation of the architects would be taken as the documentary evidence. It is argued that even the certificate was not binding; if it was so binding then there was no scope for arbitration. The fact remains that ultimately it was rejected in a conference. Hence no reasonable man acting in that position could have made the award without such evidence.

27. Mr. Basu relied on the case of *Chhogmal Rawatmal v. Sankar Chand G. Shah*, 53 Cal WN 828 where the Division Bench consisting of Harries, C. J. and Chatterjee, J. considered a case where the arbitrators decided the question of extension of

time without any evidence at all in support of the same. In that case there was no material before the arbitrators to justify the said finding or conclusion of the arbitrators and accordingly, the Division Bench held that the question was not of mistake but of misconduct because the arbitrators decided that issue of fact without any evidence or material before them and such a decision amounted to a serious dereliction of duty. The Division Bench accordingly, held that the arbitrators were guilty of misconduct and upheld the decision of S. B. Sinha J. in the Trial Court where the award was set aside.

28. Mr. Bhabra, on the other hand, contended that there was sufficient evidence before the arbitrator to enable him to make an award in the manner he has done. The certificate dated June 1, 1960 which was an admitted document and which was placed before the arbitrator certified that the said Messrs. Ballardie, Thomson & Mathews, the architects of the petitioner certified that the sum of Rupees 3,70,632.44 paise could be paid to the contractor against category "A". The said certificate was acted upon by the petitioner inasmuch as they paid to the extent of Rs. 3,50,000/- out of the said certificate amount. Accordingly, the question before the arbitrator was whether the balance sum of Rs. 20,632.44 paise was payable to the contractor by the petitioner or not. The entire correspondence and the documents were placed before the arbitrator. The arbitrator had before him enough documentary evidence and admission on the part of the said architects who were in effect acting as the agent of the petitioner all throughout and on the basis of their recommendation all payments were made all throughout until the said final bill. Even on the face of the said recommendation and certificate the said payment to the extent of Rs. 2,50,000/- was made. It appears from Clauses 27 and 29 (a) of the said formal contract that the payment was agreed to be made to the contractor by the employer from time to time by instalments upon certificate being issued by the said architects. It was provided under cl. 29 (a) that the contractor was given the right even to determine the said contract if the payment would not be made under the certificate of the said architects as provided therein. It appears from the counter-statement of facts that the said certificate was produced before the arbitrator on behalf of the petitioner and accordingly the arbitrator could consider the said document as a piece of evidence. Under the definition of evidence as provided under Section 3 of the Evidence Act it is provided as follows:

"Evidence" means and includes—

(1) xx xx xx

(2) all documents produced for the inspection of the Court, such documents

are called documentary evidence."

In any event, Indian Evidence Act by Section 1 makes it specifically clear that it will not apply to proceedings before an arbitrator. Various English authorities have been cited at the bar on this point but, in my opinion, in view of the specific provision in the Indian Evidence Act the law in India is clearly different from the law which is prevailing in England. In my opinion, it was rightly contended on behalf of the respondent that the oral evidence in this case was not adduced before the arbitrator in view of the fact that the parties might have thought that it was not necessary because on the basis of the documentary evidence the matter could be decided. The fact remains that no issue of fact was actually raised on behalf of the respondent and there was no difficulty on the part of the arbitrator to consider the documentary evidence adduced before him and to make the award in the manner he has done. The case of 53 Cal WN 828, was a case where there was no evidence at all. The Court observed that there was no material whatsoever before the arbitrators to arrive at their decision and on the basis thereof it was observed at p 830:

"It is legal misconduct to decide that there was an extension when there was absolutely no evidence in support of it and really no material before the arbitrators to justify this findings or conclusion. The question here is not of mistake but of misconduct. To decide such an issue of fact without any evidence or material before the arbitrators is serious dereliction of duty." Accordingly, in my opinion, that case is clearly distinguishable from the facts of the case before me. To my mind, the weight or the appreciation of the evidence by the arbitrator should not be considered by the court in coming to the finding as to whether there was legal misconduct or not. The arbitrator in this case did not give any reason in making his award and there being enough documentary evidence before him I see no reason why the arbitrator could not be in a position to make his award in the manner he has done. In the case of Haji Ebrahim Kassam Cochinwalla v. Northern Indian Oil Industries Ltd., AIR 1951 Cal 230 P. B. Mukharji, J., as he then was, now the Chief Justice, at page 232, observed:

"In my opinion appraisement of evidence by the arbitrator is ordinarily never a matter which this Court questions and considers.... The arbitrator in my opinion is the only judge of the quality or the quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence that Court might have arrived at a different conclusion than the arbitrator but that by itself is no ground in

my view of setting aside an award of an Arbitrator. It is familiar learning but requires emphasis that by Section 1, Evidence Act the Evidence Act in its rigour is not intended to apply to proceedings before an Arbitrator."

29. As regards the claims under category "B" Mr. Bhabra argued that the said architects made their recommendation to the employers for the payment of the said sum of Rs. 1,14,385.08p. The respondent put forward a claim which was higher than what was recommended by the said architects. The architects in their letter dated June 1, 1960 dealt with each individual item in details and gave reasons for such recommendation. As expert they had given their reasons and in respect of some of the items they had rejected the claim of the respondent and in respect of some others have reduced the figure as claimed. It is mentioned in the said recommendation that they had verified the books, vouchers, documents and bills in arriving at the said figures. The question is whether the arbitrator could rely on the said documents as a piece of evidence to arrive at his finding in making the award. Actually speaking, what was considered and in what manner the arbitrator considered the said evidence are matters of conjecture in view of the fact that he has not given reasons in the said award. Mr. Bhabra argued that, in any event the said architects were the agents of the employers and as such agents they recommended payment. The said letter dated June 1, 1960 was filed before the arbitrator on behalf of the petitioner as document No. 16. The said document was an admitted document before the arbitrator and was produced on behalf of the petitioner and as such the arbitrator had enough material to rely on such evidence to come to his finding in making the said award. My attention has been drawn to paragraph 2 of the petition where the petitioner pleaded that the tender was accepted by Messrs. Ballardie, Thompson & Matthews as agents for and on behalf of the said National Insurance Co. Ltd. and the fact remained that they were acting as the agents and that would also appear from the letter dated August 19, 1955 written by the said architects to the respondent whereby they on behalf of the said National Insurance Co. Ltd. accepted the tender and advised the respondent to start the work immediately.

30. In view of the aforesaid, in my opinion, it was practically an admitted case before the arbitrator that the said architects were acting as the agents of the said employers and consequently the said letter dated June 1, 1960 which was placed before the arbitrator could be considered as good piece of evidence for the purpose of arriving at the decision of the arbitrator. Accordingly, in my opinion, there is no

misconduct legal or otherwise in making his award.

31. In the case before me none of the parties ever offered to adduce any oral evidence before the arbitrator nor did the arbitrator have any occasion to refuse any such evidence. Under those circumstances, in my opinion, it could not be argued that the arbitrator was guilty of any legal misconduct and accordingly, I reject the said contention of Mr. Basu.

32. The third point that was argued by Mr. Basu was to the effect that the counter-claim made by the petitioner in their counter statement of facts before the arbitrator had neither been mentioned nor had the same been considered by the arbitrator in making his award. Mr. Basu contended that there was delay for 19 months and in terms of the contract the petitioner was entitled to damages at the rate mentioned in the said contract. In my opinion, there is no substance in this point and Mr. Basu also did not press his point any further as soon as Mr. Bhabra pointed out from the said formal contract that the time for completion was actually extended by the said formal contract upto April 1959 within which time the building was admittedly completed. In any event, no such point was ever taken or made out at any stage of the proceeding until the counter-statement was filed and even there also no particular amount was mentioned and the claim was absolutely vague. In view of the fact that Mr. Basu ultimately abandoned the said point regarding delay it is not necessary to consider whether the award was in complete or not. That being the position the argument as of Mr. Basu on this point is rejected.

33. The fourth point that was argued by Mr. Basu was to the effect that the arbitrator exceeded his jurisdiction by directing the payment of a sum in his award although the arbitration clause merely required him to fix the amount payable. As and when such an award would be made, thereafter on the basis of the said arbitration award a suit was to be filed in order to obtain payment. It appears that before Masud J. this point was never raised nor in the grounds (a) to (v) of paragraph 24 of the petition had the point been specifically taken. Mr. Basu indicated a few grounds on the basis whereof he submitted that the same were taken in connection with this point but to my mind, those grounds did not relate to the point now raised before me. In any event, in my opinion, the arbitration clause herein is wide enough to include reference to arbitration for any dispute relating to the payment of money. Mr. Basu has relied on the last sentence of the said arbitration clause but to construe the arbitration clause in the proper manner the entire clause has to be read as a whole. The opening words make it clear that any dispute or

difference as to the construction of the contract or as to any matter or thing arising thereunder could be referred to arbitration upon notice being given as to the matters in dispute. In this case the respondent made a claim in respect of the said sums under category "B". The petitioner by their reply dated November 30, 1962 asked the respondent to go to arbitration in the following language:

"In case your client feels aggrieved by this decision of our he may refer the matter to arbitration under the terms of the contract if so advised. No Court of law has jurisdiction to entertain the claim of your client in face of arbitration clause in the agreement."

The above letter was written by the petitioner in answer to the respondents' claim for payment of their dues. Obviously, the petitioner expressed its mind to the effect that seeking to recourse to arbitration was not the proper step but filing of suit was the only proper remedy which was open to the respondent.

34. Mr. Bhabra relied on the case of National Fire General Insurance Co. Ltd. v. Union of India, AIR 1956 Cal 11 where P. B. Mukharji J. (as he then was, now the Chief Justice,) had occasion to consider an usual arbitration clause in the Fire Insurance policy. The speciality of that clause was that the same incorporated the following language viz, "Independently of all other questions". On the basis of the said words it was observed that the same indicated that although there was a special stipulation in the Insurance Policy itself that the amount of loss or damage was alone to be the subject of arbitration, that did not defer the parties from submitting to the jurisdiction of the Arbitrators the other question regarding the liability to pay the amount and as to who should pay to whom.

35. In the instant case also the opening words of the arbitration clause as indicated above vest the arbitrator with jurisdiction to decide the question of payment in the manner he has awarded and that is how I interpret the said arbitration clause. In any event, as in the case of National Fire and General Insurance Co. Ltd. above so also in the instant case before me the parties had submitted to the jurisdiction of the arbitration in deciding the question and to make an award for the payment of money.

36. The fifth and the last argument put forward by Mr. Basu was to the effect that the arbitrator was guilty of misconduct in not intimating the parties that the case was closed and that he was going to consider the making of the award. In paragraph 23 of the petition it is stated that the Nineteenth Meeting of the arbitrator was held on April 21, 1971. At the conclusion of that meeting the parties were intimated that the next meeting

would be held on April 22, 1971 at the same time and place as fixed by the arbitrator. It is alleged that without holding any such meeting and without giving any notice or intimation to the parties that the arbitrator was concluding the reference and proceeding to consider the award he made and published a purported award on April 29, 1971. It is further alleged that the petitioner was seriously prejudiced in not being able to present his entire case before the arbitrator. The concluded portion of the minutes of the meeting of April 21, 1971 were incorrect and wrong by reason of the fact that the original minutes had been struck out in the absence of the parties and a new line substituted to the effect that the hearing of the arbitration was concluded.

37. I called for the original minutes as supplied to the parties. They have been marked as exhibits and the same have been filed in the records. The same contained correction in the handwriting of the arbitrator and both the said minutes bear the initials of the arbitrator. From the records of the arbitration proceedings as filed by the arbitrator it appears that the said copy of the minutes as corrected in the hands of the arbitrator which has been produced from the custody of the petitioner and filed in the proceedings, as stated above, were collected by the petitioner's representative by the name of one G. D. Arora, Administrative Officer, personally from the arbitrator on April 21, 1971. The said receipt was produced before me from the file of the arbitrator. Mr. Basu after looking into it, admitted the same to be the signature of the said representative of the petitioner who used to attend regularly all the meetings held by the arbitrator as representative of the petitioner. The admitted position is that none of the lawyers on behalf of either party went to the residence of the said arbitrator at the time fixed for the meeting excepting the said G. D. Arora on behalf of the petitioner and one J. Dalmiya on behalf of the respondent. Both the said representatives instructed the arbitrator that they had concluded their respective arguments and neither party had anything further to add. On that basis at the request of the said representatives the arbitrator corrected the minutes of April 21, 1971 by deleting the sentence "next meeting to be held on April 22, 1971 at the same place at 5 P.M." and by writing in its place the following sentence viz. "hearing concluded and neither party has anything further to add". The arbitrator initialled the said portion in both the minutes but by mistake he put the date as April 21, 1971 instead of April 22, 1971 when actually the correction was made. Mr. Bhabra has pointed out from the receipt granted by the said representative of the petitioner that whereas the receipts were

all throughout granted by the petitioner's solicitors in obtaining copies of the said minutes but only on the last occasion the said representative granted the receipt whereby it was indicated that none of the lawyers attended the said meeting. It was thought fit that no further meeting was required to be held and on the basis of the said representation the arbitrator concluded the hearing of the case and closed the reference and proceeded to make his award.

38. The said paragraph 23 of the said petition wherein the said allegations have been made have been verified by one Anil Kumar Banerjee, the Assistant Secretary and constituted attorney of the petitioner at its Zonal Office at Calcutta as based on information received from the records and files relating to this case and believed by him to be true. There is no supporting affidavit by the said representative who actually received the said copy of the minutes of April 21, 1971 containing the said allegations from the arbitrator. Even the records which are produced before me do not in any way support the petitioner's case on this point. On the contrary, the correct position is revealed to the effect that the arbitrator rightly closed the case at the request of the parties' representatives. As to the date of the corrections of the minutes as initialled by the arbitrator I accept the explanation given by Mr. Bhabra that by mistake he put the date as April 21, 1971 instead of April 22, 1971 but the covering letters were correctly dated as April 22, 1971 and that made the position absolutely clear. The said letter was received by the petitioner's solicitor Mr. S. K. Mondal on April 23, 1971 as would appear from the rubber stamp put on the said covering letter of the arbitrator which letter was also produced and tendered in this proceeding. It is surprising that although the petitioner through its own representative directly received the said minute as corrected on April 22, 1971 and although the petitioner's solicitors also received the same on April 23, 1971 yet no protest whatsoever was made at any point of time in respect of the said corrections made by the arbitrator. In paragraph 22 of the affidavit-in-opposition the position has been made clear and I have no hesitation to accept the said statement made in the paragraph in respect of the facts concerning the closure of the case. It appears from the records that on April 6, 1971 the argument on behalf of the petitioner was concluded by the petitioner's counsel and on April 21, 1971 the arguments on behalf of the respondent were concluded by the respondents' attorney. If anything further was to be added on behalf of the petitioner then the petitioner's lawyers would surely have attended the meeting on April 22, 1971 but since they concluded

ed their arguments and since they had no further submissions to make that was why they did not choose to attend at the said meeting. The arbitrator made his award on April 29, 1971 but even thereafter no protest whatsoever was made in respect thereto. In my opinion, the allegation and the charge of interpolation behind the back of the petitioner which were made on behalf of the petitioner by the said affidavit of the said Anil Kumar Banerjee who had no personal knowledge thereof and who could not produce any such record to support the said charge, were reckless and irresponsible and could not be accepted at all. The arbitrator's records have been clearly maintained and show the real position. I have no hesitation to come to the finding that there was no misconduct at all on the part of the said arbitrator in the manner as alleged or at all.

39. In the facts and circumstances of this case, in my opinion, the passage in Russell on Arbitration 17th Edition at page 171 has no application whatsoever. It is provided therein that the arbitrator should make it clear if there would be any possibility of doubt, that the proceedings were at an end. Mr. Basu has also relied on the case of Peterson v. Ayre, (1854) 14 CB 665 = 139 ER 273 at page 278 where on the facts involved therein it was observed that the arbitrators did not inform one of the parties that they were about to conclude the case and no opportunity was given to produce evidence if such party had any such evidence to produce. On that ground it was held that the award was unsatisfactory and the award was remanded. It would appear from page 275 of the said report that in that case an affidavit was filed saying that the said party had many witnesses who were to be called before the arbitrators. In my opinion, neither the passage appearing in Russell nor the said case have any application whatsoever in the facts and circumstances of the case before me.

40. That being the position, in my opinion, the arbitrator was not guilty of any misconduct and the points made out by Mr. Basu cannot be accepted and the same are accordingly rejected. I accordingly dismiss this application with costs.

Application dismissed.

AIR 1972 CALCUTTA 305 (V 59 C 55)

ARUN K. MUKHERJEA AND
M. M. DUTT, JJ.

Bedana Bala Dassi and others, Appellants v. Calcutta State Transport Corporation, Respondent.

A. F. O. O. No. 681 of 1967, D/- 51-1-1972.

CP/DP/C6/72/SSG

Motor Vehicles Act (1939), S. 110-B — Purpose of compensation — Factor for consideration.

The compensation is provided to replace the money that the heirs of the deceased used to receive by way of maintenance. The compensation is not in the form of a monthly allowance. It is in the form of a lump sum. To say that an investment of such lump sum would yield a steady profit of ten per cent and to reduce the compensation by ten per cent is little short of speculation. Hence the deduction by reducing the amount of compensation by 10 per cent on this ground is unwarranted. (Para 3)

Cases Referred: Chronological Paras
AIR 1960 Punj 300 = 62 Pun LR

362, Municipal Corpn., Delhi v.

Sobhagwanti

2

B. P. Chatterjee, for Appellants;
Somen Ch. Bose and Sundarananda Pal, for Respondent.

ARUN K. MUKHERJEA, J.:— This appeal is directed against an order of the Motor Accident Claims Tribunal. The short facts of the case are as follows: One Gopinath Dey died as a result of a motor accident on 5th March, 1964 at about 2 P.M. The accident took place near the junction of Upper Circular Road and Raja Rammohan Roy Road. It is an admitted fact that Gopinath was knocked down by State Bus No. WBS 1735. The widow and the children of Gopinath filed an application for compensation before the Tribunal. They alleged that the accident was due to the negligence of the driver of the aforesaid bus. The claimants claimed further that the income of Gopinath at the time of his death was about Rs. 100/- per month and that his age was 36 years at the time of death. The claimants claimed a sum of Rs. 10,000/-. Some evidence was adduced on behalf of the claimants regarding the circumstances in which Gopinath was knocked down by the State Bus. The opposite party Calcutta State Transport Corporation did not adduce any evidence though they sought to make out a case that Gopinath was overrun because of his own negligence. The learned Tribunal came to a finding on facts that Gopinath was really run over because of the negligence of the driver of the State Bus. On this basis the Tribunal held that the petitioners were entitled to compensation. The present appeal is directed against the sum assessed by the Tribunal for compensation.

2. It appears that the Tribunal assessed the compensation in the following manner: In the first instance the Tribunal estimated the net annual loss suffered by the legal representatives of the deceased. Following a decision in AIR 1960 Punj 300 the Tribunal held that the net compensation to be awarded to the petitioners should be 15 times the net annual

loss suffered by them on account of the death of the deceased. Since the Tribunal had found on facts that the income that Gopinath would handover to his family for maintaining them amounted to Rs. 40/- per month, the Tribunal computed the net compensation to be Rs. 7,200/-. After coming to this finding the Tribunal made certain deductions which we find very difficult to appreciate. The first deduction that the Tribunal made was on account of what the Tribunal described as benefit derived by the petitioners from the death of Gopinath. According to the Tribunal the fact that after Gopinath's death his widow and children would have an undivided share in their native house at Joy-nagar amounted to a definite gain on their part by Gopinath's death. The Tribunal took twenty years rent for this accommodation as the capitalised value of these rooms and deducted a sum of Rs. 1700/- from the net compensation to be given to the petitioners. The Tribunal, however, allowed Rs. 200/- to be deducted from this sum as depreciation and cost of annual repairs. On this basis the Tribunal calculated that the petitioners had obtained an inheritance worth Rs. 1500/-. This was deducted from Rs. 7200/-. The Tribunal made a further deduction of Rs. 500/- which, the Tribunal assumed, was to be given to the heirs of Gopinath out of a fine of Rs. 1000/- that had been imposed in a criminal case upon the driver of the bus. These two deductions leave a total sum of Rs. 5200/-. The Tribunal does not, however, stop here. The Tribunal again calculated that since this sum would be invested by the heirs and would yield some profit to the heirs, there should be a further deduction of ten per cent. This gives the final figure of Rs. 4680/- which, according to the Tribunal, shall be an adequate compensation in this particular case.

3. We have carefully considered the Tribunal's method of calculation and to say the least, we find ourselves more than puzzled by the logic adopted by the Tribunal in making the deductions. To say that when a person dies his family makes a gain by reason of the fact that the dwelling house or the house which belonged to the family before, becomes the exclusive property of the heirs to the exclusion of the deceased person is a fantastic consideration. Even the learned Advocate on behalf of the respondent did not want to justify this deduction. As for the second deduction, namely, Rs. 500/- on account of the sum that was expected to be given to the petitioners out of the fine imposed in a criminal case, an affidavit has been filed in this case that no such fine has been realised. Therefore, this deduction is also unjustified. The last and final deduction by reducing the balance amount of compensation by ten per cent on the ground that the sum would be in-

vested shows that the learned Judge entirely lost sight of the purpose of the compensation. The compensation is provided to replace the money that the heirs of the deceased used to receive by way of maintenance. The compensation is not in the form of a monthly allowance. It is in the form of a lump sum. For the sake of convenience the monthly allowance of Rs. 40/- has been converted into a capitalised value and the net compensation on this basis has been fixed at Rs. 7200/-. If the net allowance be again reduced by the income that may accrue from the capitalised amount, it is difficult to understand how the balance sum will yield the monthly maintenance which it is theoretically supposed to bring to the petitioners. In any event, to imagine that an investment would yield a steady profit of ten per cent and to reduce the compensation by ten per cent is, in our opinion, little short of speculation. We have no manner of doubt that the deductions made by the learned Tribunal are thoroughly unwarranted.

4. In this view of the matter we allow the appeal and set aside the order of the Motor Accident Claims Tribunal. The petitioners should get an award of Rs. 7,200/- against the opposite party without any deduction whatsoever. The opposite party is directed to pay the aforesaid sum within three months from date. If, however, some amount have already been taken away by the appellants that amount should be adjusted against the sum of Rs. 7,200/-. The appellants shall get the costs of the appeal as well as the costs before the Tribunal.

M. M. DUTT, J.— 5. I agree.
Appeal allowed.

AIR 1972 CALCUTTA 306 (V 59 C 56)

SABYASACHI MUKHARJI, J.

Banwarilal Pasari, Petitioner v. D. R. Kohli and others, Respondents.

Matter No. 439 of 1969, D/- 19-1-1972.

Customs Act (1962), S. 115 (2), Proviso — Option to pay in lieu of confiscation — If the adjudicating authority was not called upon to give option the order of such authority shall not be interfered by High Court in a writ proceeding on the ground that the right of option was not given to the legal owner. (X-Ref:— Constitution of India, Art. 226). (Para 6) Cases Referred: Chronological Paras (1968) Matter No. 18 of 1968 (Cal.),

Vaishali Finance Corpn. v. D. R. Kohli

AIR 1966 SC 1178 = (1966) 2 SCR 828, Sundaram Finance v. State of Kerala

ORDER — The petitioner in this application challenges the order of confisca-

CP/DP/C9/72/GDR

tion of a motor vehicle seized by the customs. The order was passed on 28th August, 1967. According to the petitioner, the petitioner by an agreement in writing had hired out to the respondent No. 3 an Ambassador Motor Car bearing No. GED 7173 upon a hire-purchase agreement. The said car was seized near Krishnagar Division on the ground that the car was used as a means of transport of smuggling goods to the then Indo-Pakistan border. A show cause notice was issued and it was alleged that the car was liable to be confiscated under Section 115 (2) of the Customs Act. The petitioner showed cause. Thereafter personal hearing was granted and the respondent No. 1, the Collector of Customs on the 28th August, 1967 passed an order and the order was received by the petitioner on the 9th November, 1967. The respondent No. 1 found that the car had been utilised on several occasions for the alleged smuggling of goods and transporting of passengers to the then Indo-Pakistan border. In the aforesaid view the respondent No. 1 directed confiscation of the car absolutely under Section 115 (2) of the said Act. The petitioner contends in this application that the petitioner should have been given an option in terms of the proviso to Section 115 (2) of the said Act. Section 115 (2) of the Act provides as follows:—

“(2). Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal and that each of them had taken all such precautions against such use as are for the time being specified in the Rules.

Provided that where any such conveyance is used for the carriage of goods or passengers for hire, the owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance of fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be.”

2. The petitioner made an application to this Court which came up for hearing before B. C. Mitra, J. and by a judgment delivered on the 17th July, 1969 his Lordship was pleased to discharge the Rule on the ground that the Union of India in whom the title of the said motor vehicle had vested on confiscation had not been made a party to the said proceeding. The petitioner thereupon made this application under Art. 226 of the Constitution making the Union of India a party respondent to this application.

3. It was urged that inasmuch as it was held in the decision of B. C. Mitra,

J. in the case of Vaishali Finance Corporation v. D. R. Kohli, Matter No. 18 of 1968 (Cal.), that under the proviso to Section 115 (2) of the said Act an option should have been given to the owner before making the order of confiscation and as in this case no opportunity for exercising any option had been given to the petitioner the order was liable to be set aside. It has been further contended that the defect which was there in the previous application had been remedied.

4. Counsel for the respondent, on the other hand, has contended that this Court should not accept the finding of B. C. Mitra, J. that proviso to sub-section (2) of Section 115 of the Act would apply to the instant case. It was contended that the proviso covered only of cars or vehicles in respect of which there were permits, in other words, in cases of legal hirings. It was urged that under the Motor Vehicles Act hiring out of vehicles or conveyances without a permit was illegal. In the premises it was submitted that in the instant case there having been no permit the instant hiring was illegal and did not come as such within the proviso to Section 115 (2) of the said Act. B. C. Mitra, J. did not specifically deal with this contention. This contention is of some substance. However, in view of the judgment of B. C. Mitra, J. I would not have as at present advised taken a view contrary to that taken by B. C. Mitra J. on this point but left the parties to agitate this contention in an appropriate appeal.

5. In this case there are certain other aspects of the matter. In reply to the show cause notice the petitioner stated as follows:—

“After making over possession of the said motor vehicle to the hirer, we had and have no control over the plying of same and if you will please refer to the Registration Book of the said motor vehicle, you will find therein an endorsement in our name as follows:

“The motor vehicle above described is held by the person registered as Registered Owner under a Hire-Purchase Agreement with Messrs. Banwari Lal Pasari, 16, India Exchange Place, Calcutta.

Regarding your allegation that we are the owner of the motor vehicle, we regret, the legal position is in a flux now. The Supreme Court by a majority judgment in a case of Sundaram Finance v. The State of Kerala, AIR 1966 SC 1178 has decided that the so-called Hire-Purchase Agreements are in fact Financing Agreements only and the Financiers are not the owners of the motor vehicle; but they have a charge on the said motor vehicle.”

6. The petitioner appeared before the respondent No. 1 at the personal hearing. There the petitioner repeated the said contention that the petitioner was not

the legal owner of the motor vehicle. In any event, the petitioner did not raise any contention that the petitioner was the legal owner and as such was entitled to exercise an option under the proviso to Section 115 (2) of the Act. The position the petitioner took before the respondent No. 1 was that the petitioner was not the legal owner because under the provisions of law, as the petitioner wanted those to be interpreted, under the hire-purchase agreement the petitioner was not the owner but only had a charge in respect of the said motor vehicle. In my opinion, the party which asked an adjudicating authority to decide a contention on the plea that he was not the owner is not entitled to reverse that contention and claim a relief under Art. 226 of the Constitution on the ground that he was the legal owner and that certain rights as legal owner had been denied to him. In view of the contentions made even though in a case like this where proviso to sub-section (2) of Section 115 of the Act had applied, if the adjudicating authority was not called upon to give that option to an owner in view of that fact that nobody was claiming to be the owner, then in my opinion, it would not be proper to interfere with the order of the adjudicating authority in an application under Art. 226 of the Constitution on the ground that it had not given the right of option to the legal owner enjoined by the section. There is, however, another aspect of the matter which by itself would not have really mattered very much but in conjunction with this factor would affect the Court's discretion in this matter. The order in question was passed as mentioned hereinbefore on 28th August, 1967. The petitioner had moved an application which came up for hearing before B. C. Mitra, J. in June, 1968 when it was adjourned for a fortnight. B. C. Mitra had mentioned that at the first hearing a point was taken that the previous application was incompetent in the absence of the Central Government. The matter could not be taken up by his Lordship until July, 1969. The petitioner in the meantime had taken no steps for making the Central Government a party. B. C. Mitra, J. had mentioned about that fact in his Lordship's judgment. Taking all the aforesaid facts and circumstances of this case, I am, therefore, of the opinion that the petitioner is not entitled to any relief under Art. 226 of the Constitution. In that view of the matter this application fails and is dismissed. Rule nisi is discharged. All interim orders are vacated. There will be no order as to costs. There will be a stay of operation of this order for four weeks.

Petition dismissed.

AIR 1972 CALCUTTA 308 (V 59 C 57)

B. C. MITRA, J.

India Foils Ltd., Petitioner v. The 5th Industrial Tribunal, West Bengal and others, Respondents.

Suit No. 371 of 1971, D/- 19-1-1972.

Civil P. C. (1908), O. 11, R. 14 —
Order for production of documents —
When can be made.

The Court has got ample powers to make an order for production of a document at any time during the pendency of the suit. But before such an order can be made the Court must satisfy itself and record a finding to the effect that the documents are in the possession or power of the party against whom the order is sought and they relate to the matter in question before the Court. An order made without such satisfaction is without jurisdiction and is liable to be set aside. AIR 1953 All 251 and AIR 1958 Andh Pra 157 and AIR 1959 Punj 189, Ref.; (1946) 50 Cal WN 845, Dist. (Paras 4, 5)

Cases Referred: Chronological Paras

AIR 1959 Punj 189 = 61 Pun LR 118, Delite Cinema v. Rameshwar Dyal	4
AIR 1958 Andh Pra 157 = (1958) 2 Andh WR 246, P. Varalakshamma v. P. Balasubramanyam	4
AIR 1956 Cal 592, Burn and Co. v. Jitendra Nath Maitra	3
AIR 1955 All 251 = 1955 All LJ 425, Sri Niwas v. Election Tribunal, Lucknow	4
(1946) 50 Cal WN 845, Ram Hari De v. Niranjan Krishna Das and Co.	4

A. K. Dutt, for Petitioner; Saraf, for Respondent No. 3.

ORDER:— This is an application for appropriate order and/or directions directing the respondents not to give effect to or enforce an order of the respondent No. 1, being order No. 27 of July 3, 1971.

2. The petitioner's employees are members of a Trade Union known as India Foils Employees' Union. According to the petitioner most of the supervisors and staff assistants, who are members of the Association, are not "workmen" within the meaning of the Industrial Disputes Act and for that reason, are not competent to raise any industrial dispute. According to the petitioner again although the supervisors and staff assistants are not entitled to raise an industrial dispute, they purported to raise such a dispute before the Labour Directorate, Government of West Bengal through the third respondent. An order of reference was made on June 4, 1969, by which the dispute raised by the said workmen was referred to the first res-

pondent. The issues framed in the order of reference are:

1. Incentive/Production bonus.
2. Gratuity.

Written statements were filed before the first respondent according to the directions given. On March 21, 1971, the third respondent filed a petition before the first respondent in which it was stated that the Association would at the time of hearing of the case rely on documents which were filed as annexures to the written statements. On May 2, 1970, the third respondent filed another petition setting out a list of other documents to be relied upon at the time of hearing the case. On July 3, 1971, the third respondent filed a petition stating that the documents mentioned in their petition of May 2, 1970, were in the possession of the petitioner and that on May 28, 1971, the Association served a notice on the petitioner asking it to produce the documents, particulars whereof were given in the notice. It was alleged in this petition that the documents would be required to prove the case of the employees in connection with the preliminary objection raised by the petitioner.

3. On July 3, 1971, the first respondent made the impugned order which is as follows:

"Both parties are present. Heard the learned lawyers of both sides. The Association files a petition in duplicate. Make over a copy of the petition with a copy of Annexure 'M' to the company. The company to produce the documents mentioned by the Union on its petition dated 2-5-70 and in Annexure M of 27-5-71 if in power and possession.

Documents be filed by the company within a fortnight from the date of this order."

Being aggrieved by this order, the petitioner made an application under Article 226 of the Constitution and obtained the rule nisi which is the subject-matter of this application. The first point urged by Mr. A. K. Dutt, appearing for the petitioner was that the first respondent had no jurisdiction to make the order for production of documents. He argued that this order was made contrary to and in violation of the provisions in the Code of Civil Procedure and the rules framed under the Industrial Disputes Act. He referred to Section 11 (3) of the Act which provides that the first respondent shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure. He also referred to Rule 24 of the Rules framed under the Act which says that in addition to the powers conferred by the Act, Boards, Labour Courts and Tribunals shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure when trying a suit in respect of five different matters set out under Rule 24. Mr. Dutt argued firstly that the third

respondent had no right to call upon his clients to produce the documents before the Tribunal as it purported to. Secondly, he argued that the impugned order could not be made by the first respondent as there was nothing on record to show that the documents required to be produced by the petitioner were in the petitioner's possession and power. The documents, production of which has been ordered by the first respondent, are set out in a letter dated May 27, 1971, addressed by the third respondent to the petitioner. Mr. Dutt submitted that if the third respondent felt that those documents were in the possession and power of the petitioner, he should have made an application before the Tribunal for discovery of documents under Order 11, Rule 12 of the Civil Procedure Code. In support of this contention reliance was placed by Mr. Dutt on a decision of this Court in AIR 1956 Cal 592, in which it was held that until an affidavit of documents has been directed to be filed, the court would have no jurisdiction to order inspection and that this was not a procedure which could be omitted. In that case, however, the question was one of inspection and not of production only. But it seems to me that the observations of Sinha, J. in that decision are very relevant for determining the questions in this application.

4. Counsel for the third respondent, however, submitted that the Tribunal had ample jurisdiction under Order 11, Rule 14 of the Civil Procedure Code to make the order which it did. He argued that under that Rule the Court could at any time during the pendency of a suit, order production by any party of documents. He submitted that there was no restriction on the powers of the Court to make an order for production of documents. He argued that in this case the Tribunal had made the order under the provisions of Rule 14 of Order 11 of the Code, though the Tribunal had not stated that the order was made under that Rule. In support of this contention Mr. Saraf, counsel for the third respondent, relied upon several cases to which I shall now refer. The first decision relied upon by him is one of this Court, in (1946) 50 Cal WN 845. In that case it was held that an order for production of documents under Order 11, Rule 14 of the Civil Procedure Code was not dependent on a prior order for discovery under Rule 12 and that the two rules relate to different matters. In that case, however, the respondent had admitted that the books which were directed to be produced were in its possession or power. This decision to my mind, is not of any assistance to the third respondent in this case inasmuch as there was a clear admission by the respondent that the books were in his possession or power. The next case relied upon was a

decision of the Allahabad High Court in AIR 1955 All 251. In that case also it was held that on a plain reading of Order 11, Rule 14 it would be clear that this rule was not subject in all cases to Rule 12. Reliance was also placed on a decision of the Andhra Pradesh High Court in AIR 1958 Andh Pra 157 and a decision of the Punjab High Court in AIR 1959 Punj 189. It seems to me that although the Court undoubtedly has a power to make an order for production of documents at any time during the pendency of any suit, such an order can be made only if two pre-conditions as contemplated by Rule 14 are satisfied, namely, that the documents must be in the possession or power of the party against whom the order is made; and secondly, the documents must relate to the matter in question in the suit. It is amply clear from the text of the rule itself that wide power to direct production of documents at any stage of the suit has been given to the Court subject to the two conditions mentioned above.

5. The Court has therefore, to be satisfied either upon admission of the party against whom the order is made or from an affidavit filed on his behalf or from other material such as correspondence that the documents which are directed to be produced are in the possession and power of the party against whom the order was to be made. To my mind, it seems that unless there is evidence before the Court that the documents are in the possession or power of the party against whom the order is sought, the Court will have no jurisdiction to make an order for production of the same. The second condition is also very relevant and important, namely that the documents must relate to the matter in question in the proceeding pending before the Court. It is not open to a party to come to Court and ask for an order for production of numerous documents without satisfying the Court that the documents are relevant, and that on the records there is ample evidence that the documents are in the possession or power of the party against whom the order was to be made. In this case, it is amply clear from the text of the order itself made on July 3, 1971 that the Tribunal was far from clear in its mind as to whether the documents were in the power and possession of the petitioner, because the petitioner was directed to produce the documents if in its power and possession. That makes it amply clear that the Tribunal had no materials before it to satisfy itself that the documents were in its possession or power, and in my view in the absence of such material, or in the absence of admission by a party that the documents were in its possession or power, no such order could be made by the Tribunal. I should also mention that the

Tribunal has not stated that the documents are relevant to the matters in question pending before that Tribunal. In order to exercise the wide powers given by Rule 14 of Order 11 of the Civil Procedure Code, the Court has to come to a conclusion that the documents relate to matters in question pending before that Court. If it is not so satisfied the Court will have no jurisdiction to make an order for production of such documents in exercise of the powers under Order 11, Rule 14 of the Code. In this case there is neither evidence nor admission relating to the possession of the documents by the petitioner nor is there any finding by the Tribunal that the documents are relevant for the purpose of the pending proceedings. In the absence of satisfaction of the conditions mentioned earlier in this judgment the Tribunal in my opinion, had no jurisdiction to make the impugned order.

6. For the reasons mentioned above, the Rule is made absolute. There will be no order as to costs. Let the records be sent down to the Tribunal expeditiously.

Rule made absolute.

AIR 1972 CALCUTTA 310 (V 59 C 58)

AMIYA KUMAR MOOKERJI, J.

Sm. Manjusha Debi, Appellant v. Sunil Chandra Mukherjee and others, Respondents.

A. F. A. D. No. 680 of 1959, D/- 21-3-1972.

(A) T. P. Act (1882), Ss. 11, 54 — Sale — Vendee gets all interest in property — A habendum in sale deed cannot override provisions of S. 54 — Habendum imposing conditions or limitation in conveyance deed is repugnant to S. 11.

When a property is transferred absolutely, it must be transferred with all its legal incidents; the vendor is not competent to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private arrangement, creating a life estate in favour of the vendee in a deed of Conveyance.

A purchaser cannot limit her own interest in a Conveyance executed by her vendor. She can do so by executing a deed by herself.

A habendum cannot override Section 54 of the Transfer of Property Act. A sale is a transfer of ownership of the property. By it a transferor divested himself of his interest in the property to the transferee. Thereafter he has got no right to create a life estate in favour of a transferee. If any condition or limitation is imposed in the deed of Conveyance they are repugnant to Section 11

DP/DP/C171/72/BDE/VBB

of the Transfer of Property Act. AIR 1930 Cal 731 & AIR 1934 Cal 379 & AIR 1952 Mad 166, Distinguished; (1912) 16 Cal WN 99 & (1911) 15 Cal WN 393 (PC), Rel. on. (Paras 9, 11)

(B) T. P. Act (1882), S. 54 — Sale — Rules of English mode of conveyancing cannot prevail over the conception of sale in T. P. Act. (Para 16)

Cases Referred: Chronological Paras
AIR 1952 Mad 166 = 1951-2 Mad

LJ 664, Ammireddi Sooramma v. Ammireddi Venkataratnam 11

AIR 1934 PC 72 = 38 Cal WN 477, Kamakhya Dat Ram v. Khushal Chand 11

AIR 1934 Cal 379 = 38 Cal WN 156, Kandarpa Mohan Gossain v. Akhoy Chandra Bose 11, 18

AIR 1930 Cal 731 = 52 Cal LJ 165, Kedarnath v. Gayanath 11, 17

(1912) 16 Cal WN 99 = 14 Cal LJ 308, Chamaru Sahu v. Sona Koer 20

(1911) 15 Cal WN 393 = 38 Ind App 54 (PC), Barmanya v. Kalicharan Singh 15

J. N. Ghosh, Dwijendra Nath Lahiri and Himansu Kumar Bose, for Appellant, Apurbadhan Mukherjee, Nirmal Kumar Ganguly, and Sakti Prasad Mukherjee, for Respondents.

JUDGMENT:— This appeal is by the plaintiff No. 1. It arises out of a suit brought by her and one Sambhu Mukherjee for a declaration that premises No. 51/A & B, Lansdowne Road were Debuttar properties of the deities, Sree Durgajee and Sree Baraha Kalijee and, they were the respective Shebait.

2. The plaintiff No. 1 is a granddaughter (daughter's daughter) of Kalidashi Devi who executed a Will, by which, she dedicated 51/B, Lansdowne Road, to the deity — Sree Durgajee, and appointed her only daughter Durgarani, the Shebait and after her death, her daughter, — the plaintiff No. 1. The premises No. 51/A, Lansdowne Road was dedicated to the deity Sree Baraha Kalijee and Sambhu Nath Mukherjee, her grandson (son of the defendant No. 1) was appointed a Shebait. After the death of Kalidashi Devi, who died on the 24th of November, 1949, plaintiff No. 1 applied for letter of administration in respect of the will of the said Kalidashi. Three days thereafter, defendant No. 3 brought a partition suit being title suit No. 65 of 1950, in the 1st court of Subordinate Judge, Alipore. The plaintiff No. 1 applied to the learned Subordinate Judge for being added as a party in that suit. Her prayer was rejected. The plaintiff No. 1, after contest, however, obtained a letter of administration regarding the Will of Kalidashi. Thereafter, a Receiver was appointed in the

said partition suit. As the Shebait was deprived of the income of the Debuttar Estate, the plaintiffs brought the above suit for necessary declaration and for an injunction restraining the defendants from realising rents from the tenants of the Debuttar Properties.

3. The defendants Nos. 2 and 3, Sekharesh and Sunilesh, the sons of Kalidashi, contested the suit. Their defence, in substance, was, that Kalidashi had only a limited interest with regard to the disputed properties. She had no right to dispose of the same by a Will. W. C. Banerjee, the father of Kalidashi was a rich coal mine owner, who advanced the loan to one Durgadas Chatterjee and, subsequently, purchased the property with his own money for the benefits of his widowed daughter — Kalidashi, during her life time and thereafter for the absolute benefits of her sons—the defendants. Since the death of their mother, the defendants have been possessing the properties.

4. The trial court decreed the plaintiffs' suit upon the findings that Kalidashi advanced Rs. 30,000/- to Durgadas Chatterjee; W. C. Banerjee — the father of Kalidashi, made a gift of the said money to his widowed daughter; Kalidashi became absolute owner of the suit premises by purchase and the limitation of her interest created in the Conveyance was unlawful under Sec. 11 of the Transfer of Property Act and not binding upon the plaintiffs. The learned Subordinate Judge further observed that under the Indian Law the vendor has no right to limit the interest of the purchaser in the deed by which the property had been transferred absolutely to the purchaser. The vendor was not competent to abridge the interest of the vendee in the habendum.

5. On appeal, the court of appeal below set aside the judgment and decree of the trial court and dismissed the plaintiffs' suit upon the view that Kalidashi was the holder of a life estate only, so the Will made by her, upon foundation of which the plaintiffs brought their action must fail. It found, that total consideration for the Conveyance was Kalidashi's money; the disposition the Conveyance Ext. I made, was not absolute interest in favour of Kalidashi. So that grant did not offend Section 11 of the Transfer of Property Act.

6. Mr. Ghosh, appearing on behalf of the appellant, contended that having found that the consideration for the Conveyance was Kalidashi's money, the court of appeal below erred in holding that Kalidashi by a "self-denying ordinance" limited the right, title and interest which passed to her by the said Conveyance to a life estate. Absolute right

was conveyed by the vendor upon Kalidashi and it was beyond the competence of the vendor who transferred all his right, title and interest in properties covered by the said Conveyance to the purchaser, to limit or restrict the right of Kalidashi in properties transferred, to a life estate only or to create rights in favour of persons who were not parties to the said Conveyance. Mr. Ghosh, further contended that Court of appeal below erred in law in holding that the restrictive covenant provided for, in the habendum in Ext. 1, did not offend Section 11 of the Transfer of Property Act.

7. The habendum in the Conveyance reads as follows:—

"To have and to hold the said messuages tenements or dwelling houses lands hereditaments and premises hereby granted or expressed so to be free from all encumbrances unto and to the use of the said purchaser Sreemati Kalidashi Devi to be held by her for the term of her natural life as the estate of a Hindu widow and from and after her death to her three sons Samaresh Chandra Mukherjee, Sikharesh Chandra Mukherjee and Sunil Chandra Mukherjee to be held by them as tenants in common during their representatives lives without power of anticipation and after their death unto and to the use of their respective heirs absolutely and forever".

8. In a gift the donor may impose condition upon the donee or restrict the enjoyment of the property gifted and that condition and limitation must be accepted by donee during the life time of the donee. A limited interest can also be created by a Will; by a deed of partition or by a family settlement. But it is impossible to conceive a deed of Conveyance creating a life estate by the vendor in favour of the vendee. The Conveyance is not required to be accepted by the purchaser as in the case of a gift. There is no evidence that Kalidashi imposed upon her the "self-denying ordinance" or created "an implied trust" by imposing a limitation upon herself. Undoubtedly she was capable and competent to impose upon her restriction on her proprietary rights but she could not by a collateral agreement annex a condition to an absolute grant. The learned Additional District Judge found no word of limitation being there in the premises, but the habendum, a special provision prevailed over the general provision in the Conveyance. It was not open to Kalidashi to say that she had accepted the Conveyance minus "habendum". According to the learned Judge, Kalidashi created an implied trust by imposing a limitation on herself, it was her creation, a "self-denying ordinance". Vendor divested himself of all he had. His right, title and interest was

extinguished. The new right came into being was the right of Kalidashi for her life and after her, of others. Kalidashi could and did limit her own interest.

9. When a property is transferred absolutely, it must be transferred with all its legal incidents, the vendor is not competent to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private arrangement, creating a life estate in favour of the vendee in a deed of Conveyance.

10. A purchaser cannot limit her own interest in a Conveyance executed by her vendor. She can do so by executing a deed by herself.

11. Mr. Mukherjee, appearing on behalf of the respondent, contended that in the instant case, transfer was not absolute, so provisions of Section 11 of the Transfer of Property Act, were not attracted. In support of his contentions he referred to the following decisions:—

(a) Kedarnath v. Gayanath, AIR 1930 Cal 731; (b) Kandarpa Mohan Gossain v. Akhoy Chandra Bose, AIR 1934 Cal 379; (c) Kamakhya Dat Ram v. Khushal Chand, 38 Cal WN 477; (AIR 1934 PC 72); (d) Ammireddi Sotamma v. Ammireddi Venkataratnam, AIR 1952 Mad 166.

12. I will deal with the cases referred to by Mr. Mukherjee later on.

13. The court of appeal below held that grant was absolute, no word of limitation being there in the premises, the habendum was the only place where intention should manifest itself. The habendum, a special provision, therefore prevails over the general provisions elsewhere in the Conveyance.

14. Mr. Mukherjee could not place a single decision in support of the proposition as laid down by the learned Judge of the court of appeal below that a habendum prevails over the general provisions elsewhere in the Conveyance.

15. Mr. Mukherjee referred to Norton's On Deed and Prideaux's Forms and Presidence in Conveyancing. It is said in Norton's On Deed's that the right conferred in the premises cannot be abridged in the habendum. With regard to English Rules of conveyancing, in Barmanaya v. Kalicharan Singh, (1911) 15 Cal WN 393 (PC) the Privy Council observed "Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent among those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property in a very artificial system of conveyancing and the success of those rules in giving effect to the real

Intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the facts that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instrument of Hindus, who view most transaction from a different point, think differently, and speak differently from Englishmen and who have never heard of the rules in question."

16. The Rules of English mode of Conveyancing cannot prevail over the conception of 'sale' in Transfer of Property Act.

17. In AIR 1930 Cal 731 the first case cited by Mr. Mukherjee, the question arose whether a direction against the alienation made in a Will bequeathing a life estate on the donee was valid under Section 138 of the Indian Succession Act. It is held that where the bequest is of a life estate it cannot be said that it is bequeathed absolutely. That decision is not applicable to the facts and circumstances of the present case.

18. In AIR 1934 Cal 379, Mr. Mukherjee drew my attention to certain observations at page 383 of the report where it was observed "you may prohibit alienation absolutely; you may restrict it by prohibiting a particular class of alienation; you may restrict it by prohibiting it to a particular class of individual; or you may restrict alienation by restricting it to a particular time." That observations were made in the context of one's power to dispose of the Shebaitship. It was not a case of sale. In 38 Cal WN 477 = (AIR 1934 PC 72) it was also a case for construction of a Will.

19. The Madras case referred to by Mr. Mukherjee reported in AIR 1942 Mad 166 is, with regard to a construction of a partition deed. As I have said already that by a gift, by a Will, by a partition or by a family settlement, a limited interest can be created. So, all the decisions referred to by Mr. Mukherjee do not solve the real point in controversy.

20. Where a transfer is not absolute, Section 11 of the Transfer of Property Act has got no application. That proposition is well-settled and it is not disputed by Mr. Ghose. The real point for consideration is, whether a life estate can be created by a deed by the vendor. If it can be created, then the transfer in the instant case is not absolute. So, the provision of Section 11 of the Transfer of Property Act

do not come in at all. But once it is found that a transferee of a property, takes an absolute interest, he cannot be restrained in his enjoyment of disposition of it by condition inserted in the transfer. The transferor has no right to prescribe the methods in which property transferred should be applied or enjoyed by the transferee (Vide, *Chamaru Sahu v. Sona Koer*, (1912) 16 Cal WN 99 = 14 Cal LJ 308).

21. So, in my view, a habendum cannot override Section 54 of the Transfer of Property Act. A sale is a transfer of ownership of the property. By a transfer, a transferor divested himself of his interest in the property to the transferee. Thereafter he has got no right to create a life estate in favour of a transferee. If any condition or limitation is imposed in the deed of Conveyance that are repugnant to Section 11 of the Transfer of Property Act.

22. Accordingly, I hold that restrictions imposed in the habendum in the deed of Conveyance Ext. 1, are invalid and repugnant under Section 11 of the Transfer of Property Act. Kalidashi became the absolute owner of the premises No. 51/A & 51/B, Lansdowne Road, by purchase and she had right to dispose of the same by a Will.

23. Let the plaintiff No. 1 be declared as Shebait in terms of the Will of Kalidashi Devi.

24. In the result, this appeal is allowed with costs, the judgment and decree of the court of appeal below are set aside and that of the trial court with respect to plaintiff No. 1 are restored. Hearing fee being assessed at 5 gold mohurs. Leave under clause 15 of the Letters Patent is prayed for and granted.

Appeal allowed.

AIR 1972 CALCUTTA 313 (V 59 C 59)
SANKAR PRASAD MITRA AND A. K. JANA, JJ.

Mst. Ramdayee, Petitioner v. Dhanraj Kochar and others, Opposite Parties.

Civil Rule No. 747 of 1970, D/- 8-3-1972.

(A) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 20 — Applicability — Applies to a suit or proceeding by landlord against tenant for recovery of possession simpliciter — Other suits or proceedings by a landlord against tenant in a competent court, not barred.

(Para 5)

CP/DP/C7/72/VSS/VBR

(B) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 20 — Joinder of parties and causes of action — Provisions of O. 1, Rr. 3 and 5 and O. 2, R. 3, Civil P. C. govern joinder of parties and causes of action — They are not abrogated or repealed by Section 20 — (X-Ref:— Civil P. C. (1908), O. 1, Rr. 3 and 5 and O. 2, R. 3). (Para 6)

Where a suit was filed for recovery of possession of A schedule premises against tenant defendant 1 and for possession of B Schedule premises against defendants 1 and 2 as trespassers, for declaration of title in respect of B Schedule premises and for damages, it was held that the suit was not bad for multifariousness as common questions of fact and law would arise if suits in respect of A and B Schedules were filed separately. It was further held that High Court would not be justified in interfering with the discretionary order of trial Court allowing the suit to proceed as the plea of multifariousness was raised more than five years after framing of issues and other proceedings had taken place.

(Paras 6, 11, 13, 15)

Cases Referred: Chronological Paras

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| (1962) 66 Cal WN 391, Kamala Prosad Gupta v. Chaman Lal Agarwalla | 12 |
| AIR 1958 Cal 710 = 62 Cal WN 390 Ranjit Kumar Pal Chowdhury v. Murari Mohan Pal Chowdhury | 15 |
| AIR 1918 Cal 858 = 21 Cal WN 794, Ramendra Nath Ray v. Brojendra Nath Dass | 10 |

C. Banerjee and Rathindranath Battacharjee, for Petitioner; Samarendra Kumar Dutta and Pramatha Nath Palit, for Opposite Parties.

SANKAR PRASAD MITRA, J.:—

This Rule was obtained against an Order of the Third Subordinate Judge at Alipore in Title Suit No. 50 of 1962 made on the 21st January, 1970. By this Order the Subordinate Judge has overruled two objections to the maintainability of the Suit. The first objection was with regard to misjoinder of parties and cause of action. And the second objection was based on Section 20 of the West Bengal Premises Tenancy Act, 1956 challenging the jurisdiction of the Court to try the Suit.

2. Briefly speaking the facts are that the plaintiff is the owner of premises No. 24 Russa Road South, Post Office, Tollygunge in the District of 24-Parganas which subsequently came to be known as premises No. 91, Deshapran Sasmal Road. The building appears to be a fairly large one consisting of 32 rooms and three shop rooms

facing the road. The plaintiff's case is that originally the defendant No. 1 became a tenant in respect of 23 rooms in this property. These 23 rooms have been described in Schedule 'A' to the plaint. In 1959, alleges the plaintiff, the defendant No. 1 and her husband the defendant No. 2 resisted the plaintiff's ingress to and egress from the premises in Suit. In 1960, the defendant No. 1 started depositing the rents payable in respect of the aforesaid 23 rooms with the Rent Controller but in making these deposits the defendant No. 1 described herself to be the tenant of the entire premises. The plaintiff's further allegation is that in January 1961 both the defendants trespassed into the other nine rooms which we have mentioned above and these nine rooms have been described in schedule 'B' to the plaint. The plaintiff has also alleged that the defendant No. 2 has converted all the thirtytwo rooms aforesaid into a Factory without the plaintiff's consent although the original tenancy for 23 rooms was for residential purposes only. In the last paragraph, that is to say, paragraph 16 of the plaint it is alleged: "That in the facts and circumstances set forth in this plaint the defendant No. 2 is made a party (to) this Suit and more particularly for the act of trespass committed by him also in respect of properties mentioned in Schedule 'B' (to) this plaint, and also for the fact that he is the husband of (the) defendant No. 1 and whatever has been done by (the) defendant No. 1 has been done in conspiracy with (the) defendant No. 2 in respect of the disputed premises." The plaintiff's prayers, inter alia, are (a) decree for recovery of Khas possession in respect of property described in Schedule 'A' by evicting the defendant No. 1 therefrom; (b) decree for damages in respect of Schedule 'A' properties from 1-4-1962 till Khas possession is obtained; (c) declaration of title and recovery of possession in respect of property described in Schedule 'B' after evicting the defendants therefrom and (d) a preliminary decree for mesne profits in respect of Schedule 'B' properties.

3. The first contention of the petitioner before us is that the Subordinate Judge's Court has no jurisdiction to try the Suit for recovery of possession of 'A' Schedule properties. Such a Suit, according to counsel for the petitioner, should have been instituted in the Munsiff's Court.

4. This contention is founded on the provisions of Section 20 of the West Bengal Premises Tenancy Act, 1956. The provisions are as follows: "Notwithstanding anything contained in

other law, a Suit or proceeding by a landlord against a tenant in which recovery of possession of any premises to which this Act applies is claimed shall lie to the Courts, as set out in the Schedule, and no other Court shall be competent to entertain or try such Suit or proceeding."

5. There is no dispute that where a landlord institutes a Suit or proceeding against a tenant merely claiming recovery of possession of any premises to which the West Bengal Premises Tenancy Act, 1956 applies the Suit or proceeding can be instituted only in the Court specified in the Schedule to the Act depending on valuation. But we do not find in these provisions any bar express or implied to joinder of parties and causes of action provided that such joinder is permissible in law. To us it seems that Section 20 applies to a Suit or proceeding by a landlord against a tenant for recovery of possession simpliciter. The section does not stand in the way of institution of a Suit or proceeding other than simply a Suit or proceeding by a landlord against a tenant for possession in a Court competent to try such Suit or proceeding. And neither the non-obstante Clause nor the Clause "no other Court shall be competent etc." can operate as a bar to such a Suit or proceeding. In the instant case we have to consider the provisions of Order 1, Rule 3, Order 1, Rule 5 and Order 2, Rule 3 of the Code of Civil Procedure. These provisions are as follows:

Order 1, Rule 3 — All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction of series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.

Order 1, Rule 5 — It shall not be necessary that every defendant shall be interested as to all the relief claimed in any Suit against him.

O. 2, R. 3(1) — Save as otherwise provided, the plaintiff may unite in the same Suit, several causes of action against the same defendant, or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same Suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the Suit shall depend on the amount or value of the aggregate sub-

ject-matters at the date of instituting the Suit.

6. These are the relevant provisions for joinder of parties and causes of action. In our opinion these provisions have neither been abrogated nor been repealed by Section 20 of the West Bengal Tenancy Act, 1956. Section 20 does not lay down that the Cause of action for a Suit for possession by a landlord against a tenant cannot be joined in a proper Suit with another Cause of action. The position, therefore, is that the Subordinate Judge had jurisdiction to try the Suit as framed if he was satisfied that there was a proper joinder of parties and causes of action.

7. We now proceed to discuss whether under the aforesaid provisions of the Code of Civil Procedure the plaintiff has properly framed his Suit. The plaintiff admittedly is the owner of the premises. The series of acts alleged in the plaint in respect of the premises are (a) the defendant No. 1 became a tenant of Schedule 'A' properties (b) in 1959 the defendants Nos. 1 and 2 prevented the plaintiff from entering into the premises (c) in 1960 the defendant No. 1 started depositing rents for the entire property with the Rent Controller (d) in January 1961 the defendants Nos. 1 and 2 trespassed into the 'B' Schedule properties and (e) the defendant No. 1 in conspiracy with the defendant No. 2 has converted a residential property into a factory without the plaintiff's consent. Assuming that the plaintiff had filed two Suits one against the defendant No. 1 only for recovery of possession of 'A' Schedule properties in the Court of the Munsiff under the provision of the West Bengal Premises Tenancy Act, 1956 and the other in the Court of the Subordinate Judge for recovery of possession of 'B' Schedule properties on the ground that the defendants Nos. 1 and 2 had trespassed into these properties, the common questions of facts that the plaintiff had to prove in both the Suits were: (1) that the defendant No. 1 was a tenant of 23 rooms only and had trespassed into 9 rooms along with the defendant No. 2 (2) the deposits which the defendant No. 1 made with the Rent Controller were not for the entire premises but for 23 rooms only.

8. If the plaintiff had succeeded in establishing these two common facts a further common question of law would have arisen as to the validity of the deposits in view of the provisions of Section 22 (2) of the West Bengal Premises Tenancy Act, 1956.

9. In these circumstances, we cannot but hold that the plaintiff was justified in order to avoid, multiplicity

of Suits and proceedings and also the possibility of conflicting decisions, in bringing one consolidated Suit covering both the 'A' Schedule and 'B' Schedule properties. To us it seems that this is the precise reason why the aforesaid provisions of the Code of Civil Procedure have been introduced.

10. We may now refer to a few decided cases. The earliest case on the subject to which our attention has been drawn is the case of Ramendra Nath Ray v. Brojendra Nath Dass, 21 Cal WN 794 = (AIR 1918 Cal 858). In this case the plaintiff asserted that he was the owner of certain bales of jute and the Defendant B. N. D. obtained possession of the same and of the documents of title relating thereto (namely ten bills of lading and railway receipts) by means of fraud. B. N. D. transferred nine of the documents of title to C. & Co. and C. & Co. transferred them to L. J. M. & B. Bros. One railway receipt was pledged by B. N. D. with B. N. B. Part of the goods were taken delivery of by L. J. M. and part stopped by the plaintiff in transit. Plaintiff brought an action praying in the alternative for the recovery of goods and documents of title relating thereto or the value of the goods making B. N. D., C. Co. L. J. M. B. Bros. and B. N. B. party defendants. A Division Bench of this Court has held that the defendants were properly joined in the Suit under the provisions of Order 1, Rule 1 and Order 1, Rule 3 of the Code of Civil Procedure, 1908. Mr. Justice Woodroffe at page 802 observes:

"..... The next question then is whether the joinder in the present case is justified by that rule (that is Rule 3. of Order 1). It is contended that it is not, it being argued that there are different sets of transaction and no common question of law or fact. The foundation of the case, on which the rest of it depends, is the alleged fraud of B. N. Das. If such fraud is proved the question is did the defendants who all claim under B. N. Das obtain any title? If the plaintiff fails to prove fraud on the part of B. N. Das, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence; but that does not make the case any the less one of a common question of law and fact. The same act or transaction which concerns all parties is the alleged fraud of B. N. Das, and this involves a common question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this the possession of all is alleged to be wrongful. Whether a common

question arises may be tested by seeing what the evidence will be It is true so far as the plaintiff's cause of action, as based on the fraud of B. N. Das, is concerned though there may be some facts which are particular to particular parties being offered in the proof of the Plaintiff's case (i.e., present possession of the goods as a result of such fraud) or by the defendants as part of their defence. The rule does not say that all questions must be common. It is sufficient that there is a common question. In my opinion, then, the plaint is within the provisions of Order 1, Rule 3"

11. We have already discussed the series of acts alleged in the plaint herein relating to the premises in Suit. We have also said that one common question of fact arises with respect to both the defendants and that common question is whether the defendant No. 1 is a tenant of the entire premises or only a portion thereof. Mr. Banerjee, learned counsel for the petitioner has urged that the defendant No. 2 is not at all interested in the eviction of the defendant No. 1 from 23 rooms in the premises. In other words so far as these 23 rooms are concerned no relief can be or has been claimed against the defendant No. 2. But that in our opinion does not make the Suit bad for misjoinder of parties and causes of action. Rule 5 of Order 1 of the Code specifically provides that it shall not be necessary that every defendant shall be interested in all the reliefs claimed in any Suit against him. In Ramendra Nath Ray's case also all the defendants were not concerned with all the reliefs claimed in the Suit. This contention of Mr. Banerjee, therefore, cannot be upheld.

12. A number of decisions on the relevant provisions of Orders 1 and 2 of the Code were placed before us but we need not refer to all of them. The next case we intend to rely on is the case of Kamala Prosad Gupta v. Chaman Lal Agarwalla, (1962) 66 Cal WN 391. This is also a judgment of a Division Bench. The Rule arises out of a suit for recovery of possession of the disputed property from the defendants after a declaration of the plaintiff's tenancy right therein under the defendants Nos. 3 and 4, a declaration of determination of the defendant No. 1's tenancy under the plaintiff and a further declaration that defendant No. 2 is a trespasser. An objection was taken to the maintainability of the suit on the ground that it was bad for multifariousness. In the plaint, there was a specific allegation of conspiracy amongst all the defendants for keeping the plaintiff out of possession of

the disputed property, but the learned trial Judge held that this mere allegation of conspiracy would not be sufficient for a lawful joinder of the several causes of action against the several defendants and that, accordingly, it would be no answer to the defence objection of multifariousness. This Court made the Rule absolute and set aside the order of the Trial Judge. This Court was of the view that the allegation of conspiracy in the plaint, as it stood, would be sufficient for uniting or joining the several causes of action against several defendants under O. 1, R. 3 of the Code. This Court has pointed out that the provision in Rule 3 of Order 1 has been liberally interpreted by courts and its scope has never been attempted to be narrowed down or restricted. It is stated in the judgment that on the plaintiff's case, his claims are inter-connected, the several transactions conforming the basis of his claims being so inter-linked that they may be regarded as constituting one series of transactions within the meaning of Order 1, Rule 3 out of which the plaintiff's right to relief arises. This Court has said that it is true that, in the plaint, there are also other claims, namely, of arrears of rent and mesne profits but those are only incidental or consequential reliefs flowing from or arising out of the main relief for recovery of possession. This Court has held that the Civil Procedure Code expressly permits joinder of defendants and causes of action not only where the right to relief against the several defendants exists jointly but also severally or in the alternative and does not require that all the defendants should be interested in all the reliefs.

13. To our mind the main principles enunciated in this judgment apply to the facts of this case. It is true that the plaintiff has claimed recovery of possession of 23 rooms against the defendant No. 1 and recovery of possession of 9 rooms against the defendants Nos. 1 and 2. But the series of acts which the plaintiff has alleged including deposit of rent by the defendant No. 1 with the Rent Controller for the whole premises and the conversion of a residential building into a Factory by both the defendants are so interlinked that we cannot throw out the Suit on the ground of misjoinder of parties and causes of action.

14. There is one other feature of this case we wish to deal with. Learned Advocate appearing for the plaintiff placed before us from the records a few facts concerning the conduct of the two defendants in this Suit. The plaintiff instituted the Suit on the 25th May, 1962. On July 4, 1963, the

trial Court framed the issues. On July 8, 1963 the trial Court made an Order for analogous hearing of this Suit and another Suit which the plaintiff had instituted in 1959, inter alia, for an injunction restraining the defendants from preventing the plaintiff's ingress to and egress from the premises. The defendants obtained a Rule against this order. The Rule was discharged on April 7, 1967. Thereafter the trial Court on June 3, 1967 made an Order for local inspection of the Suit premises. The defendants again obtained a Rule against this Order. The second Rule was discharged on January 9, 1968. And it was after the discharge of these two Rules by this Court, as late as the 17th September, 1968, the two defendants made the present application objecting to the maintainability of the Suit on the ground of jurisdiction and multifariousness. The objections were overruled and the trial Judge passed his Order on January 21, 1970. Immediately thereafter the defendants obtained the present Rule.

15. On these facts this Rule ought to be discharged so far as the plea of multifariousness is concerned. This Court in Ranjit Kumar Pal Chowdhury v. Murari Mohan Pal Chowdhury, AIR 1958 Cal 710 at page 713 in paragraph 13 observed: "The rule of multifariousness is a rule of convenience and it is primarily in the discretion of the Court to decide whether the plaintiff should be allowed to proceed with different causes of action in the same suit upon a consideration of all the facts and circumstances of the case. The omission of the defendants to raise the plea for a period of more than twelve years from the date of the framing of the issues, is fatal to their claim." In our case the plea of multifariousness was raised more than five years after the framing of issues and after various other proceedings have taken place both in the trial Court and in this Court. From this point of view also we would not be justified in interfering with the trial Court's discretion exercised in favour of the plaintiff.

16. In the result the Rule is discharged. There will be no order as to costs. The learned Advocate for the petitioner states that the Miscellaneous Appeal which the petitioner had filed against the said impugned order of the trial Judge has already been dismissed. Let the records be sent back to the trial Court expeditiously.

JANAH, J.:— 17. I agree.

Rule discharged.

AIR 1972 CALCUTTA 318 (V 59 C 60)

AMIYA KUMAR MOOKERJI, J.

The Corporation of Calcutta, Petitioner v. The Building Tribunal and, others, Opposite Parties.

Civil Revn. No. 1573 of 1966, D/- 2-3-1972.

Calcutta Municipal Act (33 of 1951), Sections 6, 24, 34, 414 and 414-A — Powers and position of Commissioner — Order to demolish unauthorised construction — Review of order rejected — Appeal beyond limitation — Commissioner not impleaded — Appeal held bad and defective.

In view of the provisions of Sections 6, 24 and 34, when the Commissioner exercises statutory functions in regard to which he is the sole authority, he does not exercise powers as an agent of the Corporation. (Para 8)

After a notice under Section 414 (1) with respect to an unauthorised construction, the Commissioner passed an order on 15-5-1963 to demolish it under Section 414 (3). Stay and review applications were rejected finally on 21-1-1966 as there was no provision in the Act for review. However, provision for appeal against the order for demolition was introduced for the first time by Section 414-A from 1-4-1965. Appeal was, thereupon, filed before the Building Tribunal against the order rejecting review. The appeal was only against the Corporation without impleading the Commissioner.

Held (i) that the appeal which was against the order of demolition was on the face of it, time barred. (Para 6)

(ii) that as the order of demolition was passed by the Commissioner, his absence as a party to appeal rendered the appeal bad and defective and therefore liable to be set aside. (Para 8)

Sunil Kumar Basu, for Petitioner; Mrs. Kanika Banerjee, for Opposite Parties.

ORDER:— This Rule was obtained by the Corporation of Calcutta. It is directed against the appellate order of the Building Tribunal passed in an appeal under Section 414-A of the Calcutta Municipal Act, 1951.

2. The opposite party No. 2 as proprietor of Sree Printers & Binders and as the Managing Director of Essche Printers Pvt. Ltd., is a monthly tenant of a structure in the ground floor of premises No. 42, Dharamtolla Street Calcutta, since April, 1955. Sometime in the year 1960, by two letters dated 25-8-1960 and 3-9-1960 complaint was made by the owner as well as some co-tenants of the said premises, to the

City Architect and the Commissioner of the Corporation of Calcutta respectively, that the said opposite party No. 2 without any permission covered the open space with corrugated sheets and constructed a room on the corridor space, thus created an unauthorised structure. On receipt of the said complaint, the site was inspected. Two unauthorised sheds of C. I. Sheets in the side space were detected. The said unauthorised sheds infringed Rules 32 and 33 of Schedule XVI of Calcutta Municipal Act, 1951. Thereupon, on 30th July 1962, a notice under Section 414 (1) of the Calcutta Municipal Act, 1951, (hereinafter referred to as the Act) was served upon the said opposite party No. 2. On receipt of the said notice, the opposite party No. 2 on 4th August, 1962, addressed a letter to the City Architect of the Corporation of Calcutta, wherein he denied any construction, addition and alterations and, contended that the existing structures were more than 12 years old. Thereafter, on the 15th of May, 1963, the Commissioner passed an order of demolition under Section 414 (3) of the Act after duly intimating the said opposite party No. 2 the date of hearing which was fixed on 15th May, 1963. The opposite party No. 2, however, did not appear before the Commissioner at the date of the hearing of the demolition case. Immediately after the said order of demolition was passed, the said opposite party No. 2 by his letter dated 23rd May, 1963, asked the Commissioner, Calcutta Corporation, for rehearing of the case, and stay of the implementation of the order that passed on 15th of May 1963. The Commissioner rejected the prayer for review. Thereupon, a Lawyer's notice purported to be under Section 80 of the Code of Civil Procedure was served upon the Commissioner and the Special Officer (Building), Corporation of Calcutta, by the opposite party No. 2 expressing his intention to file a suit for setting aside order of the Commissioner and for other reliefs. A reply was sent thereto intimating that the Commissioner's order should not be stayed unless an injunction was obtained from a Civil Court. Thereafter, on the 17th of December, 1963, the opposite party No. 2 again applied to the Commissioner for review of his order passed on 15th May, 1963. On 4th of April, 1960, (1964?) the Commissioner declined to grant review and by a letter dt. 16th of March, 1963 (1965?) addressed to the opposite party No. 2 asked him to carry out the order of demolition. By Amending Act XVIII of 1964, Section 414-A was brought into force on the 1st April, 1965. The right of appeal was given under that section against the order of

the Commissioner passed under sub-section (3) of Section 414 within the 30 days from the date of such order. On 16th of March, 1965, notice was given to the opposite party No. 2 to carry out the demolition order dated 15th of May, 1963. On the 20th of June, 1965, the opposite party No. 2 again applied for the third time for the review of the demolition case. On 21st January, 1966, the Commissioner rejected the opposite party No. 2's said application after hearing the parties. Thereafter on the 19th February, 1966, the opposite party No. 2 filed an appeal before the Building Tribunal under Section 414-A of the Act against the order dated 21-1-1966 passed by the Commissioner by which the opposite party No. 2's application for review had been rejected. The said appeal was filed against the Corporation of Calcutta and the Commissioner was not made a party. On 13th April, 1966, the Building Tribunal allowed the opposite party No. 2's appeal upon the findings that the sheds in question were erected more than 12 years before the issue of notice in sub-section (1) of Section 414. Accordingly, provisions of Section 414, clause (4) would be attracted. Therefore, no action could be taken under that section in respect of the sheds and as a result, the demolition case against the opposite party No. 2 was liable to be dropped.

3. Being aggrieved against the said appellate order of the Building Tribunal, the Corporation of Calcutta moved this Court on an application under Article 227 of the Constitution and obtained the present Rule.

4. Mr. Basu, appearing on behalf of the petitioner made a two-fold submission. In the first place he contended that as the order dated 21st of January, 1966, was not an order passed under Section 414 (3) of the Act, but the said order was merely an order rejecting a review application inasmuch as the order for demolition under Section 414 (3) of the Act was made on the 15th of May, 1963, and that order could not be set aside by the Tribunal under the provisions of the Section 414-A of the Act; moreover, the order dated 21-1-1966 could not be set aside while the order dated 15th of May, 1963, remained valid and subsisting, thereby the Building Tribunal exercised its jurisdiction not vested in it by law.

5. Under the Calcutta Municipal Act, 1951, there was no provision for review. The provisions of appeal under Section 414-A was introduced for the first time by the Amending Act XVIII and from 1st April, 1965. Section 414-A of the Act reads as follows:

"Any person dissatisfied with the order of the Commissioner made under sub-section (3) of Section 414 may, within 30 days from the date of the order, present an appeal accompanied by a copy of the order to the Tribunal constituted under Section 391-B (and the President of the Tribunal) may stay the execution of the order for such period or periods as (he may think fit) or until the disposal of the appeal."

6. It appears that in the instant case the order of demolition was passed on the 15th May, 1963, and the opposite party No. 2's appeal was filed on the 19th of February, 1966. So, on the face of it the said appeal was barred by limitation. Therefore I am of opinion that the Tribunal had outstepped the limits of its jurisdiction by entertaining the opposite party No. 2's Appeal under Section 414-A of the Act, and its order cannot be sustained.

7. Mr. Basu next contended that as Commissioner of Corporation of Calcutta had not been made a party in the said appeal preferred by the opposite party No. 2, the order of the Building Tribunal setting aside the order of the Commissioner passed under S. 414 (3) of the Act was illegal and without jurisdiction.

8. Under Section 6 of the Act the three authorities, namely, (a) The Corporation, (b) The Standing Committees and (c) the Commissioner are charged with carrying out the provisions of the Act. Under Section 24 of the Act, the Municipal Government of Calcutta is vested in the Corporation but the Corporation shall not be entitled to exercise or discharge any powers, duties or function expressly assigned to it by or under that Act or any other law to a Standing Committee or to the Commissioner. Under Section 34 of the Act, the Commissioner may delegate to any Municipal Officer any of his powers, duties or functions but not of those conferred under sub-section (3) of Section 414. So, where the Commissioner exercises statutory function, imposed upon him by the statute and in regard to which he is the sole authority, he does not exercise powers as an Agent of the Corporation and so, impleading of the Corporation is not enough for the purpose of challenging the impugned order passed by the Commissioner under Section 414 (3) of the Act. So the absence of the Commissioner as a party in the present appeal, has rendered the appeal bad and defective.

9. In the result this Rule is made absolute, the impugned order of the Building Tribunal is set aside and that of the Commissioner dated 15th of May, 1963, passed under Section 414

(3) of the Act, is restored. There will be no order as to costs.

Rule made absolute.

AIR 1972 CALCUTTA 320 (V 59 C 61)

ANIL KUMAR SEN, J.

Sudhansu Sekhar Maity and others,
Petitioners v. State of West Bengal and
others, Respondents.

Civil Rule No. 3302 (w) of 1969, D/-
14-12-1972.

**(A) Land Acquisition Act (1894),
Ss. 4 and 6 — Notification for acquisition
and declaration under Section 6
neither invoking delegate powers nor
issued in appropriate form — Acquisition
not vitiated for such irregularity.**

If the authority has the power for
any action taken, the act is competent
and non recital or wrong recital of the
authority for the action would not
make the act incompetent or without
jurisdiction. (Para 10)

Thus where the notification under
Section 4 or the declaration under Section
6 did not invoke the delegated
powers nor were the notifications and
declarations issued in appropriate forms
it would be a mere irregularity not
affecting the substance which would not
vitate the acquisition. AIR 1966 SC
334, Relied on. (Para 10)

**(B) Land Acquisition Act (1894),
Section 6 — Acquisition for establishment
of subsidiary Port — Competency
of State Government.**

When establishment of a subsidiary
port or a dock therein would undoubtedly
serve at least the general
public purpose even if it otherwise involves
a purpose of the Union. It would
not be beyond the authority of the
State Government to acquire lands in
exercise of its own powers and irrespective
of the powers delegated by the
Union Government in this respect. (Para 11)

Simply because the acquisition is
for the purpose of setting up a subsidiary
port, the purpose of the acquisition
does not necessarily become solely
a purpose of the Union. As it is a
project which would not only be highly
beneficial to the general public in
this State but would serve public purposes
in this State and as such the acquisition
would be well supported on
the ground that it is for a public purpose.
It is clearly so when the acquisition
is being made at the expense of
the local authority. AIR 1955 SC 810,
Followed. (Para 11)

**(C) Land Acquisition Act (1894),
Section 6 — 'Purpose' — Undeclared**

purpose cannot be supported by declared
purpose — However, real purpose,
though undeclared, if it is well
known it can be supported.

Port is a wider term of which dock
may be a part but the dock itself cannot
be equated with the port so that
if the declared purpose of acquisition
be establishment of a dock but the undeclared
purpose be establishment of a
port the undeclared purpose cannot be
supported by the declared purpose. (Para 16)

Where however on a proper reading
of the notifications and declarations
on their well known background and
along with the maps referred to therein,
it could be held that the real declared
purpose is not limited to establishment
of the dock only then in spite of the
defect and the irregularity in the terms
of the notifications and declarations,
the real declared purpose of the acquisition
was completion of the Haldia project.
Such purpose being quite known to all
concerned and the defect does not vitiate
the acquisition and the acquisition is still
well supported by a public purpose as
there can be no doubt that the completion
of the project by itself would be a
public purpose within the meaning of
Sections 4 and 6 of the said Act. Hence
it cannot be said that acquisition is being
made for a purpose other than the
declared purpose and as such it is not
in accordance with law. (Para 19)

**(D) Land Acquisition Act (1894),
Part 7 — Acquisition for establishment
of subsidiary port — Grant of land to
Indian Oil Corporation or Fertilizer
Corporation of India — Propriety.**

When the acquisition is not specifically
made for these corporations or at
their cost but the acquisition is for the
project or the complex of which these
corporations or their establishments
constitute an integral part there can
be no doubt that the establishments
which would be run by these corporations
as a part of the complex would
be highly beneficial to the interest of
the public. This being the position
when the acquisition itself is for the
project and at the cost of a local
authority it can well be supported under
Section 6 of the said Act and no question
of following the provisions of
Part 7 does at all arise. (Para 21)

**(E) Land Acquisition Act (1894),
Section 5-A — Second opportunity of
hearing to owner of land not envisaged.**

The Land Acquisition Act contemplates
no second opportunity for making
a representation after the enquiry
under Section 5-A. The report that
follows the enquiry is the recommendation
of the Collector for consideration

by the State Government along with the objections in the light of the enquiries held by him. No second opportunity to make further representation at this stage is contemplated by the statute and as such denial of a copy of the report cannot be said to have materially affected the petitioners' right to object. AIR 1968 SC 432, Followed. (Para 22)

(F) Constitution of India, Art. 226 — Writ application against acquisition of land — For maintaining the application petitioners must make out a prima facie case that they are affected by such acquisition. (Para 24)

(G) Constitution of India, Art. 226 — Parties to petition— Misjoinder of parties and causes of action — Two independent acquisition proceedings based on two independent notifications and two independent declarations — Any or all of the petitioners not jointly interested in lands involved in proceedings — The two proceedings give separate cause of action and they cannot be joined in one petition. This cannot be supported under provision of Civil P. C. (X-Ref:— Civil P. C. (1908), Order 1, Rule 1 and Order 2, Rule 3). AIR 1962 All 208, Relied on. (Para 25)

Cases Referred: Chronological Paras

AIR 1970 Punj. and Har. 361 = 1970 Rev LR 325, Rajaram v. State 21
 AIR 1968 SC 432 = 1968-1 SCR 597, Abdul Hussain v. State of Gujarat 22
 AIR 1966 SC 334 = 1966-1 SCR 120, Lekhraj v. Dy. Custodian, Bombay 10
 AIR 1966 SC 1593 = 1966-3 SCR 557, State of Madhya Pradesh v. Vishnu Prasad 22
 AIR 1966 Pat 420, Muhammad Qumar v. State of Bihar 19
 AIR 1964 SC 1486 = 1964-7 SCR 17, Andhra Pradesh State Road Transport Corpn. v. Income-tax Officer 21
 AIR 1964 All 42 = 1963 All LJ 654, Charan Singh v. State of U. P. 21
 (1963) 67 Cal WN 460, Gadadhar v. State of West Bengal 9, 11, 14
 AIR 1963 Guj 50 = 4 Guj LR 326, Gandadal Somnath v. State of Gujarat 22
 AIR 1962 All 208 = ILR (1961) 2 All 653, Balak v. State of U. P. 25
 AIR 1956 Cal 291, Manindranath v. Baranagar Municipality 25
 AIR 1955 SC 810 = 1955-2 SCR 867, State of Bombay v. Ali Gul Shan 11
 AIR 1939 All 557 = 1939 All LJ 757, Radha Swami Satsang Sabha v. Tara Chand 19

AIR 1932 All 401 = 1932 All LJ 497, Basharat Beg v. Hiralal 25
 AIR 1927 Cal 874 = 104 Ind Cas 129, Secy. of State v. Amulya Charan 18
 AIR 1918 Cal 858 = ILR 45 Cal 111, Ramendra Nath Ray v. Brojendra Nath Dass 25
 (1891) ILR 18 Cal 99 = 17 Ind App 90 (PC), Luchmeswar Singh v. Darbhanga Municipality 18

K. P. Sinha and Parimal Das, for Petitioner; S. C. Bose and Suproakash Banerjee, for the State; B. C. Dutt and D. K. Chowdhury, for the Port.

ORDER:— Two notifications under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the said Act) and two consequent declarations under Section 6 of the said Act are the subject-matter of challenge in this Rule.

2. It would be necessary to set out the facts in short which are as follows. On May 5, 1959 a notification was issued by the State Government under Section 4 of the said Act. This notification merely recited that some land in the District of Midnapore is likely to be needed for a public purpose viz., establishment of a subsidiary port at the mouth of Haldia river. This notification further authorised the Engineers of the Commissioners for the port of Calcutta and the Local Officers for the time being engaged on the undertaking to enter upon and survey land and do all further acts required for the proper execution of their work. The notification further laid down the route for the survey through the sixty-eight villages chronologically set out in the said notification. One of such villages is mouja Hatiberia Police Station Sutahata, District Midnapore. This notification was issued in terms of paragraph 13 and in form 2 of the executive instructions contained in the West Bengal Land Acquisition Manual, 1951 Part I. Obviously, the notification was made to authorise local survey on a preliminary investigation for drawing up the scheme of a proposed project of establishment of a port subsidiary to the port of Calcutta.

3. As a result of the said investigation a proposed scheme was drawn up which was divided into five phases contemplated for its completion. Acquisitions were being made of lands covered by respective phases as and when works on those phases were being taken up by the requiring authority viz., the Commissioners for the port of Calcutta. Accordingly, on August 25, 1967 two notifications were issued again under Section 4 of the said Act. The first bearing No. 13998 L. A. was in respect of several plots set out in the notification in mouja Hatiberia Police Station Sutahata covering an area of 101.42 acres. The second

one bearing No. 13991 L. A. was in respect of several other plots of the same mouja covering an area of 89.75 acres. Both these two notifications recited that the plots notified were likely to be needed for a public purpose viz., for the establishment of Haldia Dock at the expense of the Commissioners for the port of Calcutta.

4. On the issue of the said notifications under Section 4 notices inviting objections under Section 5-A of the said Act were also issued. Objections were entertained including one dated December 14, 1969 by or on behalf of the petitioners and others. An enquiry under Sec. 5-A was held on June 3, 1968 by the Special Land Acquisition Collector himself who submitted a report recommending overruling of the objections taken. The State Government accepted the recommendations and by an order dated November 4, 1968 overruled all objections. Consequently two declarations under Section 6 of the said Act one dated November 20, 1968 and the other dated November 25, 1968 covering the plots specified in the notifications under Section 4 were issued and were published in the Calcutta Gazette dated December 28, 1968. These two notifications under Section 4 and the two consequent declarations under Section 6 are the subject-matter of challenge in this Rule obtained by the sixty-one petitioners.

5. The Rule is being contested by respondents 1 to 4 who are the State of West Bengal and its Local Authorities and also by the added respondent No. 5 viz. the Commissioners for the port of Calcutta who are the requiring authorities for this acquisition. Two sets of affidavits have been filed by them.

6. Mr. Sinha appearing on behalf of the petitioners has raised four points in support of this Rule. In the first place, he has contended that establishment of a dock or a port is a Union purpose and for such a purpose the State Government could not have acquired the lands proposed to be acquired and certainly not in the manner proposed to be done. Secondly Mr. Sinha has contended that the actual purpose for which the lands are being acquired is materially different from the purpose declared in the notifications and the declarations and as such the proposed acquisition is unauthorised. Thirdly Mr. Sinha has contended that out of the sixty-eight villages covered by the first notification under Section 4 dated 5-5-1959, the State Government had already acquired vast tracts of lands covering thirty-eight villages which would be more than sufficient to meet the requirements of establishment of a dock and as such further acquisition of lands not really needed for such a

purpose is colourable — more so when the requiring authority is transferring vast tracts of acquired lands to private companies and corporations at high premium though the lands are being acquired for the declared purpose of establishment of a dock. Lastly Mr. Sinha has contended that on June 24, 1968 and on several dates thereafter the petitioners had prayed for a copy of the report submitted by the Land Acquisition Collector on the enquiry under Section 5-A but their prayer for a copy of the said document having been denied they were denied a reasonable opportunity to make a representation to the State Government before disposal of the objections under Section 5-A; therefore, according to Mr. Sinha the declarations which followed in such a proceeding held in breach of the principles of natural justice are not in accordance with law and as such should be set aside.

7. Mr. Bose appearing on behalf of the State and its Authorities has contested each of the points raised by Mr. Sinha. Mr. Dutt, the learned Advocate for the added respondent, has also contested each of the points so raised by Mr. Sinha. Mr. Dutt has further raised a preliminary objection that the Writ petition is not maintainable both on the ground of misjoinder of petitioners and causes of action and on the ground that the petitioners had not made out specifically how they are affected by the impugned notifications or the declarations. As I do not propose to dispose of the rule solely on the preliminary objection raised by Mr. Dutt I will deal with these objections hereinafter. Further details of the arguments of the respective learned Advocates on the merits would be referred to hereinafter when I deal with the points raised by Mr. Sinha which I now propose to do in the same order as they have been raised by Mr. Sinha.

8. The first objection raised by Mr. Sinha appears also to have been raised in the objection under Section 5-A. Mr. Sinha relies on Entry 27, List I of the Seventh Schedule to the Constitution. This entry runs as follows: "ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation and the Constitution and powers of port authorities therein". Mr. Sinha next draws my attention to Entry 31, List 3 of the Seventh Schedule to the Constitution which reads: "ports other than those declared by or under law by Parliament or existing law to be major ports". According to Mr. Sinha the proposed acquisition is expressly for establishment of a port subsidiary to a major port like that of Calcutta or for the dock thereof. As such Mr. Sinha contends that it would

come within Entry 27 of the Union list of the Seventh Schedule and the purpose of the acquisition must accordingly be construed to be Union purpose. Mr. Sinha next contends that if the purpose of acquisition is a purpose of the Union the acquisition must have been made either by the Union Government or by the State Government acting on the authority of the Union Government. He has drawn my attention to forms attached to the executive instructions to show that if the acquisition was for a purpose of the Union the notification under Section 4 should have been issued in form 2-A and not in form 2 and the declarations should have been issued in Form 3-A and not 3 as done in the present case. From the use of the forms and the manner of the issue of the notifications and the declarations Mr. Sinha contends that there can be no doubt that the acquisition is being made for a purpose other than a purpose of the Union. Accordingly Mr. Sinha contends that neither the notifications nor the declarations were validly made in the present case.

9. In dealing with this point it should first be noted that after the seventh amendment to the Constitution both entries 33 & 36 respectively of the Union list and the State list have now been deleted and entry 42 of the concurrent List has been appropriately amended to cover "acquisition and requisitioning of property". On this amendment acquisition is on the concurrent list and both the Union and the State are equally authorised to legislate on the subject of acquisition irrespective of purpose of such acquisition but subject to the usual limitations otherwise imposed by the Constitution. Thus acquisition irrespective of whether it is for the purpose of the State or the Union being within the legislative competence of the State is also within its executive powers. According to Banerjee, J. in the case of *Gadadhar v. State of West Bengal*, (1963) 67 Cal WN 460 at p. 470, after such amendment it is wholly inconsequential as to whether the acquisition is made for a purpose of the Union or the State. To quote his words:

"the disclosure that acquisition of land was being made for a purpose which was not the purpose of the Union; in the notification and the declaration, was possibly made under the time worn idea that since the State could legislate in the matter of land acquisition, for its own purpose only, every land acquisition by the State must be justified on that ground. After the Constitution Seventh Amendment Act, 1956 it was not necessary to make such a statement in the notification or the declaration, even if it was at all so necessary at a time when

the Constitution had not been so amended".

This statement of the principle by Banerjee, J. can be well supported so long — as is usually the case — the State Governments are duly authorised on delegation of powers by the Union Government to acquire lands for a purpose of the Union. Because in the absence of such delegated authority on the statutory provisions of Sections 4 and 6 of the said Act read with the definition of the term 'appropriate Government' in Section 3(ee), the power of acquisition would otherwise be limited to the State or the Union Government respectively for purposes of the State or the Union.

10. Now in the present case it appears from the affidavit filed by the respondents Nos. 1 to 4 that by an appropriate notification dated May 14, 1955 issued under Art. 258 (1) of the Constitution the State Government in West Bengal was duly authorised by the Central Government to acquire land for the purposes of the Union. This factum of delegation is not disputed. If that is so, even if I assume that the purpose of the disputed acquisition is a purpose of the Union it would still be within the powers of the State Government to acquire and the acquisition cannot be struck down as beyond the competence of the State Government. Mr. Sinha, however, contends that in the present case neither the notifications under Section 4 nor the declarations under Section 6 invoke the delegated powers nor are the notifications and declarations issued in appropriate forms. In my view even if that be so, that would not vitiate the notifications or declarations. It would be a mere irregularity not affecting the substance which would not vitiate the acquisition. If the authority has the power for any action taken, the act is competent and non recital or wrong recital of the authority for the action would not make the act incompetent or without jurisdiction. Reference may be made to the decision of the Supreme Court in the case of *Lekhraj v. Dy. Custodian, Bombay*, AIR 1966 SC 334.

11. That apart, in my view there is great substance in the contention of Mr. Bose that simply because the acquisition is for the purpose of setting up a subsidiary port, the purpose of the acquisition does not necessarily become solely a purpose of the Union. According to Mr. Bose it is a project which would not only be highly beneficial to the general public in this State but would serve public purposes in this State and as such the acquisition would be well supported on the ground that it is for a public purpose. It is clearly so when the acquisition is being made at the expense of the local authority. Mr. Bose rightly

relies on the decision of the Supreme Court in the case of *State of Bombay v. Ali Gulshan*, AIR 1955 SC 810 in contending that there is no merit in the contention that merely because the purpose involves establishment of a port it serves no public purpose other than a purpose of the Union. In my view the following observations of the Supreme Court are clearly instructive, "that there is another way of looking at the question involved. An undertaking may have three different facets or aspects, and may serve the purpose of a State, the purpose of the Union and a general public purpose. Even if one may regard the requisition of a room for the accommodation of a member of a consulate as one appertaining to a Union purpose, it does not necessarily cease to be a State purpose or a general public purpose". Similar also was the view taken by this Court in the case of (1963) 67 Cal WN 460 (supra). Therefore, following the above view I must hold that when establishment of a subsidiary port or a dock therein would undoubtedly serve at least the general public purpose even if it otherwise involves a purpose of the Union, it would not be beyond the authority of the State Government to acquire lands in exercise of its own powers and irrespective of the powers delegated by the Union Government in this respect. In either view therefore this objection of Mr. Sinha must be overruled.

12. The second point raised by Mr. Sinha is of some importance. Although the initial notification under Section 4 recited the purpose to be establishment of a subsidiary port the same is now overriden by the impugned two notifications under Section 4 dated August 25, 1967. These two notifications along with the declarations under Section 6 undisputedly declared the purpose of the acquisition to be 'establishment of the Haldia Dock.' According to the petitioners establishment of the dock will not require more than 42 acres of land. Petitioners further state that much more than 42 acres had already been acquired for the said purpose in the thirty-eight villages in respect of which earlier acquisitions had been made. Petitioners allege that much of the lands already acquired are not being used for the establishment of the dock but are being used for various other purposes. Some of the lands have even been leased out to corporations and companies carrying on public and private enterprises. Petitioners' further grievance is that under the disputed acquisitions lands are being acquired not really for the purpose of establishment of dock but for other collateral purposes. The respondents 1 to 4 having broadly denied this allegation in paragraph 5 (c) of their affidavit-in-opposition, however, concede

in paragraph 5 (c) that lands already acquired or sought to be acquired are being used for purposes other than establishment of the dock itself but claim such purposes to be incidental to the establishment of the dock; they have not denied the fact that some of the acquired lands are being leased out to corporations and companies but they have gone on to say; "It is difficult to imagine a dock without having ancillary industries surrounding it which are all interconnected with the existence of a dock and or which are part and parcel of a dock". This affidavit had been sworn by the Land Acquisition Collector himself and although the affidavit does not furnish any detailed information as to how the acquired lands are being used or for what actual avowed purpose the disputed acquisitions are being made such materials are to be found in the report submitted by the deponent of the said affidavit on an enquiry under Section 5-A of the said Act. This report has been made an exhibit in this case being exhibit A. I will quote in extenso from this report which clearly supports the complaint of the petitioners that actual purpose of the acquisition is not limited to the declared purpose. In page 4 of the report the Land Acquisition Collector states "preliminary notification was published for the purpose of establishment of a subsidiary port covering an area of 17 sq. miles and thereafter acquisitions are being made step by step according to the priority and the acquired lands are also being utilised for the project work. As regards the questions as to the purpose of notifications and the acquisition, I find little difference between the terms Port and Dock, which are almost the two coincident terms in the true sense of their meanings and purpose. There cannot be a port without a dock and vice-versa. The purpose of the Dock is to receive vessels for loading and unloading of goods and materials for export and import, for repair to the vessels and for construction and re-construction of vessels or ships. A port is a harbour where ships of all nations may load and unload and may be kept in safety. To serve the aforesaid purpose a vast area is necessary for making an artificial water basin and sidings for loading and unloading purpose and for making different parts of a vessel for its construction and repair, accommodation of offices, quarters for labourers and other staff, market place etc. Growth of various types of port based industries is quite likely within the port or dock area and such industries are absolutely necessary. For the greater national benefit the Port or the Dock area ultimately turns into an industrial town with all sorts of modern developments all centering round the

Port or the Dock. From the view points of the very purpose stated above the Port and the Dock have practically no difference at all. Hence the purposes mentioned in the preliminary notification, as well as, in the subsequent notifications are the same and for this purpose a vast area including the objector's lands is necessary". The Collector then goes on to observe, "so the possibilities of the growth of port based industries, if any, within the area notified or the port or dock can hardly be considered as a purpose different from what has been mentioned in the notifications".

13. The affidavit read along with this report clearly establishes that the respondents were equating dock with the port and again were thinking of the port to include therein the entire complex of the project. This position is further clarified by the affidavit of the requiring authority the respondent No. 5. The material part of paragraph 6 of this affidavit recites: "I deny the allegations contained in paragraph 7 of the said petition and state that all lands acquired uptill now have been utilised for the following works (a) Construction of Dock (b) Dock Basin (c) Installation of Electricity (d) Police Station and Out-post (e) Staff quarters (f) Stabilisation Pond, (g) Railways' link for South Eastern Railway and C. P. C. (h) Oil jetty (i) Offices of the State and Central Government (j) Port Administrative office and Commercial offices (k) Internal Road connected with National High Way No. 6 (l) Pumping Station for supplying water, (m) Market, (n) Warehouse (o) Halipad (p) Post Office and Bank (q) Construction of building and re-building vessels (r) Training Institute and schools and colleges (s) Township of Port, State Govt. and Commercial establishment (t) Establishment of oil and fertilising factory (i) Indian Oil Corporation (ii) Fertilizer Corporation of India and (u) Rehabilitation for the evicted persons due to acquisition of land for the purpose of the establishment of Haldia Dock Project. I state in this connection that for the purpose of functioning of the Dock, factories, Oil industries, Chemical industries become ancillary to the main purpose i.e. the establishment of Dock and for these ancillary purposes, land is required to be allotted". The added respondent further admits that the establishment of the dock would require 92.80 acres of land and it is not denied that such quantum had already been acquired but asserts that for the establishment of the entire project 92.80 acres of land would be necessary and the acquisition is being made for the said purpose. There is candid admission in this affidavit by the added respondent that the acquisitions are being made to support completion of the

project which contemplates a complex and a township.

14. On these facts Mr. Sinha contends that the acquisition is not being made really for the declared purpose of establishment of a dock. On the other hand, according to him acquisition is being made also for certain other purposes not declared either in the notification under Section 4 or on the declaration under Section 6. Petitioners, according to him, having been given no opportunity to file any objection against any proposed acquisition for such purpose other than establishment of dock, no enquiry was directed as to whether any land would be necessary for such a purpose or the disputed plots would be suitable for such purposes or not and above all there is no satisfaction arrived at by the State Government that acquisition of the disputed plots would be necessary for such other purposes. Mr. Sinha therefore contends that such an acquisition really for such an undeclared purpose is not in accordance with law. Strong reliance is placed by Mr. Sinha on the decision of Banerjee, J. in the case of (1963) 67 Cal WN 460 (supra) which indeed well supports him.

15. Mr. Dutt appearing on behalf of the added respondent has put forward four answers to this contention. In the first place, Mr. Dutt wanted to support the stand taken by the Land Acquisition Collector that within term 'establishment of dock' would come all the purposes set out in paragraph 6 of the affidavit-in-opposition of the added respondent. The term 'dock' is defined in Section 3 (3) of the Calcutta Port Act, 1890. This definition is "dock shall include all basin, cuts, quays, wharfs, warehouses, tramways and other works and things appertaining to any dock". He has also drawn my attention to Art. 860, Vol. 39 Halsbury's Laws of England 3rd Edn. where the term 'Port' has been explained to mean "port denotes a natural or artificial haven or access of the sea to which ships may conveniently come and at which they may load and unload. Consequently there will be in a port facilities either natural or artificial for loading and unloading, the latter being such facilities as quays, wharfs, warehouses docks, piers and jetties and a village or town in which those operating and using the port may dwell". Mr. Dutt has also drawn my attention to Art. 1250, Vol. 35 of the Halsbury's Laws of England 3rd Edn. which sets out the meaning of the term 'dock' as "a dock is an artificial enclosure, connected with a harbour or a river, provided for the reception of vessels, and is generally shut off from the harbour or river by gates for regulating the inflow or the outflow of water. A dock may be a dry or graving dock, that is, one

which is used for the inspection and repair of vessels, or a wet dock, which is used for loading and unloading them. A dock may include a lock leading from it to a river".

16. In my view, however, there remains a fundamental distinction between a dock and a port and one cannot be equated with the other. Even definitions relied on by Mr. Dutt from Halsbury clearly establish the distinction. Port is a wider term of which dock may be a part but the dock itself cannot be equated with the port so that if the declared purpose of acquisition be establishment of a dock but the undeclared purpose be establishment of a port the undeclared purpose cannot be supported by the declared purpose. It should be noted that in the present case the declarations under Section 6 are not resting on the notification of the year 1959 but are resting on the notifications dated August 25, 1967 which declare the purpose to be establishment of a dock. Mr. Dutt seriously contends that when the definition of the term 'dock' in the Calcutta Port Act is an inclusive definition and includes works or things appertaining to dock it would cover within it all the purposes set out in paragraph 6 of the affidavit in opposition of the respondent No. 5. I am unable to accept this suggestion of Mr. Dutt. Many of the purposes set out in paragraph 6 do not come within the sanction of the works which could be carried on by the Commissioners under the Calcutta Port Act. Reference may be made to Section 35 of the Calcutta Port Act which enumerates the different construction works which could be carried out by the Commissioners as part of their normal activity. Many of the purposes set out in paragraph 6 of the affidavit of respondent No. 5 are widely extraneous to the works so authorised by the Statute. In my view, it would be improper construction of the definition clause to construe all these wide ranges of purposes set out in paragraph 6 of the affidavit of respondent No. 5 as included within the term 'works and things appertaining to any dock'. In order to be appertaining to dock it should necessarily be a requisite for the dock or proximately connected therewith. Unfortunately many of the purposes like establishment of Oil and Fertilizer Factories, Indian Oil Corporation, Fertilizer Corporation of India and others are so widely different that they cannot be brought within the meaning of the term 'works and things appertaining to a dock'. Many of the purposes set out in this para. 6 may themselves be valid public purposes justifying acquisition by themselves but they do not by any stretch of the meaning of the term 'dock' come within the declared purpose of the acquisition. In

this view I must overrule the suggestion and contention of Mr. Dutt as also the stand taken by the Land Acquisition Collector that all these purposes including the establishment of dock based industries would come within the sanction of the declared purpose of establishment of a dock.

17. The second answer of Mr. Dutt is to the effect that notwithstanding the fact that some of the lands already acquired are being used for purposes other than establishment of dock the lands under disputed acquisitions are to be used solely for the purposes of establishment of dock itself. It is true that Mr. Dutt tried to impress upon me this position with reference to the map produced by him but in the absence of any proper evidence explaining the same it is difficult to come to any finding that all the disputed lands would be used as suggested by Mr. Dutt. It must, however, be conceded that on the pleadings of the parties it is not at all clear as to how the disputed plots are intended to be used. Petitioners' grievance is with reference to the user of the land already acquired and on an apprehension that the disputed lands would also be so used. The respondents having broadly denied the case of the petitioners have also made admissions which support the apprehension that the actual user of the disputed plots may not be restricted to the declared purpose of establishment of dock. This is how the uncertainty on the pleadings come in. But upon the respondent's admission that establishment of the dock would require only 92.80 acres of land, it cannot but be held that at least a part of the land sought to be acquired under the disputed acquisition must be for a purpose other than establishment of the dock. In this view this contention of Mr. Dutt must also be overruled.

18. Mr. Dutt has next suggested that subsequent use of the acquired land for purposes other than for which they are being acquired would not vitiate the acquisition. Mr. Dutt relies on the decision of the Privy Council in the case of Luchmeswar Singh v. Darbhanga Municipality, (1891) ILR 18 Cal 99 (100) (PC) and in the case of Secy. of State v. Amulya Charan, AIR 1927 Cal 874. It should, however, be noted that the principles laid down in the decisions relied on by Mr. Dutt are wholly inapplicable so far as the present case is concerned. These cases are distinguishable from the present one and no issue as in the present case did arise for consideration in these decisions. In the Privy Council decision land was acquired at the expense of the Darbhanga Municipality for the purpose of construction of a public ghat. The lands so acquired having been used

for the purpose of the ghat left a surplus which was then used for establishing a market. The acquisition was validly and lawfully made and a bona fide purpose viz., construction of a ghat supported the acquisition. User of the surplus for purpose other than the ghat for which it was originally acquired was held to be inconsequential. But here on the complaint of the petitioners the very purpose of acquisition is not the one declared in the notifications and the declarations. Their complaint is that the acquisition is being made for undeclared purposes on the cover of a sham declaration of a purpose. If this complaint be upheld the decisions relied on by Mr. Dutt will not support the respondents in any manner. In this view this contention and suggestion of Mr. Dutt must also be overruled.

19. The last answer put forward by Mr. Dutt appears to me to be sound. Mr. Dutt contends notifications and the declarations are somewhat defective in not setting out the real purpose of the acquisition which is quite known to all viz., the acquiring authority, the requiring authority as also the petitioners. Mr. Dutt has rightly pointed out that in the present case acquisition in a special manner was being made. Initially a preliminary notification was made under Section 4 for survey and framing of a scheme. The scheme was framed to include not only establishment of a dock but a complex of Haldia port. This complex included various items within it including the items specified in para. 6. The scheme itself was sub-divided phase-wise and acquisitions are being made for completing the project. It is on the basis of this scheme that the subsequent notifications under Section 4 impugned in the present case were issued. Although the declared purpose therein is establishment of a dock, on the known background and on the plan referred to in the notifications themselves it was well known to all that the acquisition was being made for the entire project. Petitioners also fully knew about it when they directed their objections to the fact that the declared purpose was not the real purpose for which the acquisition was being made. The authorities holding the enquiry under Section 5-A may have misconceived the legal position to think that the dock includes the entire project but it was quite known both to the objectors and the authorities that it is the project itself which was the purpose behind the acquisition of these plots. Petitioners' objections under Section 5-A clearly proceed on the basis that the lands are being acquired for the project itself. So also is basis for the recommendation of the Collector. State Gov-

ernment too took into consideration all the factors when it overruled the objection and directed completion of the acquisition. Mr. Dutt is well supported on this point by the following decisions relied on by him: Radha Swami Satsang Sabha v. Tara Chand, AIR 1939 All 557 (63) and Muhammad Qamar v. State of Bihar, AIR 1966 Pat 420. On the conclusions as above I hold that although the different purposes as set out in paragraph 6 of the affidavit of respondent No. 5 and as referred to in the report of the Collector do not come within the purpose of establishment of dock, yet on a proper reading of the notifications and declarations on their well known background and along with the maps referred to therein, I must hold that the real declared purpose is not limited to establishment of the dock only. In spite of the defect and the irregularity in the terms of the notifications and declarations, the real declared purpose of the acquisition was completion of the Haldia project. On my finding such purpose was quite known to all concerned and as such the defect does not vitiate the acquisition and the acquisition is still well supported by a public purpose as there can be no doubt that the completion of the project by itself would be a public purpose within the meaning of Sections 4 and 6 of the said Act. In this view I must overrule the contention of Mr. Sinha that acquisition is being made for a purpose other than the declared purpose and as such it is not in accordance with law.

20. On the conclusions as above the third contention raised by Mr. Sinha must also necessarily fail. The third point raised by Mr. Sinha is to the effect that the acquisition is colourable because it was made for purposes other than those declared. On my findings made hereinbefore there might have been some defect or irregularity in the terms of the notifications and the declarations but the real purpose of the acquisition covers the purposes for which the lands are being used and as such there can be no foundation for a complaint that the acquisition is being made in colourable exercise of powers.

21. Incidentally Mr. Sinha also contended with reference to the statements made in paragraph 6 of the affidavit of respondent No. 5 that Indian Oil Corporations or Fertiliser Corporations of India are not departments of the Government and no land can be acquired for them except under Part 7 of the Act. Mr. Sinha strongly relied on the decision of the Supreme Court in the case of Andhra Pradesh State Road Transport Corpn. v. Income-tax Officer, AIR 1964 SC 1486 as also the decisions in the case of Charan Singh v. State of U. P., AIR

1964 All 42 and Rajaram v. The State, AIR 1970 Punj and Har 361 to support his contention that these Corporations incorporated under specific statutes cannot be considered to be a part of the Government establishment for which acquisition can be made without following the specific provisions of Part 7. Without disputing the position that these corporations are not departments of the Government, the point raised by Mr. Sinha can otherwise be met. In the present case the acquisition is not specifically made for these corporations or at their cost. The acquisition is for the project or the complex of which these corporations or their establishments constitute an integral part. There can be no doubt that the establishments which would be run by these corporations as a part of the complex would be highly beneficial to the interest of the public. This being the position when the acquisition itself is for the project and at the cost of a local authority it can well be supported under Section 6 of the said Act and no question of following the provisions of Part 7 does at all arise.

22. I will now consider the last point raised by Mr. Sinha in support of this Rule. It is not in dispute that objections under Section 5-A were preferred on December 14, 1967 and were enquired into by the Collector on June 3, 1968. The Collector submitted a report on June 10, 1968. The petitioners prayed for a certified copy of the report on June 24, 1968. This prayer, however, was refused on the ground that the report had already been sent to the Government. The Government disposed of the matter on November 4, 1968. On these facts Mr. Sinha contends there had been gross violation of principles of natural justice resulting in serious prejudice to the petitioners. According to Mr. Sinha had the petitioners been made aware of the contents of this report they could have effectively met the same and also supported their objections before the State Government. Reliance is placed on the decision of the Supreme Court in the case of State of Madhya Pradesh v. Vishnu Prasad, AIR 1966 SC 1593 and Gandhal v. State of Gujarat, AIR 1963 Guj 50. But neither of these two decisions relied on by Mr. Sinha is an authority for a proposition that the objectors must have two opportunities or opportunities at two stages in objecting to the proposed acquisition. The Statute contemplates that before the Government forms the final opinion persons interested must be given an opportunity to object (subject however to the other provisions where Section 5-A is ruled out). Therefore, when the petitioners preferred their objections to the proposed acquisition they were given ample opportunity to make out

their case. An enquiry was then held to hear the petitioners and record any evidence if adduced on the objections preferred to the proposed acquisition. In my view this gives ample opportunity to the objectors. The report that follows is the recommendation of the Collector for consideration by the State Government along with the objections in the light of the enquiries held by him. No second opportunity to make further representation at this stage is contemplated by the statute and as such denial of a copy of the report could not have materially affected the petitioners' right to object. The Supreme Court in the case of Abdul Hussain v. State of Gujrat, AIR 1968, SC 432 specifically held that the Land Acquisition Act contemplates no second opportunity for making a representation after the enquiry under Section 5-A. In this view the last point raised by Mr. Sinha must fail and is overruled.

23. As all the points raised in support of this Rule fail this application falls on merits.

24. Nonetheless, I feel it proper to express my views on the preliminary objections raised by Mr. Dutt on the maintainability of the Writ petition although for disposal of the rule a decision on this point may no longer be necessary. Mr. Dutt's objections are two fold. In the first place Mr. Dutt has objected to the maintainability of the application on the ground that the petitioners have not made out any case as to how they are affected by either of the two notifications or the two declarations. Due to unfortunate defects in the pleading I find much substance in this contention of Mr. Dutt. Nowhere in the Writ petition or in the annexures thereto there is any material to indicate that any of the petitioners are in any way interested in any of the plots covered by either of the two notifications or the two declarations. Only tatement made is that the petitioners are residents of village Hatiberia Police Station, Sutahata and have right, title and interest in different plots recorded in their respective names in the last settlement records. It is, however, not stated that any of the plots so recorded in their names are the subject-matter of acquisition under the disputed notifications and declarations. It is indeed true that the petitioners in order to entitle them to challenge the acquisition, must make out a prima facie case that they are affected by such acquisition. No such case, however, having been made out in the entire Writ petition is not truly maintainable in law.

25. The next objection of Mr. Dutt is to the effect that the petition suffers from the defect of misjoinder of

petitioners and causes of action. There can be no dispute that two independent acquisition proceedings based on two independent notifications and two independent declarations are the subject-matter of challenge in this joint Writ petition at the instance of sixty-one petitioners. It is not the case of the petitioners that any or all of the petitioners are jointly interested in lands involved in the two acquisition proceedings. The two proceedings in my view give separate cause of action and the question is whether they could be joined together in one Writ petition. According to Mr. Dutt unless the petitioners make out a case that they were jointly interested in both the acquisition proceedings such a joint application is not maintainable in law. Mr. Dutt is well supported by the decision relied on by him in the case of *Balak v. State of U. P.*, AIR 1962 All 208 (209). Mr. Sinha on the other hand, contends that Civil P. C. is applicable to these Writ proceedings and the application as framed is maintainable under Order 1, Rule 1 and Order 2, Rule 3. There is no dispute that the Code has its application to these proceedings but in my view neither of the provisions thereof relied on by Mr. Sinha helps him in any manner. In order to apply Order 1, Rule 1 the right to relief must arise out of the same act or transaction or series of acts and transactions. But this test is not fulfilled if the different petitioners are differently and independently affected by the two independent acquisition proceedings. Similarly in order to join several causes of action by several plaintiffs in one suit under O. 2, R. 3 the several plaintiffs must jointly be interested in the causes of action and the defendants also must jointly be interested in the causes of action. But Mr. Dutt has rightly pointed out that in the present case the petitioners have failed to make out any case that they or any of them are jointly interested in both the acquisitions. In this view it is not possible to uphold the contention of Mr. Sinha that the application as framed can be supported by the provisions of either O. 1, R. 1 or O. 2, R. 3 of the Code. Mr. Sinha relies on the decision of this Court in the case of *Manindranath v. Baranagar Municipality*, AIR 1956 Cal 291 but in the said decision the point at issue was left undecided. Similarly the decision of the Allahabad High Court in the case of *Basharat Beg v. Hiralal*, AIR 1932 All 401 is of no help to Mr. Sinha as on the findings of the Court in the said case the defendants were joint tortfeasors acting in pursuance of a common object so that the causes of action arose out of one act or series of acts. The other case relied on by Mr. Sinha—*Ramendra Nath Ray v. Brojendra Nath Dass*, ILR 45 Cal 111 —

(AIR 1918 Cal 858) — does not also help him as on the finding of this Court the right to relief against all the defendants was based upon the same act viz., fraud of the first defendant. The result is that Mr. Dutt's objection in this respect also must be upheld.

26. On the conclusions as above this application fails and the Rule is discharged.

27. There will be no order for costs.

28. Let the operation of this order remain stayed for a week.

Rule discharged.

AIR 1972 CALCUTTA 329 (V 59 C 62)

C. N. LAIK AND AJAY K. BASU, JJ.

Haridas Roy and another, Appellants v. Calcutta Commercial Bank Ltd. (In Liquidation) and others, Respondents.

A. F. O. O. No. 146 of 1969; Suit No 1357 of 1950, D/- 9-3-1972.

Civil P. C. (1908), O. 22, R. 4 — Abatement of suit on mortgage — Death of a defendant — Plaintiff impleading all heirs of deceased known to him — Decree whether binds absent heirs — Principles to be applied in determining whether suit abates, stated. (X-Ref:— Civil P. C. (1908), S. 2 (ii) and O. 34, R. 1). (Para 22)

Where the plaintiff has impleaded under a genuine belief, all the heirs of deceased known to him and obtains a decree in mortgage suit, the same would be binding upon the other heirs interested in the estate, provided there is diligent and bona fide enquiry made by the plaintiff to find out all the heirs and provided further there would be no prejudice to the absent heirs on the passing of such a decree. It is also to be seen whether there could have been any sufficient and special defence by the left out heirs, which were not and could not be tried in the suit. The decree so passed would be binding on the estate even if any heir of the deceased is left out through oversight or on account of some doubts as to who are the heirs and if there is no fraud, collusion or other like grounds between the parties to the suit and if the trial of the action is real and fair and there is no motive to leave out the other heirs and if a preliminary or final decree has already been passed. The considerations which should generally weigh with the court in deciding such questions including the full representation of the estate are the fact of possession of the entire estate by the Administrator or by the Receiver or by those heirs who

have only been impleaded. Applying these principles, it was held that there could not be any question of any abatement of suit in the circumstances of the case. (Paras 22, 23)

Cases Referred: Chronological Paras

- AIR 1971 SC 673 = (1971) 1 SCC 460, Ram Das v. Dy. Director of Consolidation 20
- AIR 1971 SC 742 = (1971) 1 SCC 265, Mahabir Prasad v. Jaga Ram 21
- AIR 1971 SC 1028 = (1970) 3 SCC 722, Rani v. Santa Bala 21
- (1969) 73 Cal WN 932, Prabhat v. Birendra 20
- AIR 1967 SC 49 = 1966 (Supp) SCR 22, Dolai Maliko v. Krushna Chandra 20
- AIR 1966 SC 792 = (1966) 1 SCR 937, Mohd. Suleman v. Mohd. Ismail 16, 20
- AIR 1966 SC 1427 = (1966) 3 SCR 451, Sri Chand v. Jagadish Pershad 21
- AIR 1965 SC 1049 = (1965) 1 SCR 231, Daya Ram v. Shyam Sundari 20
- AIR 1965 SC 1531 = (1965) 2 SCR 830, Union of India v. Sree Ram Bohra 21
- AIR 1964 SC 215 = (1964) 3 SCR 467, Union of India v. Ram-charan 21
- AIR 1963 SC 553 = (1963) 3 SCR 858, Ram Sarup v. Munshi 20
- AIR 1963 SC 1901 = (1964) 3 SCR 549, Rameshwar Prasad v. Shyam Beharilal Jagannath 21
- AIR 1963 Cal 289 (FB), Santosh Kumar v. Nandalal 21
- AIR 1962 SC 89 = (1962) 2 SCR 636, State of Punjab v. Nathu Ram 20
- AIR 1961 Mad 428 = 73 Mad LW 640, Shanmugham v. Govindasami 20
- AIR 1951 Cal 228 = 54 Cal WN 667, Bibhuti v. Narendra 20
- AIR 1951 Orissa 212 = ILR (1950) Cut 413, Sarat Chandra v. Bichitranada Sahu 20
- AIR 1930 Mad 69 = 57 Mad LJ 712, K. K. Behari v. Kunhipakki 20
- AIR 1930 Mad 930 = ILR 54 Mad 212, Chaturbhujadoss Kushaldoss v. Rajamanicka Mudali 20
- (1905) 32 Ind App 23 = ILR 32 Cal 296 (PC), Khisarajmal v. Diam 20
- (1903) ILR 26 Mad 230 = 12 Mad LJ 368, K. M. Marakkayar v. M. K. Ayyar 20

D. K. Dey with A. K. Guha and R. P. Sinha, for Appellants; S. C. Sen with K. P. Basu (for No. 1) and A. Law, (for Nos. 2 and 3) for Respondents.

LAIK, J.:— The relevant facts leading to the present appeal are as follows:

On August 4, 1941, one Debendra Chandra Roy (hereinafter referred to as Deben) and his son Indu Bhusan Roy (hereinafter referred to as Indu) executed a mortgage in favour of the Respondent No. 1, the Calcutta Commercial Bank, in liquidation (hereinafter referred to as the Bank), to secure the repayment of a sum of Rs. 8,000/- and odd. The mortgaged property was a piece of rent-free Brahmottar land, situate in Belghoria in the district of 24 Parganas, the mortgagors holding permanent intermediary interest therein.

2. In March 1950, a suit was instituted by the Bank for enforcement of the said security against Deben and his two sons Santi and Indu being Defendants Nos. 1, 2 and 4 respectively. Two other persons viz., Soroshi and Aswini were impleaded as Defendants Nos. 3 and 5 respectively.

3. Deben died in May, 1950 leaving behind him, surviving his widow Sm. Saraju Bala and his 4 sons viz., the said Santi (Respondent No. 2), Indu (Respondent No. 3), Haridas (Appellant No. 1) and Narayan (Respondent No. 4), Deben left also one daughter viz., Sm. Sadhana Roy Chowdhury being Appellant No. 2 in the above appeal.

4. On July 1, 1954 before the Hon'ble Mr. Justice Bachawat, the plaintiff Bank conceded that it was not entitled to claim relief against all the parties to the suit jointly. The learned Judge accordingly gave leave to the plaintiff to amend the plaint. Paragraph 7 of the original plaint was allowed to be deleted and a fresh paragraph was allowed to be substituted. The names of Soroshi and Aswini were deleted from the category of the Defendants. The total revised amount claimed, was for Rs. 13,000/- and odd including a sum of Rs. 4,500/- and odd, being on account of interest, calculated upto 28th February, 1950.

5. On or about July 9, 1954 a Master's Summons was taken out on behalf of the plaintiff Bank, inter alia for setting aside the abatement, caused on the death of Deben and for substitution of the names of his two sons Santi and Indu, Respondents 2 and 3 in the above appeal as the legal heirs and representatives of the deceased Deben. All the papers in the suit are not before us, but we find in the affidavit filed in July 1950, (1954?) that attempts were made by the Liquidator of the Bank to find out who are the legal heirs and representatives of the deceased Deben.

6. In August 1955 the order of abatement was set aside, the death of Deben was recorded and Santi and Indu were impleaded for self as well

as the sons, heirs and legal representatives of the said deceased Deben.

7. In November of the said year, Santi and Indu filed their written statement inter alia stating generally, that all the legal heirs of the deceased Deben have not been brought on the record. They, however, did not specifically state that they had two other brothers and one sister, as well as their widowed mother, as stated above. In spite of the said defence in the written statement as to the non-impleading of all the legal representatives of the deceased Deben, the mortgage suit was decreed in the preliminary form on September 6, 1956 and that again by consent.

8. On July 23, 1962 Deben's widow, Sm. Saraju Bala died leaving behind her surviving, the aforesaid four sons and the said daughter Sm. Sadhana, since married.

9. After the said preliminary decree, the special Referee appointed by the Court, submitted his report on September 14, 1965 in which we find that a sum of Rs. 25,000/- and odd was due to the Bank (in liquidation) including the interest, calculated upto 31st August, 1964. Objection was taken to the said report and the matter came up before Justice S. K. Datta, who by his order, dated June 7, 1966 varied the said report to the extent that a sum of Rupees 15,380/- was due and payable by the defendants to the Bank, calculated up to the date of the said order with interest @ 6 per cent per annum.

10. The Bank thereafter made an application for final decree of the suit. The matter came up before his Lordship the Hon'ble Mr. Justice P. B. Mukharji (as his Lordship then was). On January 9, 1967, the final decree was passed, appointing a Receiver, directing him to sell the mortgaged property either by public auction or by private treaty as he thought fit.

11. In pursuance of the said final decree, the Receiver duly took possession of the mortgaged property and held various meetings. With the consent of the parties, the Receiver divided the mortgaged property (total area being 16 cottas and odd) into several plots. A plan was prepared by an Engineer which was also approved by the defendants. In December 1967, the Receiver entered into an agreement with a purchaser for the sale of Plot No. 1, measuring 2 Cottas and odd at Rs. 2,000/- per Cotta.

12. On June 7, 1968 the said Santi and Indu took out a Master's Summons disclosing for the first time, inter alia the names of all the said four sons and the said daughter of the deceased Deben.

13. On June 7, 1969 a Notice of Motion was taken out on behalf of the Respondent Bank praying inter alia that the death of the widow Sm. Saraju Bala and the names of all the other heirs (Haridas, Appellant No. 1, Narayan, Respondent No. 4 and Sm. Sadhana Roy Chowdhury, Appellant No. 2 in the present appeal) be recorded in the proceedings in the suit after setting aside abatement if any and the intending sale to the purchaser be confirmed. This application was opposed by the heirs of the deceased Deben.

14. On July 16, 1969 our learned brother, Justice A. N. Sen, made an order in terms of prayers (b) to (f) of the petition, holding inter alia, that "in the facts of this particular case and in view of the fact that the preliminary and final decree had already been passed, there cannot be any question of any abatement of the suit and in view of the provisions of the Banking Companies Act there is also no question of any limitation".

15. The present appeal is directed against the said order, preferred by Haridas and Sm. Sadhana, being the appellants Nos. 1 and 2 respectively. The other three sons viz., Santi, Indu and Narayan are impleaded as respondents 2 to 4 respectively. The Bank, still in liquidation, is Respondent No. 1.

16. We have heard at length Mr. Dey the learned Counsel appearing on behalf of the appellants. His main contention was that the application on which the impugned order has been passed, should be dismissed, as the suit has already abated for not bringing on record within time all the heirs and legal representatives of the deceased Deben as well as of his deceased widow Sm. Saraju Bala. The Supreme Court decision in the case of Mohd. Sulaiman v. Mohd. Ismail, AIR 1966 SC 792 was cited by Mr. Dey in support of his contention. It was also submitted that there were no diligent and bona fide enquiries made on behalf of the Bank as to the number of heirs and legal representatives of the deceased Deben and accordingly the application should be dismissed and the appeal should be allowed.

17. Mr. Sen, the learned Counsel appearing on behalf of the Bank, submitted that the said Supreme Court decision goes against the contention of Mr. Dey rather than supporting him. It was further submitted that the entire property viz., the Estate of the deceased was fully represented, originally by the two sons and later on, by the Receiver who went into possession of the property in pursuance of the final decree passed by this Court in the

mortgaged suit. He further submitted that even if there be imperfect representation, it should be remembered that the decree being a mortgage decree, it will bind the Estate. It is also stated that there was no case of fraud and collusion between the parties at any stage of the suit, right from the beginning either before the trial Court or in this Court. Our attention was drawn that this point was not even argued by Mr. Dey. According to Mr. Sen when the Receiver took possession of the property long time back, the other heirs including the appellants who have been left out, did not take any objection from the beginning till date. It was suggested that the two sons (Santi and Indu) are now setting up their other brother and sister to raise these frivolous pleas. Lastly he contended that in view of the special protection given by the Banking Companies Act and Ordinance coming into force in 1953, to the Banks in liquidation, no question of limitation arises, specially in view of Section 45 (O) of the said Act.

18. Mr. Law, the learned Advocate appearing on behalf of the respondents 2 and 3 (Shanti and Indu) supports the argument of Mr. Dey, advanced on behalf of the appellants.

19. The provisions of Sec. 2 (11), Order 22, Rules 3, 4, 5 and 11, as well as the provisions of Order 34, Rule 4 of the Code of Civil Procedure are considered by us.

20. Fourteen decisions are considered, six of which are of the Supreme Court, one of the Judicial Committee of the Privy Council, two of this Court, four of the Madras High Court and one of the Orissa High Court. They are: State of Punjab v. Nathu Ram, AIR 1962 SC 89 = (1962) 2 SCR 636; Ram Sarup v. Munshi, AIR 1963 SC 553 = (1963) 3 SCR 858; Daya Ram v. Shyam Sundari, AIR 1965 SC 1049 = (1965) 1 SCR 231; Mohd Sulaiman v. Md. Ismail, AIR 1966 SC 792 = (1966) 1 SCR 937 (950); Dolai Maliko v. Krushna Chandra, AIR 1967 SC 49 = 1966 (Supp) SCR 22; Ram Das v. Dy. Director of Consolidation, AIR 1971 SC 673 = (1971) 1 SCC 460; Khirajmal v. Diam, (1905) 32 Ind App 23 = ILR 32 Cal 296 (PC); Bibhuti v. Narendra, AIR 1951 Cal 228; Prabhat v. Birendra, (1969) 73 Cal WN 932; K. M. Marakkayar v. M. K. Ayyar, (1903) ILR 26 Mad 230; K. K. Behari v. Kunhipakki, AIR 1930 Mad 69; Chaturbhujadoss Kushaldoss v. Rajamanicka Mudali, AIR 1930 Mad 930 = ILR 54 Mad 212; Shanmugham v. Govindasami, AIR 1961 Mad 428; Sarat Chandra v. Bichitranada Sahu, AIR 1951 Orissa 212 (229).

21. Six other decisions of the Supreme Court and a Full Bench decision of this Court touching the point of abatement are also considered but they do not relate to the point at issue. They are: Union of India v. Ramcharan, (1964) 3 SCR 467 at p. 476 = AIR 1964 SC 215; Rameshwar Prasad v. Shyam Beharilal Jagannath, (1964) 3 SCR 549 at p. 556 = AIR 1963 SC 1901; Union of India v. Sree Ram Bohra, (1965) 2 SCR 830 at p. 836 = AIR 1965 SC 1531; Sri Chand v. Jagdish Pershad, (1966) 3 SCR 451 at pp. 454, 455 = AIR 1966 SC 1427; Ranil v. Santa Bala, (1970) 3 SCC 722 = AIR 1971 SC 1028; Mahabir Prasad v. Jaga Ram, (1971) 1 SCC 265 = AIR 1971 SC 742; Santosh Kumar v. Nanda Lal, AIR 1963 Cal 289 (FB).

22. On consideration of the aforesaid decisions, it seems safe to assume that in similar circumstances the following principles of law (though not exhaustive) are to be applied and the suit then would not be visited by an order of abatement:

(a) Where the plaintiff has impleaded under a genuine belief, all the heirs of the deceased known to him and obtains a decree, the same would be binding upon the other heirs interested in the estate, provided there was a diligent and bona fide enquiry made by the plaintiff to find out all the heirs of the deceased and provided further, there be no prejudice to the absent heirs on the passing of such a decree. It is also to be seen whether there could have been any sufficient and special defence by the left out heirs, which were not or could not be tried in the suit.

(b) The decree so passed, would be binding on the Estate even if any heir of the deceased is left out through oversight or on account of some doubts as to who are the heirs, and if there is no fraud, collusion or other like grounds between the parties to the suit.

(c) If the trial of the action is real and fair and there is no motive to leave out the other heirs.

(d) If a decree, preliminary or final, has already been passed.

(e) The considerations which should generally weigh with the Court in deciding such questions including the full representation of the Estate are the fact of possession of the entire estate by the Administrator or by the Receiver or by those heirs who have only been impleaded.

(f) The exercise of the discretion by the Courts in not impleading the left out heirs must be judicial and cautious and the Courts must have jurisdiction to exercise such discretion.

23. Circumstances in the instant case do not indicate that there has not been a fair and real trial of the suit. The Bank proceeded under a genuine belief that the two sons who were brought on record, were the only legal representatives of the deceased. Deben. Bona fide attempts were made by the liquidator of the Bank to find out the names of all the heirs but they failed to get all the names. Moreover, the other sons of the deceased did not disclose the names of all the heirs. There was a real contest in the mortgage suit, though ultimately the preliminary decree was a consent decree. No argument was advanced that there could have been sufficient and independent defence by the left out heirs or that there was fraud or collusion of the Bank with the other parties or that the Bank had any motive to leave out the other heirs. The Receiver was all along in possession for all these years of the entire estate without any objection by any of the heirs, either made parties or left out.

24. I disagree with the contentions of the appellant both on points of fact and law. The grounds seem to be tenuous. They are too little and too late. In view of the foregoing discussions, we are not called upon to decide other points of law raised by the Respondent Bank.

25. In the result we dismiss this appeal with costs. In the larger interest of administration of justice we hope that there would be the end of the litigation, started more than 20 years ago for recovery of such a small sum.

AJAY K. BASU, J.:— 26. I agree.
Appeal dismissed.

AIR 1972 CALCUTTA 333 (V 59 C 63)
ARUN K. MUKHERJEE AND M. M. DUTT, JJ.

State of West Bengal, Appellant v. Ganesh Chandra Mitra and others, Respondents.

A. F. O. D. Nos. 906 and 907 of 1967, D/- 10-12-1971.

(A) Land Acquisition Act (1894), Section 54 — In an appeal by the Government against the award the respondent can abandon part of his claims under the cross-objection so as to confine his claims within the limit of the valuation of the cross-objection. But this does not mean that he cannot press any of the claims made in the cross-objection. (Para 8)

(B) Land Acquisition Act (1894), Section 23 — In the absence of proper material enabling the court to determine the value of the tank in a logical and scientific manner it would not be unreasonable for the Court to value the tank at one-half the value of solid land. (Para 15)

(C) Land Acquisition Act (1894), Section 23 — The accepted modes of valuation of lands acquired under the Act are (1) the price paid, within a reasonable time, in bona fide transactions of purchase of land acquired or the adjacent lands and possessing similar advantages (2) a number of years' purchase of the actual or immediately prospective profit from the lands acquired and (3) the opinion of valuers or experts. (1907) 11 Cal WN 875 and AIR 1959 SC 429, Relied on. (Para 17)

(D) Land Acquisition Act (1894), Section 23 — In capitalising the rental value of the premises for 20 years the rent must be the fair rent or the rent prevailing in the locality in respect of buildings having similar advantages and amenities. (Para 17)

Cases Referred: Chronological Paras
AIR 1959 SC 429 = (1959) Supp

(1) SCR 404, Special Land Acquisition Officer, Bangalore v. T. Adinarayan Setty 17
(1907) 11 Cal WN 875, Harish Chunder Neogy v. Secy. of State for India 17

Sachindra Chandra Das Gupta and Gouri Prasad Mukherjee, for Appellant; Lala Hemanta Kumar and Narottam Chatterjee, for Respondents.

M. M. DUTT, J.:— These two appeals at the instance of the State of West Bengal are against the awards passed by the learned Additional District Judge, Purulia, in two land acquisition cases under Section 18 of the Land Acquisition Act, 1894.

2. The property acquired is a premises comprising buildings, land and a tank. The premises is known as 'Kamala Kutir'. The notification under Section 4 of the Act in respect of the acquisition of Kamala Kutir was published on May 16, 1960. The description of the premises and the buildings, fixtures and other amenities appertaining thereto, appear from the following portion of the judgment of the learned Additional District Judge, as follows:—

"The premises 'Kamala Kutir' stand on 7.91 acres of land with a compound wall on all sides measuring 7 ft. 6 inches in height and 1931 Rft. in length. Within this boundary-wall, there was a Bungalow having a plinth area of 6061 Rft., with terraced roof on rolled steel joists and tees, all walls 20" thick at super structure containing a

main hall covering a floor area of 692 sft., with a front Verandah of 900 sft., in marble floor and Mosaic dado, two rooms covering a floor area of 361 sft., having Mosaic floor and dado and five other rooms, septic latrine and bath and the remaining Verandahs having artificial stone floor and dado with electric fittings and glazed and Venetian shutters for outside doors and windows and pannel shutters for inside doors and also containing a circular and cast iron stair case for going to the roof. Besides the main building as above, there was one Pucca structure with C. I. Sheet roof measuring 1058 sft., one Pucca structure with Khapra roof measuring 1053 sft., one Chala with Pucca structure and C. I. sheet roof measuring 12 sft. (?) one attached Chala with C. I. sheet roofing of 709 sft., one Pucca structure with C. I. sheet roofing measuring 866 sft., one attached Chala with C. I. sheet roofing measuring 396 sft., one Pucca building measuring 1114 sft., one Pucca structure with Khapra roof measuring 144 sft., one Pucca walled house measuring 432 sft., one Pucca privy measuring 217 sft., one Pucca building measuring 377 sft., and one Pucca structure with C. I. sheet roof measuring 188 sft. In the premises there were further five pucca wells and two cisterns. There were also four Octagonal masonry gate pillars 13 ft. high above the ground level and M. C. Beam rail over the gate-opening joining the pillars and one M. S. ornamental iron gate, one round masonry platform in front of the Bungalow 19'6" diameter and one ft., high above the ground level, four cement statues on masonry base and six iron light-posts, one tank having a bed area of 1.23 acres with ridges measuring 1.51 acres and a Pucca Khat in it and also some trees. The main building was constructed in 1926 by late Lalit Kishore Mitra, who was a lawyer by profession and all other constructions within the premises were completed mostly by 1935, the tank only being constructed in 1938."

3. Although the premises comprise a compact area measuring 7.91 acres and surrounded by a boundary wall a portion of the area measuring 5.43 acres consisting of the entire homestead and a small portion of the bank of the tank appertains to mouja Purulia and the remaining portion measuring 2.48 acres consisting of the entire land and the major portion of the bank, appertains to mouja Raghabpur. In view of the fact that the area of the premises appertains to two moudas, two land acquisition cases were started by the Land Acquisition Collector.

4. The Land Acquisition Collector assessed the total amount of com-

pensation in these two cases at a sum of Rs. 1,18,228.38 including the additional compensation under Section 23 (2) of the Act. The different items and the compensation allowed by the Land Acquisition Collector in both the cases appear from his award, as follows:—

	Rs.	Np.
1. For 5.17 decimals of land classified as Bastu Bagan at the rate of Rs. 7,000/- per acre	36,190	00
2. For 1.51 decimals of land classified as all Rs. 291.00 per acre	439	41
3. For bed of the tank measuring 1.23 decimals at the rate of Rs. 583/- per acre	717	09
4. For excavation cost of 4,00,000 cft. at the rate of Rs. 15/- per thousand cft. less a depreciation of 25 % the tank being out of repair	4823	00
5. Towards the value of the trees	429	78
6. Towards the value of the structures excluding wells and cisterns	51,708	00
7. To value of the wells and cisterns	8,500	00
8. Additional compensation at 15 %	15,421	10

5. The referring claimants who are the respondents before us in these two appeals made two applications under Section 18 of the Act objecting to the amount of compensation assessed by the L. A. Collector which gave rise to two land acquisition cases before the learned Additional District Judge, Purulia. The objections of the respondents as summarised by the learned Additional District Judge are as follows:—

"1. The Bastu Bagan land should have been valued at Rs. 12,000/- per acre.

2. The land of the ails and of the tank should have been classified as Bastu Bagan and compensation allowed at the rate of Rs. 12,000/- per acre.

3. The method of valuing the main building and some of the structures which had been let out to the D. F. O. at 20 times of the annual letting value is not the proper way of valuation of the structures. The L. A. Department ought to have accepted the valuation of the main building and the other structures as made by the Executive Engineer.

4. The excavation costs of the tank was based on an imaginary figure of 4,00,000 cft., earth work and should not have been valued in that way and instead the compensation for the tank

should have been assessed at 20 times the annual value of fish that were got from the tank every year, such annual value being Rs. 1,500/- per acre.

5. No valuation of the compound wall, the Pucca Ghat, the gates in the compound wall, iron posts for electric light, the statues and the platform was made by the Land Acquisition Department and these should have been valued correctly.

6. The trees were under-valued and the masonry wells were also under-valued."

6. Both the land acquisition cases were heard analogously by the learned Additional District Judge. The learned Additional District Judge enhanced the amount of compensation by Rupees 9,954.16 in L. A. R. case No. 18 of 1962 and by Rs. 90,635.84 in L. A. R. case No. 19 of 1962. Both the amounts included the additional compensation at the rate of 15 %. It does not appear from the award that any interest was awarded by the learned Additional District Judge under Section 28 of the Act on the excess amount awarded.

7. The respondents have also filed two cross-objections. The cross-objection in respect of F. A. No. 906 of 1967 has been valued by the respondents at Rs. 4,100/-. In the memo of cross-objection several grounds have been taken. Under the first ground, the respondents claimed that the learned Additional District Judge should have passed a decree for a further sum of Rs. 4,101/- in respect of the tank including the pucca ghat. In case the claim made in the first ground of the respondents is allowed, it will exhaust the valuation of the cross-objection and the question of granting reliefs to the respondents as claimed in the other grounds of the cross-objection, will not arise. The cross-objection in respect of F. A. No. 907 of 1967 has been valued by the respondents at Rs. 7,900/-. In the first ground of this cross-objection the respondents claim that the learned Additional District Judge should have passed a decree for a sum of Rs. 7,900/- in respect of the acquired property including the structures and fixtures. In the remaining grounds other claims have been made. In ground No. IX, the respondents have claimed additional sum of Rs. 5,430/- for 5.43 acres of land and also a further sum of Rs. 2,350/- for the boundary wall, platform, statues and iron posts and also a sum of Rs. 570/- for the trees standing on the acquired property. Besides the claims made in other grounds, the claim made in ground No. 1 exhausts the valuation of the cross-objection. The claims made under different heads in ground No. IX also

exceed the valuation of the cross-objection.

8. Mr. Das Gupta, learned Advocate appearing on behalf of the appellant submitted before us that the respondents were not entitled to press either of the cross-objections inasmuch as the claims made by the respondents in either of the cross-objections exceeded the valuation of the respective cross-objections. We would have upheld the contention of Mr. Das Gupta had not Mr. Lala, learned Advocate for the respondents abandoned part of the respondents' claim in respect of both the cross-objections so as to confine the respondents' claim in both the cross-objections within the limit of the valuation of the cross-objections. So far as the cross-objection in F. A. No. 906 of 1967 is concerned, Mr. Lala abandoned the respondents' claim in all the grounds excepting ground No. 1 and in F. A. No. 907 of 1967, Mr. Lala submitted that the respondents would only press their cross-objection in respect of part of the claims made in ground No. IX, namely, in respect of claims for the additional sum of Rs. 2,350/- for the boundary wall, platform, statues and iron posts and also the additional sum of Rs. 570/- for the trees standing on the acquired property. The other claims made in the other grounds including the claim for an additional sum of Rs. 5,430/- for 5.43 acres of land as contained in ground No. IX were expressly abandoned by Mr. Lala. We are unable to accept the contention of Mr. Das Gupta that even after the abandonment by the respondents part of their claims under both the cross-objections, the respondents were not entitled to press any of the claims made in either of the cross-objections. It is well settled that a plaintiff or an appellant is entitled to abandon part of the claim made by him in a suit or appeal so as to confine the suit or appeal within the valuation of the same or within the jurisdiction of the Court concerned.

9. The first contention of Mr. Das Gupta relates to the award of the learned Additional District Judge on the objection No. 1 of the respondents. The L. A. Collector assessed the value of the bastu bagan land at the rate of Rs. 7,000/- per acre. The respondents claimed that it should have been enhanced to Rs. 12,000/- per acre. The learned Additional District Judge, however, assessed it at the rate of Rupees 11,000/- per acre and enhanced the amount of compensation on that head by Rs. 20,680/-. Mr. Das Gupta submitted that in view of the documents of sale transactions filed by the respondents, the learned Additional District

Judge should have assessed the price of bastu began land at Rs. 7,000/- per acre as made by the L. A. Collector.

10. It appears that the respondents filed certain documents containing transactions of sale. The documents are marked Exhibits 1 to 1 (e). Exhibit 1 relates to a property in mouja Nadiha and before us it was not relied on by either party. By the document Exhibit 1 (a) dated 4-1-1961, 3.95 acres of raiyati land was sold for Rs. 6,999/-, that is, at the rate of Rs. 1,772/- per acre, by the document Exhibit 1 (c) dated 3-9-1960, 48 acres of raiyati land was sold for Rs. 750/-, that is, at the rate of Rs. 1,652.50 per acre and by the document Exhibit 1 (d) dated 1-11-1961, 26 acres of bastu land was sold for Rs. 1,199/-, that is, at the rate of Rupees 4,615/- per acre. The lands covered by all these three documents are situate in mouja Raghampur. By the sale deed Exhibit 1 (a), 1 cotta of bastu land was sold for Rs. 600/- on 1-12-1958, that is, at the rate of Rs. 36,300/- per acre and by the sale deed Exhibit 1 (e) dated 9-12-1959, 1 cotta 13 chhataks of bastu land was sold for Rs. 949/-, that is, at the rate of Rs. 31,660/- per acre. These two sale deeds, namely, Exhibits 1 (a) and 1 (e) are sale transactions of land situate in mouja Purulia.

11. Mr. Das Gupta strongly relied on the sale deeds Exhibits 1 (a), 1 (b) and 1 (c) and contended that the respondents having themselves filed and relied on these documents, the valuation of the land in the acquired premises should have been made on the basis of these documents. It has been already stated that all these documents of sale have been filed by the respondents. These documents, namely, Exhibits 1 (a), 1 (b) and 1 (c) do not at all support the contention of the respondents that the land should have been valued at the rate of Rs. 12,000/- per acre. There is no indication in the records for what purpose the respondents filed these three documents of sale. Mr. Lala submitted that as there was much dispute as to the class of land to which the bed of the tank belonged, the respondents had to file these documents showing the class of land adjoining the tank. It may be stated here that the L. A. Collector classified the bed of the tank as Gora III land and assessed compensation on the basis of that classification. The reason for this classification as given by the L. A. Collector is, that the lands adjoining the tank are Gora III land. It has been already stated that the tank is situate in mouja Raghampur. Mr. Lala submitted that the respondents filed these documents, namely, Exhibits 1 (b) to

1 (d) for the purpose of showing that the lands in the neighbourhood of the bed of the tank are not Gora III lands, but they are superior to Gora III land and that the respondents also relied on the sale transactions embodied in these three documents for the purpose of determination of the price of the bed of the tank.

12. The aforesaid contention of Mr. Lala has much force. The tank is situate in the Raghampur mouja and these three documents also relate to the said mouja. The rates of price at which the lands covered by these three documents were sold, are much lower than the rate of price claimed by the respondents in respect of the bastu land appertaining to mouja Purulia. The highest of these rates is Rs. 4,615/- per acre under the sale transaction embodied in the document Exhibit 1 (d). It is not even the case of the appellant that the bastu land appertaining to mouja Purulia is valued at Rs. 4,615/- per acre. The L. A. Collector assessed the price of bastu-land in mouja Purulia at Rs. 7,000/- per acre. It is apparent from the valuation made by the L. A. Collector that he did not rely on these sale transactions in determining the market value of the bastu land in mouja Purulia. We are, therefore, of the view that these documents, namely, Exhibits 1 (b), 1 (c) and 1 (d) were relied on by the respondents for the purpose of showing the nature of land adjoining the Gora III land and also in support of the claim for compensation for the bed of the tank. We have already pointed out that all these transactions of sale took place long after the date of the notification under Section 4. By the documents—Exhibits 1 (a) and 1 (e)—very small parcels of land were sold. In our opinion, these two sales are not at all comparable sales. The learned Additional District Judge was justified in not relying upon any of these documents including the documents Exhibits 1 (a) and 1 (e) relating to transactions of sale of land in mouja Purulia.

13. The L. A. Collector valued the bastu began land at the rate of Rs. 7,000/- per acre, that is, at the rate of Rs. 117/- per cotta. There is nothing on record to show the basis on which the L. A. Collector assessed the price of the bastu began land at Rupees 7,000/- per acre. It has been simply alleged that the land was valued on the basis of sale transactions in the neighbouring areas. Our attention was not drawn to any such transactions from the records of the case nor do we find that any document evidencing any such transactions has been printed in the

paper book. The nature and situation of the land appear from the judgment of the learned Additional District Judge as quoted above. Although Exhibits 1 and 1 (e) are post notification transactions of small quantity of land, we get some idea about the price of bastu land in mouja Purulia. The learned Additional District Judge enhanced the price of bastu bagan land from Rs. 117/- per cotta to Rs. 183.33 per cotta, that is Rs. 11,000/- per acre. We do not consider that the price thus assessed by the learned Additional District Judge of bastu began land situate in mouja Purulia is either excessive or unreasonable. We would accordingly overrule the contention of Mr. Das Gupta that the learned Additional District Judge should have affirmed the value of the bastu land at Rs. 7,000/- per acre as made by the Land Acquisition Collector.

14. It appears from the evidence of the Land Acquisition Collector that the bed of the tank was classified as Gora III land and the same was valued at 1/12th the price of the homestead land. The question is whether or not the bed of the tank can be classified as Gora III land. The documents filed by the respondents, namely, Exhibits 1(b), 1(c) and 1(d) do not show that the land in the locality of the disputed tank are Gora III lands. After assessing the value of the bed of the tank as Gora III land, the Land Acquisition Collector assessed the cost of excavation and by adding these two, he fixed the value of the tank at Rs. 583/- per acre. The bank of the tank measuring 1.51 acres was valued by the L. A. Collector at the rate of Rupees 291/- per acre.

15. The method adopted by the Land Acquisition Collector appears to be erroneous. In the first place, there is no evidence that the bed of the tank is Gora III land. Secondly, it is curious that the bank of the tank should be valued at a much lesser price than the price of the tank land. The respondents claimed that the bank of the tank measuring 1.51 acres should be valued at the same rate as that of the homestead land. It appears from Parks' Principles and Practice of Valuations (4th Ed. page 72) that the Courts have adopted during the past few years a method of valuing tanks at one-half the value of solid land. Although the learned author has termed this method as a Rule of Thumb method, in our opinion, in the absence of proper materials enabling the Court to determine the value of the tank in a logical and scientific manner, it will not be unreasonable for the Court to adopt this method. The learned Additional District Judge has assessed the value of the tank land including the bank of the tank, that is, the entire 2.74 acres of land

at 1/3rd the rate allowed for the homestead land. In view of the facts and circumstances of the case, we do not find any unreasonableness in the decision of the learned Additional District Judge in valuing the tank land at 1/3rd the value of the homestead land. We would accordingly overrule the contention of Mr. Das Gupta and uphold the finding of the learned Additional District Judge as to the value of the tank land.

16. The objection No. 3 of the respondents relates to the value of the structures including the main building. The respondents examined on Commission one Ananta Kumar Sen Gupta, who was an estimator in the office of the District Board, Purulia. Ananta Kumar Sen Gupta valued, these structures appertaining to the acquired premises 'Kamala Kutir' and submitted a valuation statement dated September 22, 1963, which was marked as Exhibit 1 by the Commissioner. This witness deposed that he estimated the cost of construction of the structures in the year 1926 and also the value of the structures in the year 1960. The value was determined by him according to the P. W. D. rate that was in force in the year 1926 in the then province of Behar. The respondents also relied on the estimate of valuation of the structures made by the Executive Engineer of the District. It appears from the evidence of the parties and it is not disputed before us that the Executive Engineer had to value the structures at the instance of the Land Acquisition Department. The Land Acquisition Department accepted the valuation made by the Executive Engineer in respect of all the structures excepting the main building. The reason for not accepting the valuation of the Executive Engineer of the main building is that on the date of notification, the D. F. O. (District Forest Officer) was a tenant of the main building at Rs. 200/- per month. The L. A. Collector valued the main building at 20 times the annual rent which comes to Rs. 40,800/- after deducting the collection and other incidental charges at 15 per cent. of the gross annual rental. It may be stated here, that the D. F. O. became the tenant in respect of the main building in the year 1946 at monthly rental of Rs. 150/-. When the owners of the building served a notice to quit on the D. F. O., the building was requisitioned by the Behar Government and the monthly compensation was fixed at Rs. 100/- by the Court. Lalit Mohon Roy, the Kanungo of the Land Acquisition Department was examined as the sole witness on behalf of the appellant and he admitted in his cross-examination that they did not ascertain the rent of neighbouring premises which were let out nor did they enquire about the pro-

able rent of premises having same accommodation and facilities. They did not also ascertain the cost of collection and incidental charges in respect of the tenancy of the D. F. O.

17. We may at this stage refer to the accepted modes of valuation of lands acquired under the Act. They are (1) the price paid, within a reasonable time, in bona fide transactions of purchase of the land acquired or the lands adjacent to the land acquired, and possessing similar advantages; (2) the number of years' purchase of the actual, or immediately prospective, profit from the lands acquired and (3) the opinion of valuers of experts (See *Harish Chunder Neogy v. Secy. of State for India*, (1907) 11 Cal WN 875; *Special Land Acquisition Officer, Bangalore v. T. Adinarayan Setty*, AIR 1959 SC 429). In the instant case, there is no evidence of bona fide transactions of sale of similar premises consisting of similar structures. In the absence of any such evidence the capitalisation of the annual rental for 20 years may represent the market value of the structures. The L. A. Collector relied on this mode of valuation as already stated above. It may, however, be pointed out that in capitalising the rental value for 20 years or in estimating the value on the basis of a number of years' purchase of the actual or immediately prospective profit from the lands acquired, the rent must be the fair rent or the prevailing rent in the locality in respect of buildings having similar advantages and amenities and the profit must be the actual or immediately prospective profit. The monthly rental of Rs. 200/- taken into consideration by the L. A. Collector for evaluating the main building is not the fair rent or rent prevailing in the locality in respect of buildings having similar advantages and amenities. We have already noticed the circumstances under which the D. F. O. occupied the building at a monthly rent of Rs. 200/-. We have also referred to the evidence of the Kanungo, who frankly admitted that nothing was done for ascertaining the prevailing rate of rent of buildings situate in the locality of the acquired premises and having similar advantages and amenities. The cost of collection and incidental charges were arbitrarily fixed at 15 per cent. of the gross annual rental without any basis therefor. In such circumstances, it is very difficult to uphold the valuation made by the L. A. Collector on the basis of the rent paid by the D. F. O. for the main building.

18. The learned Additional District Judge has rightly refused to accept the valuation of the main building as made by the L. A. Collector on the basis aforesaid. No reason has been given on behalf of the State why the valuation

made by the Executive Engineer in respect of the main building was not correct. The Executive Engineer is an officer of the Government having expert knowledge about valuation. He is a disinterested person and no defect has been pointed out in the method of valuation adopted by him. The learned Additional District Judge has relied on the valuation made by the Executive Engineer in preference to that made by the L. A. Collector and the said Ananta Kumar Sen Gupta. We are of the same view as that of the learned Additional District Judge that the valuation made by the Executive Engineer in respect of the structures including the main building of the premises 'Kamala Kutir' should be accepted.

19. Mr. Das Gupta, however, drew our attention to Exhibit 'C' which is a letter from Shri K. P. Sen, officer on Special Duty, Education Department to the Deputy Commissioner, Purulia, dated February 23, 1960. In that letter it was stated that the owners of 'Kamala Kutir' were agreeable to sell the property to the Government at a price of Rupees 1,00,000 provided payment of Rs. 75,000 was made immediately. Mr. Das Gupta submitted that the said offer was a good piece of evidence to show that the property was not worth more than Rupees 1,00,000 and that the compensation should not exceed the said amount. We may, however, refer to the evidence of the respondent Ganesh Chandra Mitra who while admitting in his cross-examination the said offer, stated that the same was made for the purpose of clearing the debts. Apart from that there is no evidence that the Government accepted that offer or that the respondents pursued the said offer. It seems to us that the respondents were under pressing need for money for the purpose of clearing their debts. In view of that, we do not consider that the said offer of the respondents indicated the market value of the premises 'Kamala Kutir'.

20. The learned Additional District Judge allowed a sum of Rs. 3,000 for the compound wall, Rs. 1,000 for the gates, Rs. 100 for the platform, Rs. 30 for the statues, Rs. 150 for iron posts, and Rs. 4,000 for the pucca ghat, that is, in all Rs. 8,080. These structures were not valued by the L. A. Collector and accordingly no compensation was awarded by him on these items. In this connection we may refer to the cross-objection of the respondents, namely, ground No. I in F. A. No. 906 of 1967 and ground No. IX in F. A. No. 907 of 1967. There was some dispute about the existence of the pucca ghat. The Kanungo in his evidence stated that he did not see any pucca ghat in the tank. This evidence of the Kanungo appears to be untrue. It appears from the schedule of acquired

land (Exhibit 'B') prepared by the Land Acquisition Department, that there is a reference to a cemented pucca ghat measuring 36' x 30'. Ananta Kumar Sen Gupta, in his evidence stated that the tank had a good pucca ghat. The evidence of this witness and the appellant's own document (Exhibit 'B') conclusively prove the existence of a cemented pucca ghat. The learned Additional District Judge valued it at Rs. 4,000. The respondents have claimed a further sum of Rs. 4,000. We do not, however, consider that a further sum should be allowed to the respondents as claimed by them on account of compensation for the pucca ghat. The boundary wall measures 7' 6" in height and 1931 Rft. in length. The learned Additional District Judge has allowed only a sum of Rs. 3,000 as compensation for the boundary wall. The respondents in their cross-objection have claimed a further sum of Rs. 2,050 for the boundary wall, platform, statues and iron posts. In the statement of valuation prepared by the respondents' valuer, Ananta Kumar Sengupta, the boundary wall has been valued at Rs. 4,634. In view of the length and height of the boundary wall, in our opinion, the respondents should have been awarded at least the said sum of Rs. 4,634 as valued by the said Ananta Kumar Sengupta. We would accordingly allow a further sum of Rs. 1,634, which is, the difference between Rs. 4,634 and Rs. 3,000. We do not, however, allow the respondents' claim in the cross-objection in respect of the platform, statues and iron posts.

21. The Land Acquisition Collector has valued the trees at Rs. 429.78 only. The learned Additional District Judge disallowed the claim of the respondents for further compensation for the trees. In their cross-objection the respondents have claimed a further sum of Rs. 570 on account of trees. In this connection we may refer to the list of trees (Exhibit 'A') containing the names and other particulars of the trees standing on the acquired property. The list was prepared by the Land Acquisition Department, Purulia and it has gone in the evidence at the instance of the appellant. We find from this list (Exhibit A) that the trees have been valued at Rs. 1,682.89. The Land Acquisition Collector should have allowed the said sum on account of compensation for the trees, but curiously enough only a sum of Rs. 429.78 was allowed by the Land Acquisition Collector as compensation for the trees. This document (Exhibit A) was not noticed by the learned Additional District Judge. We would accordingly allow the cross-objection of the respondents and allow the additional sum of Rs. 570 on account of compensation for the trees.

22. Mr. Das Gupta did not challenge the findings of the learned Additional District Judge on the objection No. IV of the respondents relating to the excavation cost of the tank.

23. For the reasons aforesaid, both the appeals are dismissed. The cross-objection of the respondents in F. A. No. 906 of 1967 is also dismissed. The cross-objection of the respondents in F. A. No. 907 of 1967 is allowed in part. The award of the learned Additional District Judge is modified to the following extent:— The respondents shall be entitled to an additional sum of Rs. 1,634 on account of compensation for the boundary wall and a further sum of Rs. 570 on account of the trees. The respondents are also entitled to a sum of 15 per cent on the market value of the land under Section 23 (2) of the Act. The respondents shall also be entitled to interest on the excess amount awarded by the learned Additional District Judge as modified by this judgment from the date on which possession of the acquired premises was taken by the Collector, that is, from June 22, 1962 to the date of payment of such excess amount in Court. The L. A. Collector shall make payment in Court of the outstanding amount of compensation within three months of the date of communication of the award to him as modified by this judgment. Save as stated above, the rest of the award of the learned Additional District Judge will stand.

24. In view of the facts and circumstances of the case, the parties are directed to bear their own costs in this Court both in respect of the appeals and the cross-objections.

ARUN K. MUKHERJEA, J.: 25.
I agree.

Order accordingly.

AIR 1972 CALCUTTA 339 (V 59 C 64)

S. C. GHOSE, J.

B. K. Plastic Industries, Applicant v. Jayantilal Kalidas Sayani, Respondent.

Matter No. 157 of 1970, D/- 8-12-1971.

(A) Patent and Designs Act (1911), S. 51-A, sub-s. (1), Cl. (a) (iii) — Even if a design which is original but is published earlier than the date of registration such design loses its novelty or newness on the date of registration and hence the registration may be revoked. (Para 10)

(B) Patent and Designs Act (1911), S. 51-A (1), Cl. (a) — Word 'or' between sub-clauses (i), (ii) and (iii) of Cl. (a) should be read as 'and' — Person is entitled to take one or all of the grounds mentioned in the said sub-clauses for

cancellation of the registration.

(Paras 12, 14)

(C) Patent and Designs Act (1911), S. 51-A, Cls. (a) and (b) — Forums prescribed in two clauses for applying for cancellation of registration are not mutually exclusive.

Therefore, application pending before the Controller under Cl. (b) does not bar the initiation of suit in the High Court by way of petition under Cl. (a).

(Para 15)

Cases Referred: Chronological Paras

(1969) Suit No. 969 of 1969 (Cal),
B. K. Plastic Industries v. Plasto Metal 5

AIR 1963 Cal 132 = 67 Cal WN 58, Hari Das Mundra v. National and Grindlays Bank Ltd. 12

(1944) 2 All ER 60 = 1944 AC 341, Chichester Diocesan Fund Etc. v. Simpson 14

AIR 1941 Bom 188 = 43 Bom LR 280, Dwarkadas Dhanji v. Chhotalal Ravicarandas and Co. 10

(1921) 1 Ch D 664 = 90 LJ Ch 288, Gunston v. Winox, Ltd. 10

(1888) 39 Ch D 678 = 57 LJ Ch 909, Blank v. Footman, Pretty, and Co. 10

P. K. Mullick, for Applicant.

ORDER:— This is an application for cancellation or revocation of the registration of the design bearing No. 134095 dated the 26th June, 1968. This application has been made under Section 51-A of the Patent and Designs Act 1911. The said section reads as follows:—

"51-A. Cancellation of registration—

1. Any person interested may present a petition for cancellation of the registration of design—

(a) At any time after the registration of the design, to the High Court on any of the following grounds, namely:—

(i) that the design has been previously registered in (India); or

(ii) that it has been published in (India) prior to the date of registration; or

(iii) that the design is not a new or original design; or

(b) Within one year from the date of registration to the Controller on either of the grounds specified in sub-clauses (i) and (ii) of Cl. (a).

2. An appeal shall lie from any order of the Controller under this section to the High Court, and the Controller may at any time refer any such petition to the High Court, and the High Court shall decide any petition so referred".

2. The facts leading to the making of this application are set out hereunder:

On or about January 29, 1968 the petitioner applied to the Controller of Patents and Designs at Calcutta for the registration of a patent in respect of a

'picnic set' being an assembly of tumblers made of plastics. After making the said application the petitioner started manufacturing and marketing for commercial purposes the said assembly of tumblers.

3. The petitioner subsequently came to know that on or about June 26, 1968 an application was made by one J. K. Sayani of Bombay for the registration of a design in respect of assembly of tumblers. On the said date, i.e., 26th June, 1968 a certificate of registration of design bearing No. 134095 was issued by the Controller of Patents and Designs in favour of the said J. K. Sayani of Bombay. Prior to the said application made by the said J. K. Sayani for the registration of the said design on 26th June, 1968 but subsequent to the date of application for the issue of the Patent made by the petitioner the said J. K. Sayani also known as Jayantilal Kalidas Sayani produced and sold in the market the said assembly of tumblers according to the said design. The petitioner on coming to know of the said marketing of the said tumblers according to the said design complained of the infringement made thereby of its aforesaid patent in respect of the said 'picnic set'.

4. On 5th October, 1968 on behalf of the petitioner advertisement was published in the Gazette of India in respect of the said petitioner's patent by the Patent Office, Calcutta. Notwithstanding the complaint made by the petitioner it appears that the respondent J. K. Sayani went on marketing the said design in infringement of the aforesaid patent granted to the petitioner.

5. On April 2, 1969, the petitioner filed a suit in this Court being Suit No. 969 of 1969 (Cal), (B. K. Plastic Industries v. Plasto Metal) inter alia against the Respondent for a permanent injunction restraining inter alia respondent from infringing the petitioner's Patent in respect of the said 'picnic set'. The petitioner also made an application before the Controller of Patents for the cancellation of the said registration of the said Design.

6. Thereafter the petitioner made the present application.

7. The respondent has not appeared in the instant application. But it appears that the said J. K. Sayani also known as Jayantilal K. Sayani has assigned and transferred the said design bearing No. 134095 together with the rights, power, authority, privileges and advantages appertaining thereto to one Jethalal K. Sayani a partner of one Plasto Metal. The said assignment and/or transfer it appears however has not been registered in accordance with the provisions of the Patent and Designs Act and as such this Court is unable to take any notice of the said alleged assignment.

Be that as it may, the assignee was granted leave to appear in the instant proceeding and make his submission.

8. The main contentions on behalf of the assignee as made by the Counsel Mr. P. K. Mullick, are as follows: to wit, the said design was in any event an original design on the date of registration and therefore cannot be cancelled or revoked. Secondly the fact that the said application before the Controller of Patent is pending is a bar to this Court's entertaining the instant application for cancellation or revocation of the said registration of the said design. According to Mr. Mullick the right of an applicant for cancellation or revocation of a design in a forum under Section 51-A of the Act has been given in the alternative. Under clause (a) to sub-section (1) the applicant may choose his forum to be the High Court or under clause (b) of the said sub-section the applicant may choose his forum to be the Controller; but if the applicant chooses his forum to be the Controller of Patent and Designs the application for such cancellation has to be made within one year from the date of the registration and only on the grounds specified in sub-clauses (i) and (ii) of clause (a) of S. 51-A (1) of the Act. The grounds enumerated in sub-clause (iii) of clause (a) would not be available to an applicant before the Controller. In short the submission by Mr. Mullick was that the two forums prescribed by the said section for the relief of cancellation or revocation of a registration of design as prescribed in the said sub-section (1) of S. 51-A of the said Act are mutually exclusive.

9. An application for registration of a design is made under Section 43 of the Act. Sub-section (1) to the said section provides as follows:—

"The Controller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in (India), register the design under this part".

10. Previously the words used in the corresponding section of the Invention and Designs Act of 1888 were "new and original design" which were substituted by the words "new or original design" in the said Section 43 of the Patents and Designs Act, 1911. Mr. Mullick laid stress on the substitution of the word 'and' by the word 'or' and submitted that even if a design be not new but only original the same may be registered. Publication, according to Mr. Mullick, does not do away with the originalities of a design. We are not really concerned with this aspect of the matter in the instant application because under

sub-clause (iii) to clause (a) of sub-section (1) to S. 51-A of the Act the ground for cancellation is where the design is not new or where the design is not an original design. Therefore, as contended rightly, to my mind, by Mr. Ray if a design loses its novelty or newness on the date of registration the registration of such design shall be cancelled or revoked. In my opinion the case relied on by Mr. Mullick and reported in AIR 1941 Bom 188 at p. 189 does not assist Mr. Mullick. Even if a design which is original but is published earlier than the date of registration the registration may be revoked. It has been admitted in paragraphs 6, 7 and 10 of the affidavit affirmed by Amritlal K. Sayani affirmed on the 1st July, 1970 that the respondent since December, 1967 with the consent of J. K. Sayani has been manufacturing the plastic tumblers in the aforesaid form of the design for the purpose of selling the same in the market and has been selling the same in various parts of India through various agencies. In the case of *Gunston v. Winox, Ltd.*, (1921) 1 Ch D 664 it was held that if a particular design was disclosed in good faith prior to the registration thereof that amounted to publication of the design. Similar was the decision also in the case of *Blank v. Footman, Pretty & Co.*, (1888) 39 Ch D 678 where the inventor of a design showed it to his own agent who in his turn showed it to two persons and asked for their orders. The said soliciting of custom with regard to the said goods was held to be amounting to the publication of the design of the said goods within the meaning of the said Patent and Designs Act. In the instant case the invention or the method or dovetailing the tumblers under a cover is not of any intricate mechanism. It is true that any process is not registered but only the product i.e. the shape and configuration of the tumblers assembly with the cover but even then in any event the same has to be held to have been published on the basis of the admission itself made in the said affidavit of Amritlal K. Sayani.

11. Reliance of Mr. Mullick on Section 43 in my opinion is not of assistance to him. It is true that either a new or an original design may be registered under Section 43 of the Act but certificate of registration issued by the Controller under Section 45 (1) of the Act is only a prima facie evidence to the said effect. In an action for damages for infringement defence may raise the plea that the design is neither new nor original. Similarly, in an application for cancellation or revocation of a registration of a design the petitioner may raise the plea that the design is neither new nor original and on that ground should be cancelled or revoked. Upon proof of

either of the said grounds, the registration may be cancelled. Mr. Mullick's first contention, therefore, fails for the reasons stated hereinabove.

12. It is true that the word 'or' prima facie or in the absence of ambiguity should be taken to be disjunctive. But the word 'or' should be construed in the context in which the same is used. Sub-clauses (ii) and (iii) in clause (a) of sub-section (1) of S. 51-A of the Act are preceded by the word 'or'. But it appears to me that a person is entitled to take any or all of the grounds set out in sub-clauses (i), (ii) and (iii) of Cl. (a) of sub-section (1) to the said section as the ground for cancellation or revocation of registration of a design. It cannot be said that since the word 'or' stands in between the sub-clauses, a person is entitled to take only one of the grounds mentioned in the said sub-clauses in the application for cancellation of registration. That would lead to an incongruous result. Mr. Ray was right when he submitted that the word 'or' here should be read as "and/or" namely, in the sense that a person is entitled to take one or all of the grounds mentioned in the said sub-clauses for cancellation or revocation of the registration of a design. Mr. Ray in support of his submission relied on the decision of this Court in *Hari Das Mundra v. National & Grindlays Bank Ltd.*, 67 Cal WN 58=(AIR 1963 Cal 132) where in a Division Bench of this Court presided over by Mr. Justice Bachawat construed the word 'or' appearing in Section 176 of the Indian Contract Act as 'and'. To understand the said construction made by the said Division Bench, it is necessary to consider Section 176 of the Indian Contract Act which reads as follows:—

"176. If the pawnor makes default in payment of the debt or performance, at the stipulated time of the promise, in respect of which the goods were pledged the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor".

It was argued in the said case that the pawnee in case of default to redeem by the pawnor has three rights, viz. (a) he may bring a suit against the pawnor upon debt or promise, (b) he may retain the goods pledged as a collateral security, or (c) he may sell it on giving the pawnor reasonable notice of the sale,

13. It was urged that the pawnee if he institutes a suit to recover the debt has the right only to retain the goods pledged. He cannot in that event sell the goods. In other words the right to institute a suit on the debt or promise is alternative to and not concurrent with the right to sell the goods pledged and are mutually exclusive rights under the said section. Bachawat, J. observed to the following effect, to wit:—

"I think that when the word "or" is used in relation to two or more alternatives, it is not necessarily the case that the alternatives are mutually exclusive. The question as to whether they are mutually exclusive or not must be determined by applying the general rule that words should be construed to ascertain the intention of the provision in question to be collected from the whole of its terms".

It was held by the said Division Bench that the word "or" preceding the last sentence of the first paragraph of Section 176 did not make the rights conferred by the two sentences of the said first paragraph of the said Section 176 mutually exclusive and it was held that the institution of the suit on the debt or promise by a pawnee in court does not destroy his right to sell the goods pledged out of Court.

14. In *C. D. Fund Etc. v. Simpson*, (1944) 2 All ER 60 it was observed at p. 73 by their Lordships that "In certain contexts meaning of the word 'or' might not be exclusive". In my opinion the entirety of the Section 51-A of the Patents and Designs Act would lead to anomalous and absurd result if the word "or" in between sub-clauses (i), (ii) and (iii) in sub-section (1) in clause (a) of the said section be not read as "and". The word "or" appearing before clause (b) of the said sub-section (1) should also be given the same meaning for the simple reason that the same word appearing in the same statute and in particular in the same section should be given the same meaning.

15. For the reasons stated above I am of the opinion that the forums prescribed by Section 51-A for cancellation or revocation of registration of Design in sub-clauses (a) and (b) are not mutually exclusive. In the premises, the application made by the applicant which is pending now before the Controller cannot operate as a bar to the initiation of the present proceeding by way of petition. The word "or" may mean "and/or" in the context of certain circumstances is also corroborated by *Saunders' Words and Phrases* Vol. IV. The last contention of Mr. Mullick must also fail for the reasons stated above.

16. In this premises this application must succeed. There shall be an order in terms of prayers (a) and (b) of the petition.

Application allowed.

AIR 1972 CALCUTTA 343 (V 59 C 65)

ARUN K. MUKHERJEE AND

M. M. DUTT, JJ.

The Union of India, Appellant v. Radharani Ghosh, Respondent.

A. F. O. D. No. 740 of 1964 and Cross-objection, D/- 30-11-1971.

(A) Requisitioning and Acquisition of Immoveable Property Act (1952), Section 8 (3) (a) — Assessment of compensation.

Where land is acquired after an earlier requisition the compensation should not be limited to the value on the date of requisition but it should be fixed at the value of it on the date of acquisition. AIR 1968 SC 377, Rel. on.

(Para 7)

(B) Civil P. C. (1908), O. 41, R. 22 — Cross-objections — New point — Point not taken in the memorandum of objections not allowed to be raised at the hearing of appeal. (Para 12)

Cases Referred: Chronological Paras

AIR 1968 SC 377 = (1968) 1 SCR

463, Union of India v. Kamalabai Harjivandas Parekh

AIR 1954 SC 170 = 1954 SCR 558,

State of West Bengal v. Bela

Banerjee

Chandidas Roy Choudhury and Amaresh Chakraborty, for Appellant; Apurbadhan Mukherjee and Gopal Chandra Narayan Choudhury, for Respondent.

ARUN K. MUKHERJEE, J.:— This is an appeal from a decision dated 29 May 1963 of the learned Arbitrator, Alipore, 24-Parganas in connection with an award of compensation for certain properties which were originally requisitioned by Government under sub-r. (1) of Rule 75-A of the Defence of India Rules on 3 March, 1942 and thereafter permanently acquired on 27 March 1947 under the Requisitioning and Acquisition of Immoveable Property Act, 1952, hereinafter referred to as the Act XXX of 1952.

2. The facts which are in short compass are as follows:—

The properties relate to five plots of land in Mouza Sultanpur and two plots of land in Mouza Jangalpur. The lands in Mouza Jangalpur are within North Dum Dum Municipality. The Land Acquisition Collector made an award in favour of the claimant for the total sum of Rs. 47,943-3 annas. In making this award he valued the land at the rate of Rupees

2,000/- per bigha and the tanks at Rupees 1,000/- per bigha and awarded a lump sum of Rs. 986-13 annas for the trees standing on the land and also a sum of Rs. 23,422/- for the structure standing thereon.

3. The respondent claimant on being dissatisfied with this award, made a reference to the Arbitrator. After this reference was made, the referring claimant came up to this High Court for determination of the question whether the provisions of Section 8 (3) (b) of Act XXX of 1952 the Requisitioning and Acquisition of Immoveable Property Act, 1952 are ultra vires. This Court, however, did not decide that question and disposed of the Rule that was obtained by the claimant on the following terms:

(a) The Arbitrator will give his award according to law.

(b) The arbitrator will give his finding as to value of the properties on the date of requisition as well as on the date of acquisition.

(c) Liberty was given to the petitioner to take the point of ultra vires at the hearing.

Thereafter the matter was heard before the learned Arbitrator. The claimant examined two witnesses viz., Shri T. K. Ghosh, a Chartered Engineer and Valuer and one Birendra Nath Ghosh. The opposite party, that is to say, the State of West Bengal, also examined two witnesses, namely, the Surveyor of the Office of the Land Acquisition Collector, 24-Parganas as well as one Officer of the C. P. W. D. who was at the material time posted at Dum Dum Air Port. The learned Arbitrator after hearing the evidence increased the amount of compensation awarded by the Collector to Rupees 75,988.94 p. In making this award the learned Arbitrator gave Rs. 3,000/- as compensation for each bigha of solid land and Rs. 1,500/- per bigha of tank. Further, he allowed the lump sum of Rs. 5,523/- as compensation for the trees and the sum of Rs. 35,164.38 p. as compensation for the structure standing on the land.

4. In computing the compensation for land and tank the learned Arbitrator proceeded on the basis of the prices obtaining at the date of requisition. Pursuant to the directions of the High Court, however, the learned Arbitrator also determined the values of the solid land and the tank as on the date of acquisition; these he found to be Rs. 4,500/- and Rs. 2,250/- per bigha respectively.

5. The State of West Bengal have now come on appeal from the award of the Arbitrator. The referring claimant has also filed a cross-objection.

6. The appellant's main objection in the grounds of appeal centred round the valuation of the land and the tank.

But this objection is no longer tenable in view of the recent Supreme Court decision. The appellant Union of India wanted to contend that the compensation for the lands and tanks should have been fixed at a lower figure. The appellant naturally accepts the position that the compensation should be fixed on the basis of the value at the date of requisition and not on the basis of the value obtaining on the date of acquisition. The claimant, of course, claims the value as on the date of acquisition.

7. The entire contention of the appellant on this ground fails for the simple reason that it is now settled law that in a case like this where land is acquired after an earlier requisition the compensation should not be limited to the value on the date of requisition but that it should be fixed at the value of it on the date of acquisition.

8. This question came up for decision in Union of India v. Harjivandas Parekh, AIR 1968 SC 377. Mitter, J. in delivering the judgment on behalf of the Court held that clause (b) of Sec. 8 (3) of Act XXX of 1952 was ultra vires Art. 31 (2) of the Constitution in so far as that clause directed that the excess of the value of the land arrived at in terms of the Land Acquisition Act in comparison with twice the price which the requisitioned property would have fetched in the open market if it had been sold on the date of requisition was to be ignored. In order to understand the ratio of his Lordship's judgment, it is necessary to set out the provisions of sub-section (3) of S. 8.

"The compensation payable for the acquisition of any property under Section 7 shall be—

(a) the price which the requisitioned property would have fetched in the open market, if it had remained in the same condition as it was at the time of requisitioning and had been sold on the date of acquisition, or

(b) twice the price which the requisitioned property would have fetched in the open market if it had been sold on the date of requisition, whichever is less".

Mitter, J. observes that Cl. (a) of Section 8 (3) lays down the principle aimed at giving the owner of the land something which approximates its just equivalent on the date of acquisition. Clause (b), however, directs the Arbitrator to measure the price arrived at in terms of Cl. (a) with twice the amount of money which the requisitioned property would have fetched if it had been sold on the date of requisition and to ignore the excess of the price computed in terms of Cl. (a) over that in terms of Cl. (b). Following the principles laid down in Bela Banerjee's case, AIR 1954 SC 170,

his Lordship observes further that the basis provided by Cl. (b) has nothing to do with the just equivalent of the land on the date of acquisition. His Lordship, in fact, held that there is no principle for such a basis. On this ground his Lordship refused to accept the proposition that Cl. (b) satisfied the requirements of Art. 31 (2) of the Constitution.

9. The learned Arbitrator in this case allowed twice the price of the property as on the date of requisition. On this ground he allowed Rs. 3,000/- per bigha for land and Rs. 1,500/- per bigha for tank. In view of the Supreme Court decision to which we have just made a reference, there remains absolutely no scope for complaint against the Arbitrator's award so far as the appellant is concerned. On the contrary, the referring claimant is right in her contention that the Arbitrator should have given compensation on the basis of the value at the time of acquisition. Fortunately for us, the learned Arbitrator following the earlier directions given by this High Court has given us his finding as to the value of the lands and tank on the date of acquisition. He has valued the lands at the rate of Rs. 4,500/- per bigha and the tank at the rate of Rs. 2,250/- per bigha. There can be no manner of doubt that the claimant should get compensation for the lands and tank at this rate. In fact, the learned Advocate appearing for the appellant did not press this part of the grounds of appeal before us at all. He was obviously mindful of the decision of the Supreme Court. He pressed his claims only on two grounds, namely, as regards the valuation of the trees and the valuation of the structures.

10. According to the appellant, the Arbitrator's valuation of betel nuts and Mahogany trees is not supported by any evidence and is arbitrary. It was also contended by the appellant that the learned Arbitrator's assessment of the compensation for structures was wrong in so far as he did not allow proper depreciation of the property in regard to the structures. The claimant, on the other hand, in her cross-objection has claimed that the value of Mahogany trees should be at least Rs. 4,500/-. She does not complain about the compensation awarded by the Arbitrator in regard to the structures.

11. So far as the trees are concerned, we have gone into the evidence and also the judgment of the learned Arbitrator and we are of the opinion that the learned Arbitrator was not justified in rejecting the evidence of the valuer, Shri T. K. Ghosh to the effect that each of the Mahogany trees should be valued at Rs. 500/-. The learned Arbitrator allowed only Rs. 50/- for each.

The learned Arbitrator does not give any reason for this except making a general observation regarding the valuer's evidence that he had no knowledge of the conditions obtaining in the locality. In our opinion, it is well-known that Mahogany trees are very valuable and considering that Dum Dum is practically contiguous to Calcutta, we cannot ignore the valuation of the expert regarding the value of Mahogany trees merely because the expert has come from Calcutta and has no knowledge of local condition. We think it would be quite fair and reasonable to value the Mahogany trees at the rate of Rs. 300/- each.

12. Our attention was drawn to the Arbitrator's valuation of the betel nut trees at Re. 1/- for each tree on the basis of the evidence of witness No. 1 for the opposite party even though the witness had actually stated that the value of betel nut trees was Rs. 10/- each. Perhaps this was a mistake on the part of the learned Arbitrator but this point has not been taken in the cross-objection and we do not allow this objection to be raised at this stage.

13. We finally come to the valuation in regard to the structures. We have carefully considered the manner in which the learned Arbitrator has determined the value of the structures. He had annexed to his decision a schedule in which he has itemised all the different structures and then set out side by side (i) the Collector's assessment, (ii) the assessment of the valuation expert of the claimant, (iii) the assessment of the valuation expert of the opposite party and finally, (iv) his own assessment. Looking at this comparative chart we find absolutely no reason to cavil at what the Arbitrator has done in assessing the compensation for structures. The complaint that he has not allowed deduction for depreciation is not true. In fact, he has allowed deduction at the rate of 25 per cent., as will appear from page 49 of the paper-book.

14. In this view of the matter, the appeal falls on all the grounds. The cross-objection succeeds on two points, namely, as to the value of the land and tank and also as to the value of the Mahogany trees.

15. The appeal is dismissed and the cross-objection is allowed in part. The award of the learned Arbitrator is affirmed with the following modification: The compensation for the solid land should be given at the rate of Rs. 4,500/- per bigha and compensation for tank is to be given at the rate of Rs. 2,250/- per bigha. The value of the Mahogany trees should be determined at the rate of Rs. 300/- for each. If the State of West Bengal has already deposited the amount

awarded by the learned Arbitrator in Court, the claimant will get interest at 4 per cent. per annum on the difference between the Collector's award and the Arbitrator's award from the date of acquisition upto the date of such deposit. The claimant will, however, get interest on the difference between the award made by this Court and the award of the learned Arbitrator from the date of acquisition upto realisation at the rate of 4 per cent. per annum.

16. There will be no order as to costs in the appeal. The claimant will get costs in the cross-objection.

M. M. DUTT, J.: 17. I agree.
Order accordingly.

AIR 1972 CALCUTTA 345 (V 59 C 66)
GHOSE, J.

Central Bank of India, Applicant v. Shrish Chandra Guha and another, Respondents.

Suit No. 248 of 1970, D/- 15-11-1971.

Civil P. C. (1908), O. 40, R. 1 —
Rights of person examined pro inter esse suo. (Para 9)

A proceeding in pro interesse suo is not provided for either in the Code of Civil Procedure or in the Rules of the Original Side of this Court. This is a procedure imported into this country from England. In order to do justice to a person, the Court allows that person to come in and be examined as to his title to the goods or property over which the Court has appointed Receiver in a proceeding between persons other than the said person. That is done so that no person may suffer because of any order that may be passed by the Court. It is a personal right of that person only. That person cannot in such a proceeding ask the Court to examine some other person with regard to that person's right or title in the goods or property over which the Court has appointed a Receiver. An examination pro inter esse suo is never ordered unless the applicant shows diligence. (Para 9)

Cases Referred: Chronological Paras

AIR 1969 SC 1287 = (1970) 1 SCR	
22, Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon	8
AIR 1966 SC 997 = (1967) 1 SCJ	
106, Nichhalbhai Valiabhai v. Jaswantlal Zinabhai	8
AIR 1957 SC 357 = 1957 SCR 438,	
L. J. Leach & Co. Ltd. v. Jardine Skinner & Co.	8
AIR 1925 Cal 681 = 41 Cal LJ 197,	
Sreedhar Chaudhury v. Nilmoni Chaudhury	11

Shankar Ghosh, for Applicants.

JUDGMENT:— This is an application for amendment of a petition filed in pro-inter esse-suo seeking inter alia to add in the said proceedings Indian Tea Association stated to be an unregistered Association of members. The petition was filed by Assam Bengal Cereals Limited, an existing Company within the meaning of Companies Act, 1956 of No. 10, Netaji Subhas Road. In the said petition the Assam Bengal Cereals Limited claimed inter alia to be examined pro-inter-esse-suo as to their right, title and interest in 19139 Quintals 87 Kilogramms and 805 gramms of wheat and/or Bhushi fully described in Annexure (a) to the said petition. The petitioner in the said petition also claimed a declaration to the effect that it was the absolute owner of the said goods.

2. The petition was necessitated because of the fact that on the aforesaid goods Joint Receivers were appointed by this Court on the application of the plaintiff in the Suit No. 248 of 1970, that is to say, Central Bank of India. The Central Bank of India claimed to be the hypothecatee or pledgee in respect of the said goods. The hypothecation or pledge was alleged to have been created by the defendants in the suit, Srish Chandra Guha and Debabrata Guha carrying on business under the name and style of Guha Rice Co.

3. After the petitioner Assam Bengal Cereals Limited made the said application in pro-inter-esse-suo an order was made on the said application by me on July 20, 1970 inter alia to the following effect to wit:—

"The petitioner shall be at liberty to take delivery of the goods claimed by it on furnishing bank guarantee for the controlled price of the goods. The form of the guarantee shall be settled by Mr. S. C. Mitter of Messrs. C. C. Basu and in case of dispute as to the form, the matter may be mentioned in Court. The rights of the parties in the goods so taken delivery of by the petitioner shall shift to the monies covered by the bank guarantee".

4. Pursuant to the said order the bank guarantee in terms thereof was duly furnished by the petitioner viz., Assam Bengal Cereals Limited. A part of the goods claimed by them were handed over to them by the Joint Receivers according to the petitioner. The Joint Receivers are not in possession of any goods now. Pursuant to the directions given by Court affidavits were duly filed by the parties. Thereafter the matter was directed to be tried on evidence.

5. The parties duly disclosed their documents, inspection whereof were given and taken by them respectively. In fact Examination De Benese of one of the

witnesses of the petitioner is going on before Mr. Justice R. M. Datta.

6. By the proposed amendment, petitioners seek to claim a declaration in the alternative of the ownership of Indian Tea Association of the said goods upon examination of the members of the said Association in pro-inter-esse-suo.

7. The order for appointment of Receivers was made in this suit on June 18, 1970 for the first time and the application in pro-inter-esse-suo was moved before the Court for the first time on July 20, 1970. Notice of motion in the instant case was taken out by special leave of the Court on August 31, 1971 i.e. after more than a year from the date of making of the said application in pro-inter-esse-suo, by the Assam Bengal Cereals Limited, as well as the Indian Tea Association, an unregistered association of members. The applicants i.e., Kamal McNair Kidwai and Joseph Cajetan D'Souza, the Vice-Chairman and Secretary of the Indian Tea Association have applied to be added as party petitioners in the instant application in the pending application made by Assam Bengal Cereals Limited in a representative capacity, that is to say, on behalf of all the members of the said Association.

8. Mr. Shankar Ghosh, appearing on behalf of the applicants submitted that from the documents disclosed in the proceedings a view may be taken that Assam Bengal Cereals Ltd. were not the owners of the said goods but were the agents of the owners of the said goods, their principal the Indian Tea Association being the owners thereof. In the premises Mr. Ghosh submits in order to avoid multiplicity of proceedings and save unnecessary additional expenses this application has been made. Mr. Ghosh cited the cases of L. J. Leach and Co. Ltd. v. Jardine, Skinner and Co., AIR 1957 SC 357 where the original cause of action in damages for wrongful conversion of the goods was allowed to be amended by the Supreme Court by substituting the cause of action of breach of contract. Mr. Ghosh also cited Nichalabhai Vallabhai v. Jaswantlal Zinabhai, AIR 1966 SC 997 for the proposition that although Indian Tea Association was not formally a party petitioner in the pending application it was in substance the petitioner in the pending application through its agent the Assam Bengal Cereals Ltd. Thus adding in these circumstances of Indian Tea Association at the present moment is merely a formal matter. Mr. Ghosh also relied on Jal Jai Ram Manohar Lal v. National Building Material Supply Gurgaon, AIR 1969 SC 1267. Amendment in the said case was allowed on the ground that the firm which had sued as the plaintiff through the manager could not do so because

the provisions of Order 30 of the Civil P. C. did not apply to the case of a proprietorship concern. It was heard however that in substance it was the person constituting that firm who had instituted the said suit. So amendment was allowed only to rectify the mis-description of the plaintiff by bringing in the proprietor of the firm as the plaintiff suing as such proprietor of the said firm. In AIR 1966 SC 997 the averments made by mistake in the plaint by describing the plaintiff as a present member of the joint family was allowed to be deleted by way of amendment on the ground that the suit was in substance a suit for partition and that averment was really made through inadvertence.

9. A proceeding in *pro interesse suo* is not provided for either in the Code of Civil Procedure or in the Rules of the Original Side of this Court. This is a procedure imported into this country from England. In order to do justice to a person, the Court allows that person to come in and be examined as to his title to the goods or property over which the Court has appointed Receiver in a proceeding between persons other than the said person. That is done so that no person may suffer because of any order that may be passed by the Court. It is the right in such a proceeding of that person who claims to be the owner of the goods or property to be examined as to his title to the said goods or property. It is in that sense a personal right of that person only. That person cannot in my opinion in such a proceeding ask the Court to examine some other person with regard to that person's right or title in the goods or property over which the Court has appointed a Receiver.

10. In the pending proceeding the interest of the Original applicant i.e. the interest of the Assam Bengal Cereals Ltd. was directed to be examined. Further subsequent to the making of the said application an order was passed on 20th July, 1970 directing the Joint Receivers to hand over the said goods to Assam, Bengal Cereals Ltd. upon its furnishing security in the sum of Rs.

Assam Bengal Cereals Ltd. along with National and Grindlays Bank Ltd. agreed to indemnify or pay to the Central Bank of India the value of the said goods being the sum of Rs. . . . in the event Assam Bengal Cereals Ltd. fails to establish its title as the owner of the said goods. The said bond or the agreement has been acted upon by the parties. It cannot now be ordered by amending the original petition that even if Assam Bengal Cereals Ltd. fails to establish its title to the said goods but the Indian Tea Association establishes its title thereto Assam Bengal Cereals Ltd. or the

National and Grindlays Bank Ltd. jointly or severally shall not be liable to pay the said sum to Central Bank of India. The right, title and interest in the said goods of the parties in the said proceeding on 20th July, 1970 stood shifted to the said money under the said bond. That position cannot be changed now in my opinion in the instant application.

11. It is not that the members of the said Indian Tea Association or the Association or the applicants did not know of the said suit or the proceedings therein. The Indian Tea Association and/or the applicants had knowledge of the said suit filed by the Central Bank of India as long ago as 18th June, 1970. They stood by; they did not take any step in the matter. The Assam Bengal Cereals Ltd. by furnishing the said Bank guarantee mentioned above has taken away the said goods. The aforesaid facts, to say the least, show want of diligence on the part of Indian Tea Association. A summary procedure in the form of an application in *pro interesse suo* be resorted to or allowed to be resorted to only by a party who shows the utmost diligence. See *Sreedhar Chaudhury v. Nilmoni Chaudhury*, 41 Cal LJ 197 at p. 201 - (AIR 1925 Cal 681). An examination *pro interesse suo* is never ordered unless the applicant shows diligence.

12. Now there is no goods in the possession of the Joint Receivers in regard to which there may be an examination in *pro interesse suo* of the Indian Tea Association. Therefore, in my opinion, no application can be made now for examination in *pro interesse suo* by any person. If the Indian Tea Association is directed to be added it shall be deemed to have made the application in *pro interesse suo* only when the order for its addition is made.

13. The Indian Tea Association cannot in my view be added as a party petitioner at this stage.

14. For the reasons stated above I pass the following order:—

Leave is given to the petitioner Assam Bengal Cereals Ltd. to amend the petition as shown in red ink in paragraph 3-A of the draft petition being Annexure 'D' thereto. Leave is given to re-verify the petition after such amendments are effected. Amendments be effected on the signed copy of the minutes upon the applicant's Solicitor's undertaking to Court to have this order drawn up and filed. The applicant must pay the cost of this application. Leave is given to the respondents to file an affidavit-in-opposition to the amended petition within three days of the service upon them of an amendment copy of the

petition. All parties to act on a signed copy of the minutes.

Order accordingly.

AIR 1972 CALCUTTA 348 (V 59 C 67)

ANIL KUMAR SEN, J.

Mahboobur Rahman, Petitioner v. Public Service Commission, West Bengal and others, Opposite Parties.

Civil Revn. Case No. 45 (W) of 1970, D/- 15-11-1971.

(A) Constitution of India, Art. 226 — Writ petition — Public Service Commission exercising its discretion regarding matter within its independent jurisdiction — Commission whether answerable to High Court. (Para 5)

It is undoubtedly true that the commission has got its independent jurisdiction and in exercising its discretion or deciding matters left to its individual judgment the commission is not answerable to anyone including the High Court. But it is not proper for the commission to take the view that it is not answerable at all to High Court and that it has been invested with powers to act arbitrarily or that it is above the law in any manner. If the commission fails to act bona fide or if it acts arbitrarily the High Court possesses ample power to make the commission amend. (Para 5)

(B) Constitution of India, Art. 226 — Petitioner called for interview by Public Service Commission on a short list which was not final — List revised and petitioner rightly excluded on ground of ineligibility — The fact that the petitioner had on one occasion been called for an interview without real eligibility, would not prevent commission from rectifying its own error at a subsequent stage nor would it confer any legal right on the petitioner. (Paras 7, 8)

Syed Ataunnabi, for Petitioner; P. K. Sengupta and Pabitra Kumar Basu, for Opposite Party.

ORDER:— This Rule was issued on a Writ petition. This Rule could not have been issued but for the unreasonable conduct on the part of the Public Service Commission, West Bengal.

2. Petitioner is a member of the West Bengal Junior Educational Service and is the lecturer of Arabic at the Calcutta Madrasa. He is an examiner of Arabic in the M. A. Examinations of the University of Calcutta. On October 25, 1968, the respondent Commission, invited applications from eligible candidates for the post of the Principal, Calcutta Madrasa, a cadre post in the West Bengal General Educational Ser-

vice. In the advertisement it was set out that one of the essential qualifications is a first class master's degree or a doctorate degree with first class honours or second class master's degree of an Indian University in Arabic or equivalent. The petitioner does not possess any master's degree from any Indian University but he claims that he obtained the higher diploma of the faculty of Theology from the Ajahar University, Cairo which is equivalent to the requisite First Class M. A. degree of an Indian University. The petitioner applied to the respondent in answer to the aforesaid advertisement inviting candidates. His application was filed on November 18, 1968 with necessary requisites. By a memo dated March 17, 1969 the petitioner was called to appear for an interview before the respondent on April 7, 1969. But by a further memo dated April 2, 1969 such interview was postponed until further communication in the matter. Unfortunately petitioner got no further communication but he came to know that fresh interview letters for the said post were being issued in favour of other candidates. Thereupon on August 6, 1969 the petitioner made a representation to the respondent requesting the respondent to allow him to appear at the postponed interview which was fixed on August 11, 1969. The respondent gave no reply to this representation but the interview for the other candidates were held on August 11, 1969.

3. On these facts on October 7, 1969, the petitioner moved this court with the present Writ petition on an allegation that though eligible and once called for an interview the respondent had wrongfully and arbitrarily excluded the petitioner from the interview and as such from an opportunity for being considered for such appointment. This court did not issue any rule on the writ petition when it was entertained but directed a notice of the application to be served on the commission which was duly served. Thereafter the application was adjourned from day to day but the respondent refused to appear or answer the allegations made in the writ petition. No step was taken to enlighten this court under what circumstances the petitioner who was once selected and called for an interview was subsequently excluded therefrom. Accordingly, on January 2, 1970 this court had no other alternative but to issue a rule on the uncontroverted statements made in the writ petition.

4. Mr. P. K. Sengupta who along with Mr. Pabitra Kumar Basu is now appearing on behalf of the respondent informs this court that it is after a long persuasion that he could impress upon the commission that an affidavit-in-opposition to the rule should be filed disclos-

ing the circumstances in which the petitioner was excluded from the interview. According to Mr. Sengupta such persuasion was necessary as the respondent thought it unnecessary to file any answer to the petition itself on the ground that the commission is not answerable for its conduct.

5. In my view the stand taken by the commission cannot but be regretfully disapproved and it is really unfortunate that a responsible authority should have behaved in this manner. It is undoubtedly true that the commission has got its independent jurisdiction and in exercising its discretion or deciding matters left to its individual judgment the commission is not answerable to anyone including this court. This court was quite aware of this position and consequent limitation of its own jurisdiction even when the writ petition was entertained. But the commission should not have thought that it had been invested with powers to act arbitrarily or that it was above the law in any manner. Under the existing Constitution, our country is ruled by rule of law which affords no sanction for exercise of arbitrary powers by authorities set up thereunder. If the commission fails to act bona fide or if it acts arbitrarily — as was the *ex parte* allegation on the Writ Petition — this court possess ample power to make the commission amend. As it appears from the facts set out hereinafter the commission has now pleaded reasons for excluding the petitioner but unfortunately the commission failed to appreciate that the reasons should have been disclosed to the applicant at the proper time before he came to this court or when the notice of the writ petition was given to the respondent. Had that been done there may not have been any occasion to issue a rule. This court finds absolute lack of propriety on the part of the respondent commission in taking the view that it is not answerable at all to this court.

6. An affidavit has since been filed by the commission wherein all the allegations referred to hereinbefore made by the petitioner are admitted by the commission except the fact that the higher diploma of the Cairo University has not been considered by the commission to be equivalent to a First Class M. A. degree of an Indian University. According to this affidavit the petitioner was no doubt called for an interview on the earlier occasion on a short list prepared which was not final and which was later revised. On such revision the petitioner was found not to be possessing the minimum academic qualification and as such he was excluded from the interview.

7. The learned Advocate for the petitioner comments that it is strange that the commission could have called for interview candidates even before finally scrutinising the applications for the eligibility of the candidates, so that even after once being called for interview a candidate can later be excluded from such interview. In my view the learned Advocate is justified in making this comment on the facts of this case. But even if the petitioner had on one occasion been called for an interview without real eligibility, that would not confer any legal right on him. So if this court finds that he was rightly excluded on the ground of ineligibility, this court would be unable to render any assistance to the petitioner.

8. The learned Advocate appearing in support of this rule has contended that the higher diploma of the Cairo University should have been accepted by the commission to be equivalent to a First Class M. A. degree of an Indian University. Much reliance has been placed by him on the fact that the petitioner is being appointed an examiner in Arabic for the M. A. Examination by the Calcutta University. But the commission does not consider such a diploma to be equivalent to a M. A. degree far less a First Class M. A. degree. In the absence of any official equation of the diploma with a M. A. degree of the Indian University, the matter must lie within the judgment of the commission itself to adjudge whether the higher diploma of the Cairo University is equivalent to M. A. degree or not. The petitioner may have been appointed an examiner of Arabic by the University of Calcutta for the M. A. Examination but the commission is not bound to act on the wisdom of the University of Calcutta nor is the learned Advocate right in his contention that this court has any jurisdiction to adjudge the same by itself or sit in judgment over the decision of the commission. Therefore as it now appears from the affidavit-in-opposition filed at last that though the petitioner was called for interview at one stage he was later excluded on just grounds. The commission might not have acted properly in once inviting the petitioner to an interview without proper verification of the application but that would not prevent the commission from rectifying its own error at a subsequent stage. All that the commission should have done — as this court expects the commission to do — the commission should have informed the petitioner at least in answer to his representation, the reason for his exclusion. Had the commis-

gion done, so, it would have saved the trouble of this court and the unnecessary expenses both by the petitioner and by the commission itself.

9. On the reasons as aforesaid this application must be held to have no merits and the rule is accordingly discharged. But in view of the facts set out hereinbefore I hold the commission liable for the costs incurred by the petitioner and I direct the commission to pay the costs, hearing fee being assessed at ten gold mohurs.

10. Let a copy of this order be forwarded to the Chairman, of the Public Service Commission, West Bengal.

Application dismissed.

AIR 1972 CALCUTTA 350 (V 59 C 68)

SABYASACHI MUKHARJI. J.

D. Macropolo and Co. Applicant v. Union of India and another, Respondents.

Matter No. 779 of 1968, D/- 26-5-1971.

Public Premises (Eviction of Unauthorised Occupants) Act (1958), Sections 7 (2), 10-E — Section 7 (2) is void being in contravention of Art. 14 of the Constitution — Doctrine of eclipse has no application to post-Constitution laws that infringe fundamental rights — Section 4 of Amendment Act 1948 which adds Section 10-E cannot make S. 7 (2) valid — (X-Ref:— Constitution of India, Art. 14). AIR 1959 SC 648 & AIR 1971 Delhi 1 (FB), Followed). (Para 3)

Cases Referred: Chronological Paras

AIR 1971 Delhi 1 = ILR (1970) 2	
Delhi 545 (FB), P. L. Mehra v. D. R. Khanna	3
AIR 1968 Cal 1 = 71 Cal WN 719 (SB), Standard Literature Co. Ltd. v. Union of India	2
AIR 1968 Cal 560 = 72 Cal WN 787 (SB), Rajendra Prasad Singh v. Union of India	2
AIR 1967 SC 1581 = 1967-3 SCR 399, Northern India Caterers Pvt. Ltd. v. State of Punjab	2, 3
AIR 1959 SC 648 = (1959) Supp (2) SCR 8, Deepchand v. State of U. P.	3

ORDER:— In this application under Article 226 of the Constitution the petitioner challenges the notice dated 2nd December, 1968, issued by the Estate Officer under the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1958. The petitioner was for a long time a tenant in respect of a building known and numbered as premises Nos. 9, 10, 11 and 12 of the

Old Court House Street, Calcutta. The petitioner was paying rent at a particular rate. The Government of India purchased the said property on or about the 31st January, 1963. By a notice dated 22nd July, 1963, the Deputy Director of Estates and Under Secretary of the Government of India on behalf of the President of India terminated the tenancy in respect of the said premises on the expiry of the month of August, 1963. On the 21st September, 1963, the Estate Officer, Government of India, informed the petitioner that the petitioner was in unauthorised occupation of the said premises and called upon the petitioner to show cause on or before the 10th October, 1963, as to why an order of eviction should not be made against the petitioner. The petitioner duly showed cause and after negotiations there was an agreement and the petitioner was allowed to remain in occupation till the end of October, 1965. The petitioner vacated the said premises on the 29th October, 1965. On the 27th September, 1965, the said Officer demanded damages from the petitioner at the rate of Rs. 2,626/- for the period between the 1st September, 1963 to the 30th June, 1965 and called upon the petitioner to show cause why an order requiring the petitioner to pay the said amount should not be made. By another notice dated the 5th October, 1966, the Estate Officer again demanded from the petitioner damages at the said rate for the period from the 1st July, 1965, to the 29th October, 1965. The petitioner duly showed cause. Then the Estate Officer made an order under Section 7 (2) of the Act. There was an appeal preferred and the appeal was heard by the Chief Judge, City Civil Court, Calcutta and by an order dated the 6th March, 1968, the learned Chief Judge, City Civil Court, Calcutta, set aside the order of assessment of damages under Section 7 (2) of the Act and remanded the case back to the Estate Officer for passing a fresh order after taking evidence of both sides. By a notice dated 2nd December, 1968, the Estate Officer issued another notice under Section 7 (2) of the Act and the respondents considered that the damages amounting to Rs. 53,925 were due for the period between the 1st September, 1963 to the 29th October, 1965 and the petitioner-Company was asked to show cause on or before the 18th December, 1968. It is the propriety of the last mentioned order that is under challenge in this application under Art. 226 of the Constitution.

2. In the case of Standard Literature Co. Ltd. v. Union of India, 71 Cal WN 719 = (AIR 1968 Cal 1) the Spe-

cial Bench of this Court upheld the said Act. In the said case however the controversy was not raised in the present form. In the case of *Rejendra Prasad Singh v. Union of India*, 72 Cal WN 787 = (AIR 1968 Cal 560) the Special Bench of this Court following the decision of the Supreme Court in the case of *Northern India Caterers Pvt. Ltd. v. State of Punjab*, AIR 1967 SC 1581, held that Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, was violative of Art. 14 of the Constitution and, therefore, void. Sections 5 and 7 of the Act provide inter alia as follows:

"5. Eviction of unauthorised occupants.

(1) If, after considering the cause, if any, shown by any person in pursuance of a notice under Sec. 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the estate officer is satisfied that the public premises are in unauthorised occupation, the estate officer may, on a date to be fixed for the purpose, make an order of eviction, for reasons to be recorded therein, directing that the public premises shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction within forty-five days of the date of its publication under sub-section (1), the estate officer of any other officer duly authorised by the estate officer in this behalf may evict that person from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary:

Provided that in the case of any such person who is not a Government employee and who has been in continuous occupation of the public premises for a period exceeding three years immediately preceding the date of the publication of the order of eviction, the estate officer shall not, if any application is made to him in this behalf, evict such person from the public premises within ninety days of such publication.

7. Power to recover rent or damages in respect of public premises as arrears of land-revenue.

(1) Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order.

(2) Where any person is, or has at any time been, in unauthorised occupa-

tion of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time and in such instalments as may be specified in the order:

Provided that no such order shall be made until after issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer.

(3) If any person refuses or fails to pay the arrears of rent or any instalment thereof payable under sub-section (1) or the damages or any instalment thereof payable under sub-section (2) within the time specified in the order relating thereto, the estate officer may issue a certificate for the amount due to the Collector who shall proceed to recover the same as an arrear of land revenue."

The Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1968 was passed by the Parliament on 16th August, 1968 and the relevant amendment with which we are concerned provides as follows:

"4. Insertion of new Section 10-E — After Section 10-D of the principal Act, the following section shall be inserted, namely:—

"10-E. Bar of Jurisdiction — No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of the eviction of any person who is in unauthorised occupation of any public premises or the recovery of the arrears of rent payable under sub-section (1) of Section 7 or the damages payable under sub-section (2) of that section or costs awarded to the Central Government under sub-section (4-A) of Section 9 or any portion of such rent, damages or costs."

3. The main question that was canvassed in this application is, whether the proposed action under Section 7 (2) of the aforesaid Act mentioned in the petition is permissible in law. It was urged that Section 7 could not stand independently of Section 5 of the said Act. Unless it was determined that a person was in unauthorised occupation, there could not be any scope of determination of damages by a person in unauthorised occupation, it was submitted. Therefore, it was submitted that Section 7 could not have any independent existence apart from

Section 5. It was also urged that Section 7 also suffered from the same infirmity as mentioned in Section 5 of the Act inasmuch as wide discretion had been given to the Estate Officer without laying down any guiding principle to determine whether to go to Civil Court or to take steps under provisions of the Act. Therefore, it was urged that on the parity of reasoning given in the Supreme Court in the case of AIR 1967 SC 1581 Section 7 (2) of the Act was also void. It was submitted that Section 7 (2) of the Act was void because it violated the provisions of Article 14 of the Constitution and it could not be amended by the provisions of the Amendment Act, 1968; the only way was to repeal the Act and enact a new legislation removing the infirmity. This point has been exhaustively considered by the Full Bench of the Delhi High Court in the case of P. L. Mehra v. D. R. Khanna, AIR 1971 Delhi 1 (FB). The majority of the learned Judges of the Delhi High Court consisting of Hardayal Hardy and Parkash Narain, JJ. came to the conclusion that the statute which was void within the meaning of Article 13 (2) of the Constitution was non-existent for all purposes including repeal, amendment or enforceability. They further came to the conclusion that the whole of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, was void as it enabled the Government to discriminate between the occupants of Public Premises arbitrarily by adopting the summary procedure against some while giving to the others the benefit of the regular civil suits. As the Act was merely amended in 1968 by the insertion of an additional section, namely, Section 10-E, the amendment was ineffective and the Act remained void. In my opinion Section 7 of the said Act suffers from the same infirmity as Section 5. Section 7 (2) is, therefore, liable to be struck down. The fact that Section 7 (2) was not struck down prior to the passing of the amendment by the Amendment Act, 1968, makes no difference because if an Act is void it is void irrespective of the fact whether it has been so declared by the Court. In that view of the matter on the same reasons mentioned by the Supreme Court in the case of AIR 1967 SC 1581, I am of the opinion that Section 7 (2) before the Amendment Act, 1968, was void. I am of the opinion that the Parliament was incompetent to enact the said Section 7 (2) of the Act in violation of Article 14 of the Constitution because of Article 13 (2) of the Constitution. Section 7 (2) of the Act was a nullity ab initio. The doctrine of eclipse has no applica-

tion to post-Constitution laws infringing the Fundamental Rights as they would be void ab initio to the extent of their contravention of the Fundamental Rights. For this reliance may be placed on the observations of the Supreme Court in the case of Deepchand v. State of U. P., AIR 1959 SC 648. Therefore the said void section cannot be made valid by amendment. Therefore Section 4 of the Amendment Act of 1968 cannot make Section 7 (2) of the principal Act valid. In so far as the majority of the learned Judges of the Delhi High Court expressed the aforesaid opinion in the aforesaid decision, I am in respectful agreement with the decision of the majority of the learned Judges of that High Court. It is not necessary for me to decide whether the whole Act was void or not. In the aforesaid view of the matter I, therefore, hold that the Section 7 (2) of the Act was void and could not be amended in the manner purported to be done by the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1968. Therefore, the action proposed to be taken under Section 7 (2) of the Act by the order of 2nd December, 1968, is not permissible. In the aforesaid view of the matter it is not necessary for me to decide other points urged in this application.

4. In the premises, this application must succeed. The respondents are directed not to give effect to the said notice dated the 2nd December 1968, mentioned in the petition and not to proceed further in pursuance thereof. Let a Writ in the nature of Mandamus issue accordingly. The Rule is made absolute to the extent indicated above. There will be no order as to costs. There will be a stay of operation of this order for 12 weeks. During the period of stay interim order will also continue.

Application allowed.

AIR 1972 CALCUTTA 352 (V 59 C 69)
AJAY KUMAR BASU AND
BOROOAH, JJ.

S. N. Chakraborty, Petitioner v.
 Bimalendu Mazumdar, Opposite Party.
 Criminal Misc. Case No. 215 of 1970,
 D/- 7-5-1971.

Contempt of Courts Act (1952), Section 1 — Contempt — What amounts to.

A defamatory attack on a Judge unless it is also calculated to interfere with the due course of justice or proper administration of law by such court

AP/CP/A351/72/SNV

will not be treated as contempt of court. Thus the test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. AIR 1950 All 549 and AIR 1954 SC 10 and AIR 1953 SC 185. Followed. (Paras 7, 10)

Where a Court Inspector used the word 'vindictive' against the Magistrate in open Court with regard to the Magistrate's order for not sending a copy which was more in the nature of an executive order, the use of that word could not be said to have constituted contempt of Court. (Para 8)

Cases Referred: Chronological Paras

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| AIR 1971 SC 221 = 1971 Cri LJ 268, Perspective Publications (P) Ltd. v. State of Maharashtra | 10 |
| AIR 1957 All 37 = 1956 Cri LJ 18, Rajendra Kumar Garg v. Shafiq Ahmed Azad | 9 |
| AIR 1954 SC 10 = 1954 Cri LJ 238, Brahma Prakash Sharma v. State of Uttar Pradesh | 7 |
| AIR 1953 SC 185 = 1953 Cri LJ 911, Rizwan-Ul-Hasan v. State of Uttar Pradesh | 8 |
| AIR 1952 Cal 258 = 56 Cal WN 51 = 1952 Cri LJ 666 (SB), Re: S. C. Ray Choudhury | II |
| AIR 1950 All 549 = 51 Cri LJ 1500, Rex v. C. B. S. Nayyar | 7 |

S. N. Banerjee, for Petitioner; K. B. Roy, and Amaresh Ch. Bhattacharjee, for Opposite Party.

AJAY K. BASU, J.:— This is a Rule issued by our learned brothers R. N. Dutt and K. K. Mitra, JJ. under Contempt of Court's Act against the opposite party B. Mazumdar alias Baimalendu Majumdar, M. A., B. L., Court Inspector, Barrackpore, for contempt of Shri Sailendra Nath Chakraborty, Magistrate, 1st Class, Barrackpore, as reported to this Hon'ble Court.

2. Pursuant to the direction of this court the alleged contemnor B. Majumdar appeared in person before us and showed cause through his Advocate Sri K. B. Roy.

3. The short facts leading to the Rule are as follows:

The said Magistrate Sailendra Nath Chakraborty insisted that Court Inspectors must use cartridge or conquest papers in their petitions intended to be filed before the said court. But as the police fund did not permit such expenditure the Court Inspectors could not use such papers in their petitions before the said court and for that the Court Inspector alleged to have incurred the displeasure of the said Magis-

trate. This will be evident from Annexures C and D. The learned Magistrate has taken strong exceptions to the two communications one dt. 1-4-1970. (Annexure A) and another dated 6-7-1970 (Annexure B) sent by the alleged contemnor both to the District Magistrate, 24-Parganas, with copies to the S. D. M., the S. P. and the A. S. P.

4. Now in this first letter dated 1-4-1970 the real point for consideration is whether the following sentences constitute contempt of court. The relevant sentences run as follows:

"Shri Chakraborty, Magistrate, 1st Class, Barrackpore is not of judicious temperament and at the same time very much whimsical. That his behaviour is rude and rough and this will be supported by each and every member of the Barrackpore Bar and also by each and every employee in S. D. M.'s office who frequently come in contact with him ... That Shri Chakraborty has recently passed an order that all petitions and hajiras of witnesses as filed in this court in connection with the police case must be filed in cartridge or conquest papers ... and making a note "No notice is taken of the petition as it is not in a cartridge or conquest paper ... It is surprising that Shri Chakraborty has been accepting petitions in excise cases from the excise prosecutors in quarter size Foolscape papers which are neither cartridge nor conquest papers ... he is unfavourably disposed towards the police who are being unreasonably discriminated against by the learned Magistrate ... this attitude of Shri Chakraborty towards the Police cases is really unhappy and something may kindly be done immediately to remedy the existing state of affairs."

Thereafter on the 6th of July, 1970 an incident happened in court between the said Magistrate and the Court Inspector and the Court Inspector wrote a letter to the District Magistrate on the said date recording the entire incident and sent copies to S. D. M. and S. P. (Exhibit B). In that letter he inter alia wrote:

"... Whereupon I said 'well Sir how will it be possible for O. C. to submit his explanation unless he gets a copy? Your honour should not act in a vindictive manner'. As soon as I said this Shri Chakraborty became exceedingly excited and flared up and asked his Bench Clerk to go to the door (there is only one door for entrance and exit for the room) and shut the same. Seeing that Shri Chakraborty had lost his temper and was out to humiliate me in the presence of the Lawyers and litigant I left the Court room."

... .. The learned Magistrate had been acting with a bias against the prosecution. It will be very difficult for my Court Inspectors to conduct cases in his court if the learned Magistrate behaves or rather misbehaves with the police officers in the way described above. The learned Magistrate is ill-tempered, suffers from an extraordinary sense of 'Superiority Complex' and hardly loses an opportunity of insulting the police and putting them in trouble."

The incident happened on the 6th July, 1970, and was duly recorded by the Court Inspector contemporaneously by his letter of the same date, but on the 13th July, 1970 the said Magistrate writes in the order sheet:—

"I had occasion to go through the copy sent to S. D. O. Barrackpore by the Court Inspector, Barrackpore of the communication addressed by him to the District Magistrate 24-Parganas, through the additional S. P. Barrackpore and the S. P., 24-Parganas. The communication is highly disparaging and it contains contemptuous remarks and comments on my work as a Judge, and also on my temperament. Each and every allegation made regarding my judicial conduct and temperament is false. The communication also contains a false and distorted version of certain incidents taking place in my court on 6-7-1970. I think it would be just and proper to place the matter before the Hon'ble High Court for favour of considering if appropriate proceedings under the Contempt of Courts Act should be drawn up against the author of the communication; and it appears that the conduct of the O. C., Titagarh may incidentally come up for review by their Lordships: and in this circumstance I do not want to proceed any further against the O. C. for repeated non-compliance with my orders.

I would like to note here that the Court Inspector actually uttered words for more contemptuous than he professes to have done in the communication. I may quote them verbatim. 'You are acting vindictively. Why should a Court be so mean?'

For the ends of justice and for the vindication of the dignity of the court, I told the Court Inspector immediately after he had used the invectives against me, that I would proceed against him under Section 480, Criminal P. C. and I at once asked him not to leave the Court room, but he hurriedly left. I did not like to proceed with the matter any further after recording the events in the order sheet, nor did I think it expedient to file a formal complaint before some other Magistrate which would

entail a complicated and protracted proceeding." (Annexure H).

5. On 4th September, 1970 the said Magistrate Shri S. N. Chakraborty wrote a letter to the Registrar of this Court praying for drawing up contempt proceeding against Shri B. Mazumdar, Court Inspector, Barrackpore. At first the court directed the Sessions Judge, 24 Parganas to look into the same and settle the matter amicably if possible and report to this Court. But as the officer was on leave and then transferred nothing was done and thereafter the rule was issued.

6. Mr. K. B. Roy, the learned Advocate appearing for the alleged contemner, submitted that his client did not commit any Contempt of Court but in case this court holds that he had committed any contempt of court his client will tender his unqualified apology and drew Court's attention to paragraph 3 of his affidavit which says,

"At the outset I beg to state that I have the highest regard for this Hon'ble court and also judiciary as a whole and that I have no desire or intention knowingly or otherwise to violate and/or flout the dignity of the judiciary in any way. I tender my unqualified apology for any expression used, conduct expressed, actions done by me in connection with the matters referred to by Shri S. N. Chakraborty, Magistrate 1st Class, Barrackpore and I crave pardon and put myself at the mercy of the court."

It may be that the Court Inspector was exasperated and so wrote those two impugned letters. None of those two letters no doubt leaves a bad taste in the mouth and seem to be improper and indecent specially the two phrases 'bias against prosecution' and 'vindictive manner' used against the learned Magistrate are really very unfortunate. But the question is considering all the facts and circumstances of the case can the two communications be regarded as 'Contempt of Court'.

7. The contempt of court has been judicially determined by various judgments of the Supreme Court and the High Courts. The main criterion of contempt is interference or likelihood of interference with the course of justice. Fair and reasonable criticism of the conduct are character of the Judges in relation to the judicial duties does not amount to a contempt. Bona fide complaints against judicial officers addressed to authorities to seek redress for some grievances and not intended to exert pressure upon them in the exercise of judicial functions or to diminish their authority as Judges by vilifying them cannot be treated as Contempts (Rex v. C. B. S. Nayyar. AIR 1950

All 549). It has also been held by the Supreme Court that a defamatory attack on a Judge unless it is also calculated to interfere with the due course of justice or proper administration of law by such court will not be treated as contempt of court. (Brahma Prakash Sharma v. State of Uttar Pradesh, AIR 1954 SC 10). Criticism of Judges in relation to something done by them which has absolutely no relevance to their position as Judges or criticism of the executive acts of a judicial officer where he possesses both executive and judicial functions does not amount to contempt. (AIR 1950 All 549).

8. Now these comments of the Court Inspector in his communications to the District Magistrate do not, in our view, in any way appear really or substantially to interfere with the course of justice. True the word 'vindictive' used against the Magistrate in open Court is certainly not proper but had it been used to scandalise the judge in his judicial works this might amount to contempt of court. But in the present case those words which were used because of the learned Magistrate's order for not sending a copy, is more an executive order rather than a judicial order.

9. This Court should not exercise its jurisdiction of contempt upon a mere question of propriety as it has been held in several decisions that in order to justify the exercise of the jurisdiction in contempt the interference with the due course must be a substantial interference (Rajendra Kumar Garg v. Shafiq Ahmed Azad, AIR 1957 All 37 at p. 46). In Rizwan-ul-Hasan v. State of Uttar Pradesh, AIR 1953 SC 185 at page 187 it was held:

"the jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice and that purpose of the court's action is a practical purpose and it is reasonably clear on the authorities that the Court will not exercise its jurisdiction upon a mere question of propriety."

Utterance in the open court of offensive words against the Magistrate as we have stated earlier may amount to contempt in different context but a court will not exercise its extraordinary power of contempt in light occasions where the ends of justice do not require its use.

10. Mr. Roy appearing for the alleged contemner drew our attention to a recent Supreme Court judgment reported in Perspective Publications Pvt. Ltd. v. State of Maharashtra, AIR 1971 SC 221 where it is said:

"It is open to any one to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though out-spoken, comments of ordinary men."

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as contempt. It is one thing to use improper words and another to commit contempt of court.

11. We have given this matter our anxious consideration. Considering the entire case, Annexure A to I, and the circumstances and from the arguments advanced by the learned Advocates we are convinced that Sri Majumder is not guilty of contempt of court as we cannot hold that the two communications by the Court Inspector are calculated to interfere with the due course of justice or the proper administration of law by the Court which would amount to contempt of court or tend directly to interfere with the course of justice (Re: S. C. Roy Choudhury, 56 Cal WN 51 = (AIR 1952 Cal 258) (SB).

12. Mr. Banerjee, the learned D. L. R., appearing for the State has left this matter entirely to us.

13. Before we part with this we should observe that it would have been better if the Court Inspector had couched the communications in more temperate language.

14. We, therefore, discharge the Rule.

BOROOAH, J.:— 15. I agree.
Rule discharged.

AIR 1972 CALCUTTA 355 (V 59 C 70)
S. K. CHAKRAVARTI AND SALIL
KUMAR DATTA, JJ.

Mihir Kumar Sarkar and others, Appellants v. The State of West Bengal and others, Respondents.

A. F. O. O. No. 211 of 1970, D/- 23-9-1970.

Constitution of India, Art. 226 — Questions of fact and law — Complicated questions of title and possession requiring oral evidence to be taken and also involv-

HO/HO/D542/71/LGC

ing title of persons who are not even parties in the proceedings cannot be decided in a writ petition. (Case law discussed). (Paras 9 and 22)

Cases Referred: Chronological Paras

- AIR 1971 SC 1021 = (1970) 1 SCC 582, Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council 17.
 AIR 1970 SC 802 = 1970 All LJ 178, Gunwant Kaur v. Bhatinda Municipality 4, 6, 17, 22
 (1970) Civil Appeal No. 2542 of 1969, D/- 16-3-1970 = 1970 UJ (SC) 481 4, 7.
 AIR 1960 Cal 47 = 63 Cal WN 717, Serajuddin and Co. v. Michael Golodetz 8, 18
 AIR 1959 SC 725 = (1959) Supp (2) SCR 316, Kayalappara Kottarathil Kochunni v. State of Madras 21

Noni Coomar Chakraborty, Ganendra Narayan Roy and Samaresh Chandra Nandi, for Appellants; A. K. Jana with Moni Bhusan Sarkar, for Respondents.

S. K. CHAKRAVARTI, J.:—This appeal is at the instance of the petitioners in an application under Art. 226 of the Constitution against an order passed by our learned brother A. K. Sen, J. by which he had dismissed the application on the ground that the “petitioners have no locus standi to maintain this application disputing the validity or otherwise of the purported acquisition of the aforesaid R. S. Plot No. 212.”

2. The facts giving rise to this appeal are as follows: Certain plots including R. S. Plot No. 212 were notified for acquisition for reclamation of the Salt Lake Area and the notification was published on the 14th of February, 1956. The declaration under Section 6 was made on the 22nd of May, 1968. The present appellants challenged the proceedings on the ground that they were entitled to get notice thereof, and that the same was mala fide and was not for any public purpose etc. That was registered as C.R. 7132(w) of 1968. In that proceeding the R.S. Plot No. 212 was left out. That rule was made absolute on the 15th July, 1969. On the 15th of October 1969 on the self same grounds the petitioners challenged the proceeding in respect of R. S. Plot No. 212 alleging inter alia that through inadvertence it was not included in the earlier application. They claimed that this plot was actually a fishery and formed a part and parcel of their fisheries known as Nalban fisheries, there being no demarcating line between this plot and other plots, and that they had been in occupation of this plot as a fishery since more than 100 years. They had also made out an alternative case to the effect that they had taken settlement of the fishery right on this plot in the

benam of Sambhu Nath Chakraborty who had also taken settlement in the benam of some persons known as Pradhans. The State of West Bengal contested this application and raised a preliminary objection to the effect,—we quote the exact words of the learned Trial Judge—that this R.S. Plot No. 212

“is not the property belonging to the petitioners and as the petitioners cannot claim any right, title or interest therein they have no locus standi to maintain this application. According to the respondents the said land belonged to some other person who has not only submitted to the acquisition but also taken a compensation therefor. Thus a dispute as to title having been raised an opportunity was given to the petitioner to substantiate his locus standi to maintain this application by showing that he has got any right, title or interest in the aforesaid plot. Mr. Chakraborty for the petitioner took time to file an additional affidavit to substantiate his points and a supplementary affidavit has since been filed.”

3. The learned Judge discussed the questions involved and came to the opinion that it was “really difficult to decide such a disputed issue as to title on such materials alone and in a proceeding like the present one wherein even the alleged benamdars are not parties.” He also came to the conclusion that the petitioners have no locus standi and dismissed the case. Hence this appeal.

4. Mr. Nani Coomar Chakraborty learned counsel appearing for the appellants has very strenuously contended that the learned Judge was in error in the view he had taken and that there are no complicated questions of title involved in this proceeding and that he could easily decide the same. Mr. Chakraborty has relied on two decisions of the Supreme Court in this connection. Gunwant Kaur v. Bhatinda Municipality, AIR 1970 SC 802 and the other is an unreported decision in Om Prakash v. State of Haryana, (Civil Appeal No. 2542 of 1969, D/- 16-3-1970 (SC)).

5. In both the cases referred to above the applications were dismissed in limine without any notice having been issued even on the other side. In this particular case notice had been issued on the other side. They had filed an affidavit and the learned Judge had even granted an opportunity to the petitioners to file supplementary affidavit. This fact alone would distinguish the instant proceeding from the decisions referred to and relied on by Mr. Chakraborty.

6. What is more, even if we apply the principles enunciated in these two decisions to the facts of the instant proceeding, we do not think that the case would improve, so far as the appellants are concerned. In Gunwant's case, AIR 1970 SC

602 the Supreme Court observed as follows:

"The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Art. 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Art. 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made, dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons."

7. In *Omi Prakash's* case, (Civil Appeal No. 2542 of 1969, D/- 16-3-1970 (SC)) the Court observed as follows:

"The two judgments referred to by the High Court proceeded on the ground that the High Court would not in deciding a petition for a writ under Art. 226 of the Constitution enter upon disputed questions of fact. But whether in the present case there are disputed questions of fact of such complexity as would render it inappropriate to try in hearing a writ petition is a matter which has never been decided. There is no rule that the High Court will not try issues of fact in a writ petition. In each case the Court has to consider whether the party seeking relief has an alternative remedy which is equally efficacious by a suit, whether refusal to grant relief in a writ petition may amount to denying relief, whether the claim is based substantially upon consideration of evidence oral and documentary of a complicated nature and whether the case is otherwise fit for trial in exercise of the jurisdiction to issue high prerogative writs."

8. In the instant proceeding the learned Judge had referred to a number of facts for the purpose of finding out that

the disputed questions of fact were of such complexities as it would not be convenient to try in a writ petition. This conclusion he arrived at after considering the affidavits which had been filed by both the parties. In *Sarajuddin and Co. v. Michael Golodetz*, AIR 1960 Cal 46 this Court has observed with regard to the discretion used by the Judge.

"That it should not be lightly interfered with is well established on the authorities, but we do not think that law does, in any way, fetter the power of the appellate Court to interfere in a proper case. Where the discretion has been exercised on a consideration of all relevant materials and circumstances and in accordance with sound judicial principles and no injustice has been done, or is likely to result from the trial Court's order, no question of interference arises even if the appellate Court does not agree with the trial Court's actual exercise of discretion or conclusion on the point and might have decided differently if the original discretion had lain with it. In other words, in such circumstances, the appellate Court would not have been entitled to substitute for the trial Court's exercise of discretion in the matter its own exercise of the same. Where, however, the trial Court has not considered all the relevant materials or has proceeded on assumptions, not borne out or justified by the records, or has applied wrong legal principles, leading to an unjust order, it is not only the right—and in the powers of the appellate Court,—but clearly also its duty to interfere with the same and set matters right by undoing the mischief and injustice, occasioned by the trial Court's order."

9. Here, we have been led through the affidavits in question and also the order passed by the learned Judge and we are of opinion that the discretion which he has used is the proper one. There can be no doubt of the fact that the appellants must prove that they have got an interest in the sub-soil of the R. S. Plot No. 212 or at least in the watery portion thereof. So far as the sub-soil is concerned, their case is that they have been in possession of the same for more than 100 years. The record of rights, however, is against them and shows some Mallicks are in possession of it and the right to catch fish was also recorded in the name of one Jew Pradhan from the year 1357 B.S. to 1366 B.S. The Mallicks also claimed compensation as the owners of the lands and that compensation had also been paid to them on the 11th of July, 1969, long before the instant application had been filed. The Mallicks are not parties also in this proceeding. In the circumstances, the complicated questions of title in the plot itself cannot be properly decided in this proceeding. So far as the watery portion is concerned, the petitioners contended

that it formed a part and parcel of their Nalban fishery. The State has sworn affidavit to show that it is not correct and that there was always a boundary between the petitioners' Nalban fishery and the watery portion of this land. In the original application or even in affidavit-in-reply the petitioners did not disclose as to how they had acquired the right in the waters. It is only by a supplementary affidavit that they filled up this blank. They alleged that after the lease in favour of Jew Pradhan had expired, Jew's sons had taken lease of the fisheries from the Mullicks on the 2nd December, 1959 and had also executed a deed of nadabi in favour of Dr. Chakraborty who is alleged therein to have taken bandobast of the jalkar in the name of Jew's sons, and that Dr. Chakraborty was also the benamdar of the petitioners, and in affidavit had admitted that. The very fact that Jew's name was recorded as having the right of fishing over this plot from 1357 to 1366 B.S. would negative the petitioners' contention that they had been in possession of this fishery for more than 100 years. There is no affidavit from Jew to show that he had given up the possession on the expiry of the period of his lease. Moreover, the petitioners' case depends on a double benami which is, on the very face of it, very improbable. It cannot be understood as to why this double benami had to be gone into. Merely because a person says that he is the benamdar of another, would not show that it is benami. The question of benami is always a mixed question of law and fact and should not be decided in the circumstances of this case in a writ petition. It should also be noted in this connection that in the supplementary affidavit in paragraph 3 (d) the petitioners have definitely made out a case that

"the said Jew Proadhan became a direct lessee under the State of West Bengal in accordance with the provisions of Section 6 (2) proviso of the Estates Acquisition Act. I submit that the said Giri Mohan Mallick and/or his successor-in-interest, namely, the said Sambhu Nath Mallick and others not having possessed the said Plot No. 212 on the date of vesting; but the said Jew Proadhan having possessed the said "Tank Fishery" on the date of vesting under a Jalkar lease for a period from 1357 to 1366 B.S. the said Giri Mohan Mallick and his successors namely Sabhu Nath Mallick and others were only entitled to compensation for their superior interest in the said Jalkar under the provisions of the West Bengal Estates Acquisition Act." It is clear that the case made out in this paragraph is inconsistent with the main case made out by the petitioners. If the interest of the Mallicks had vested during the continuance of the lease of Jew, then the Mullicks could not have leased the same again to the sons of Jew through

whom the petitioners claim. It is obvious therefore that the petition raises questions of fact of a complex nature, which require oral evidence to be taken and also to be decided in the presence of the Mullicks, Jiut, his son and Dr. Chakraborty, and cannot appropriately be decided in a writ petition.

10. In the circumstances, we agree with the learned Judge in the view that he had taken and dismiss the appeal. The interim injunction is vacated.

11. There will be no order as to costs in this appeal.

SALIL KUMAR DATTA, J.:— 12.

I agree that the appeal should be dismissed as proposed and I would like to say my reasons in support.

13. This is an appeal by the petitioners against the order passed by A. K. Sen, J. on March 5, 1970, dismissing the application of the appellants under Article 226 (1) of the Constitution. The preliminary ground on which application was dismissed was that the petitioners had no locus standi to move the application.

14. The facts as borne out by the petition and supplementary affidavits as also by documents produced at the hearing are as follows:

(a) The petitioners and their co-sharers had been the owners in possession over a century of two fisheries known as Nalban Fishery and Bherry No. 4 in village Dhapa Manpur comprising one common sheet of water over various plots including plot No. 212. The petitioners in or about August, 1968, came to know from newspapers about the land acquisition proceedings for acquisition of the lands of the said fisheries and they challenged the acquisition proceedings on various grounds, by filing petition under Article 226 (1) of the Constitution giving rise to Civil Rule No. 7132 (W) of 1968. Similar rules on petitions filed by other persons in respect of their fisheries were issued by this Court and by its judgment made in all the rules it was held that the acquisition proceedings were not in accordance with the provisions of the Land Acquisition Act, 1894 and accordingly a writ of mandamus was issued restraining the State of West Bengal from proceeding with the said acquisition.

(b) The petitioners contended that R. S. Plot No. 212 formed part of their Nalban Fishery within its common sheet of water and had always been in their ownership and possession but through inadvertence, the said plot was not mentioned in the petition of Civil Rule No. 7132(W) of 1968. Taking advantage of the omission, the State Government had been taking steps to fill up the portion of Nalban Fishery appertaining to the said plot with sand and silt of Ganges. On the ground as were urged in the above rules the petitioners by

filing another application under Article 226 (1) of the Constitution challenged the acquisition proceedings as being void as it was not in accordance with law and prayed *inter alia* for a writ of mandamus commanding the State Government and its officers to forbear from proceeding further with the said acquisition proceedings.

(b) Upon the issue of rule nisi on the said application the State Government filed its affidavit-in-opposition as return to the said rule, contending that the petitioners had no *locus standi* to file the application, as the R.S. Plot No. 212, which was demarcated by a bundh, did not belong to the petitioners. It was stated that the plot belonged to Giri Mohan Mallick and on his death his heirs Sambhunath Mallick and others inherited the same. The name of Giri Mohan Mallick appeared in the present settlement record and the said heirs duly filed their claim under Section 9 of the Land Acquisition Act. An award was made in their favour for the acquisition of their interest by the State and the compensation was duly received by them, as it appears, on July 11, 1969, while possession thereof was taken by the State Government in due course. Other allegations about the alleged illegality of the land acquisition proceeding were denied. The petition accordingly, it was submitted, was not maintainable in law.

(c) The petitioners filed an affidavit-in-reply wherein they stated that in the revisional record of right, the name of one Jeut Prodhan was recorded as holding the Jalkar lease under Giri Mohan Mallick and under the West Bengal Estates Acquisition Act, 1953, the interest of Sambhunath Mallick and others vested in the State of West Bengal on April 15, 1955. Jeut Prodhan, who held the lease from 1357 B.S. to 1366 B.S., became, on the vesting of his landlords' interest, a direct tenant under the Government. The Mallicks thus had no subsisting interest in the land for which they could be entitled to compensation and possession of the plot could not be taken from them as stated in the affidavit on behalf of the State. The petitioners reiterated their and their co-sharers' title and possession of the said fisheries including the disputed plot for over a century.

15. It appears that supplementary affidavits were affirmed on behalf of the petitioners, with leave of Court, to explain their *locus standi* to move the application on which a preliminary objection was taken by the State. While again asserting their and their co-sharers right and possession over a century to the said fisheries, it was stated that Jeut Prodhan as the lessee of the jalkar right from 1357 to 1366 B.S. (middle of April, 1959) was the benamidar of the petitioners. After the expiry of the lease, the petitioners got a lease executed on December 2, 1959, by

Shambhu Nath Mallick and others, heirs of late Giri Mohan Mallick in the name of Kedar Nath Prodhan and Ram Ugra Prodhan sons of Jeut Prodhan for ten years from December 2, 1959 to December 1, 1969. This lease was duly registered and was obtained by the petitioners in the names of the said sons of Jeut Prodhan through their friend one Sambhu Nath Chakraborty. It is further alleged that at the instance of the petitioners, a nadabi patra was executed and registered by the said lessees in favour of Sambhu Nath Chakraborty on April 27, 1963, in respect of the Jalkar interest. The petitioners contended that the lease was obtained by them by way of abundant caution, though they as owners had been in actual possession throughout. Though the nadabi was executed in the name of Sambhu Nath Chakraborty, he never had any interest in or possession of plot No. 212 nor any right to receive compensation for the acquisition. To complete the case of the petitioners, there is another supplementary affidavit by Sambhu Nath Chakraborty who stated that he was a family friend of the petitioners and as the petitioners did not want to prejudice their claim of title and possession of the Nalban Fishery including plot No. 212, they could not themselves take any lease of the plot from Sambhu Nath Mallick and others. Accordingly they had to take the lease in benami and at their instance, Sambhu Nath Chakraborty took the lease as their benamidar in the benami of the sons of Jeut Prodhan, though he had no interest and the lease in fact was taken by the petitioners in the above process. On the basis of their original title and possession as also of the transactions evidenced by the documents referred to above, the petitioners claimed that they had title and possession in the disputed plot which gave them the *locus standi* to move the application.

16. The rule came up for hearing before A. K. Sen, J. who was of opinion, on the preliminary objection taken by the State, that the petition was bound to fail. The State raised a dispute regarding the title of the petitioners to the land and in support of their claim the petitioners filed the supplementary affidavits. The Court was of opinion that *ex facie* the settlement record did not support the petitioners on their title or even on possession. Further even on the supplementary affidavits it was not possible to hold that the petitioners had any *locus standi* to dispute the acquisition or to challenge the same by the present petition. On the above findings the rule was discharged. The present appeal is against the said decision.

17. Mr. Noni Coomarr Chakravarti, the learned counsel appearing for the appellants, contended that merely because a fact is disputed or complicated questions of title are involved in a petition, it will

not be proper exercise of jurisdiction to dismiss an application under Article 226 (1) of the Constitution on either ground. It is often possible to decide questions of fact on affidavits as here and even if that was not possible the Court should give opportunity to the parties to establish their case by filing affidavits or by issue of commission or even by setting down the application for trial on evidence. In support reliance was also placed on decisions of the Supreme Court in AIR 1970 SC 802 where it was laid down that it would not be proper to dismiss a petition under Article 226 merely because questions of fact may befall to be determined in considering the petitioner's right to relief and in such petition, the High Court has jurisdiction to try issues both of fact and law. In *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*, 1970-1 SCC 582 = (AIR 1971 SC 1021), it was held that merely because a question of fact has been raised the High Court will not be justified in requiring the party to seek relief by somewhat lengthy, dilatory and expensive process by a Civil Suit against a public body. On the above authorities, Mr. Chakravarti contended that if the learned Judge felt any difficulty to decide the question of title, the petitioners should have been given further opportunity to produce oral and other evidence in support of their claim in a trial on evidence to prove their locus standi and dispute the acquisition. The finding of the learned Judge that the petitioners had no locus standi to dispute the acquisition was also assailed as being contrary to the materials on record. On the above grounds, Mr. Chakravarti wants this Court to set aside the judgment under appeal and refer back the matter for trial in accordance with law and established principles of procedure.

18. Mr. Arun Kumar Janah, the learned counsel appearing for the State of West Bengal, has contended that on the materials on record the learned Judge made no error on facts or in law in holding that the petitioners had no locus standi to dispute the acquisition, as having no title or possession of the disputed plot. Further the learned Judge has properly exercised his discretion on consideration of all relevant materials and circumstances and in accordance with sound judicial principles and such discretion should not be interfered with by the appellate Court even if the appellate Court may not agree with the trial Court's discretion or conclusion, as was held in AIR 1960 Cal 46 at p. 51. Further the question of investigation of title as claimed by the petitioners would be inappropriate in proceedings under Article 226 (1) of the Constitution.

19. On a consideration of the respective contentions of the parties, it ap-

pears to me that the judgment under appeal must be sustained. The petitioners, in support of their case, have claimed title on alternative basis which are inconsistent with and even destructive of each other. Their principal claim to the lands of the fishery including the disputed land is on the basis of their ownership and possession for over a century, while the records of rights do not record their title or possession. Excepting that bare statement in the petition and affidavits, there is no evidence in rebuttal of the presumption arising from the records of rights and it is not possible to find their title and possession from mere assertion of the claim. As to the other alternative claim that on vesting, Jeut Prodhan, whose name was recorded in the records of rights as the lessee of the jalkar, became the direct tenant under the State, and that Jeut Prodhan was the benamdar of the petitioners, there is no document of release or otherwise from Jeut Prodhan nor any evidence in support excepting again the bare assertion of the petitioners. Again if Jeut Prodhan became the direct tenant under the State and the interests of Mallicks vested in State, the lease taken by the sons of Jeut Prodhan from Mallicks has no legal consequence and conferred no interest on them and there is again no evidence of any surrender by Jeut Prodhan or of extinguishment of his interest. Further on the materials on record, it is also extremely difficult to appreciate the reasons for creating benami in the names of the sons of Jeut Prodhan and again in the name of Sambhu Nath Chakravarty for the same property, while the nadabi document by Prodhan makes no mention of the petitioners at all. On the materials on record, it is clear that the petitioners have failed to establish that they had any interest or legal right or possession in the disputed plot and I agree with the findings of the learned Judge that the petitioners have failed to discharge the onus that they have the locus standi to dispute the land acquisition proceedings regarding the disputed plot.

20. It may be mentioned here that the learned Judge, while stating in the judgment that it is really difficult to decide such a disputed issue as to title on such materials alone, really proceeded to consider the evidence adduced and on consideration of the materials arrived at the finding that the petitioners had no locus standi in the matter. The decisions cited by Mr. Chakravarti have therefore no application and in fact in both the cases, as pointed out by Mr. Janah, the applications were dismissed in limine and it also appears that the questions of the fact involved therein were elementary. In the present case the applications were considered apart from the usual affidavits of the parties, also on supplementary affida-

vits on behalf of the petitioners in support of their case and the questions of fact involved was anything but elementary. There could thus be no grievance on the ground that the Court rejected the application merely it involved disputed question of title.

21. As to the other contention of the petitioners that the application should have been set down for trial on evidence in a case like this, as contended by Mr. Chakravarti, undoubtedly similar contention found support in the decision in *Kavalappara Kottarathil Kochunni v. State of Madras*, AIR 1959 SC 725 where in respect of applications under Article 32 of the Constitution, the Court took the view that in appropriate cases, the Court to determine a disputed question of fact may direct issue of commission or set down the application for trial on evidence. In the present case, the petitioners were given an opportunity to file further affidavits to support their claim of title and possession to the land in dispute and the petitioners availed of the opportunity. The Court found the affidavits insufficient to establish the petitioner's claim and rightly so, in my opinion. The petitioners thereby failed to discharge the onus that lay on them. There was no prayer, at any point of time, for production of further evidence or for trial on evidence and there could be thus no question of granting any further opportunity to the petitioners to adduce evidence. In fact no grievance is made on that ground by the petitioners even in the memorandum of appeal before us.

22. Mr. Chakravarti however contended that the learned Judge should have taken further evidence in a trial on evidence in the circumstances of the case if he found any difficulty, as he did find, in coming to a finding about the petitioners' claim on the materials on record, on the authority of the decision in AIR 1970 SC 802 (*supra*). It was observed in that case as follows:

"The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on the view that the dispute may not be appropriately be tried in a writ petition, the High Court may decline to try a petition."

There is no doubt that the present petition raises complicated questions of fact and law and involves rights of persons who are

not before us. Even if the learned Judge should have normally embarked upon the enquiry as to title as contended, the present case, in view of the complex questions of fact and law involved was not one, in my opinion, in which such enquiry should have been made. Even on the authority of decision referred to above, it would not be proper for the Court to determine complicated questions of title and possession involving protracted hearing involving title of persons who are not even parties in the proceedings. Such question should appropriately be tried in regular suit and I feel unable to concede to the prayer of the petitioners for a trial on evidence in such state of affairs.

23. In the circumstances the appeal fails and is dismissed in the manner proposed by my learned brother.

Appeal dismissed

AIR 1972 CALCUTTA 361 (V 59 C 71)
SANKAR PRASAD MITRA AND ARUN
KUMAR JANAH, JJ.

Pradip Lamp Works, Appellant v. Pratap Chandra Basu, Respondent.

F. M. A. No. 78 of 1965 with C. R. Nos. 3566 (M) of 1964 and 998 of 1965, D/- 24-4-1972.

Industries (Development and Regulation) Act (1951), S. 18C — Proceeding instituted by Authorised Controller of company — Order of liquidation of company — Proceeding abates.

A proceeding under Section 18-C is one which the person or body of persons authorised under Section 18-A of the Act alone can institute. When a person or body of persons becomes *functus officio* the proceeding already launched must abate. (Para 27)

An authorised controller is not the agent of the company like the directors who are the agents of its share-holders. He is the agent of the Central Government except that his powers are similar to those of the directors. Thus the proceeding commenced by the authorised controller cannot be continued by the Liquidator on behalf of the company who takes over the possession from the controller on an order of liquidation. AIR 1971 Bom 124, Relied on. (Para 27)

Cases Referred: Chronological Paras
AIR 1971 Bom 124 = 1971 Lab IC

429, D. P. Kelkar v. Ambadas Keshav Bajaj 19
(1853-54) 149 R. R. 32 = 2 Ex R.

281, Aberdeen Rly. v. Blaikie 12

P. N. Mitter, P. P. Ghose, K. Banerjee and Alok Banerjee, for Appellant; S. C. Mitter, S. P. Roy Chowdhury and P. N. Chunder, for Respondent.

FP/FP/D504/72/MVJ

SANKAR PRASAD MITRA, J.— This is an appeal against an Order of the Seventh Court of the Subordinate Judge at Alipore made on July 28, 1964 restraining the respondent by an injunction from proceeding with a Suit for specific performance of a contract instituted in a Court at Delhi. Briefly, the facts are that on February 16, 1959 the Board of Directors of the India Electric Works Limited passed a resolution agreeing to sell a piece of land in Delhi to a partnership firm called Pradip Lamp Works. Some of the Directors of the Limited Company were the partners of the firm. On February 17, 1959, the limited Company informed the firm in writing that the resolution aforesaid had been passed. On November 17, 1960, the Central Government in the exercise of its powers under the Industries (Development & Regulation) Act, 1951 appointed an authorised Controller of the India Electric Works Limited. We shall set out the relevant provisions of this Act at a subsequent stage. Let us now proceed with the bare facts. On February 1, 1962, Pradip Lamp Works filed a Suit in the Court of the Subordinate Judge of Delhi for specific performance of an agreement between India Electric Works Limited and Pradip Lamp Works in respect of the land in Delhi. We incidentally mention that it has been urged before us that there was no concluded agreement between the parties but we do not propose to express any opinion on this contention in this appeal. On the same day namely February 1, 1972, Pradip Lamp Works made an application to the Delhi Court for an interim injunction restraining the limited company from dealing with or disposing of the Suit Land during the pendency of the Suit. The Delhi Court passed an order of interim injunction. The Written Statement in the Delhi Suit was filed on April 6, 1962. The Delhi Court made this order of injunction absolute on May 7, 1962. On April 30, the issues were settled. On June 5, 1962 an additional issue being Issue No. 1-A was framed.

2. In May, 1963 the India Electric Works Limited filed a petition for amendment of the Written Statement. The amendments were allowed and the amended Written Statement was filed on May 20, 1963.

3. On June 25, 1963 the authorised Controller filed a petition under Section 18-C of the Industries (Development and Regulation) Act, 1951 in the Court of the Subordinate Judge at Alipore. Section 18-C runs thus: "Without prejudice to the provisions contained in Section 18-B, the person or body of persons authorized under Section 18-A to take over the management of an industrial undertaking may, with the previous approval of the Central Government, make an application to any Court having jurisdiction in this

behalf for the purpose of cancelling or varying any contract or agreement entered into, at any time before the issue of the notified order under Section 18-A, between the industrial undertaking and any other person and the Court may, if satisfied after due inquiry that such contract or agreement had been entered in bad faith and is detrimental to the interests of the industrial undertaking make an order cancelling or varying (either unconditionally or subject to such conditions as it may think fit to impose) that contract or agreement, and the contract or agreement shall have effect accordingly."

4. The authorised Controller's case, inter alia, was that the agreement, if any, between India Electric Works Limited and the Pradip Lamp Works for sale of the Delhi land had been entered in bad faith and was detrimental to the interests of the India Electric Works Limited.

5. On June 25, 1963 the authorised Controller filed a petition in connection with his application under Section 18-C praying for temporary injunction restraining the Pradip Lamp Works from proceeding with the Delhi Suit till the disposal of the 18-C "Suit" or proceeding at Alipore. When this application was ready for hearing the Alipore Court passed an order of injunction as prayed for on the 28th July, 1964. The propriety of this order is the subject-matter of the present appeal. It was admitted on the 28th September, 1964 when a Rule was issued.

6. On October 1, 1964 Pradip Lamp Works filed an application in the Alipore Court under Sections 10 and 151 of the Code of Civil Procedure praying for stay of the Alipore 'Suit' (that is to say the proceeding under Section 18-C) till the disposal of the Delhi Suit.

7. On February 8, 1965 the Seventh Subordinate Judge at Alipore rejected the application of Pradip Lamp Works. The partnership firm moved this Court against the said order on the 29th March, 1965 under Section 115 of the Code and a Rule was issued.

8. Thereafter an interesting event took place. On November 6, 1967 there was a petition to the Company Court on the Original Side for winding up of the India Electric Works Limited. The winding up order was made on August 27, 1968 but its operation was stayed from time to time till December 9, 1968. The Official Liquidator ultimately took possession of the India Electric Works Limited on the 9th December, 1968. There was an appeal also against the winding up order but the appeal was dismissed.

9. On these facts counsel for the petitioner has made before us the following points:

(1) The Alipore Court has no jurisdiction to entertain the proceedings under Section 18-C of the Industries (Development and Regulation) Act, 1951 in view of the provisions of Section 16 (d) of the Code of Civil Procedure. Learned counsel contends that the proceedings under Section 18-C in the instant case involved determination of a right to or interest in immoveable property and should have been instituted only in the Court within the local limits of whose jurisdiction the property was situate. In other words, it could be filed in the Delhi Court but not in the Alipore Court.

(2) Assuming that the proceedings under Section 18-C have been properly instituted in the Alipore Court that Court is bound to stay these proceedings in view of Section 10 of the Code of Civil Procedure. The matters in issue in the 18-C proceedings are directly and substantially the same as those in the previously instituted Suit in the Delhi Court. The parties were litigating substantially on the same title and the same relief was available in the Delhi Court.

(3) Assuming that the order for stay could not be granted under Section 10 the order of injunction restraining the plaintiff in the Delhi Court from proceeding with the Delhi Suit which the Alipore Court made under Section 151 of the Code was made without jurisdiction.

(4) Assuming that an order under Section 151 could be made the Alipore Court should not have exercised its powers under that section as the order for injunction was not necessary for the ends of justice. In other words, the Court's discretion under Section 151 has been improperly exercised and

(5) The proceedings under Section 18C have now abated by reason of the order for winding up and the liquidator's taking over of the assets of the India Electric Works Limited.

10. In our opinion, the last point urged by the petitioner's counsel is enough for disposal of this appeal. And we do not intend to express any opinion on the four other points we have set out above.

11. Mr. S. C. Mitter appearing for the respondent has urged that the proceedings under Section 18-C by the authorised Controller were proceedings launched on behalf of the Company. In support of this proposition, Mr. Mitter has drawn our attention to Section 18-C and Section 18-B, particularly to clause (e) of Section 18-B (1). This clause provides as follows:—

“(1) On the issue of a notified order under Section 18-A authorizing the taking over of the management of an industrial undertaking—

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xx xx xx

(e) the persons, if any, authorized under Section 18-A to take over the management of an industrial undertaking which is a company shall be for all purposes the directors of the industrial undertaking duly constituted under the Indian Companies Act, 1913 and shall alone be entitled to exercise all the powers of the directors of the industrial undertaking, whether such powers are derived from the said Act or from the memorandum or articles of association of the industrial undertaking or from any other source.”

12. Mr. Mitter's argument is that that the acts of the authorized Controller were for all purposes acts of Directors, done on behalf of the Company. In other words, the authorized controller was, in fact, a Director of the Company, an agent of the Company, having a fiduciary capacity. He read out to us the following passages from Gower's "The Principles of Modern Company Law" Third Edition, at pages 526-527:

“By the middle of the last century it had been clearly established that the trustee-like position of directors vitiated any contract which the board entered into on behalf of the company with one of their numbers. This principle receives its clearest expression in *Aberdeen Ry. v. Blaikie*, (1853-54) 149 RR 32, in which a contract between the company and a partnership of which one of the directors was a partner was avoided at the instance of the company notwithstanding that its terms were perfectly fair.

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xx xx xx

Later cases have added little to the general principle thus enunciated. It applies not only to contracts directly with the directors but also to those in which they are in any way interested, whether because they benefit personally however indirectly, or because they are subject to a conflicting duty in general the contract will be voidable at the instance of the company, and any profits made by the directors personally will be recoverable by the company.

xx xx xx
....The same applies to a contract with any agent of the company other than a director. But the directors themselves cannot escape so easily. Disclosure to themselves is ineffective even if the interested directors refrain from attending and voting leaving an independent quorum to decide, for the company has a right to the unbiased voice and advice of every director. Hence, in the absence of express provision in the company's articles, the only effective step is to make full disclosure to the members of the company and to have the contract entered into or ratified by the company in general meeting.”

13. Mr. Mitter's point is that on the facts in this case the contract, if any,

between Messrs. India Electric Works Ltd. and Pradip Lamp Works is voidable at the instance of the Company. The Company by an appropriate action can enforce the remedy available to it. When, therefore, the authorized Controller institutes an action he does so, according to Mr. Mitter, on behalf of the Company. The only fetter imposed on him by Section 18-C is that he has to obtain the previous approval of the Central Government. A Director of a Company could have instituted a suit or a proceeding to have a contract declared void. When the Director's functions are being discharged by the authorized Controller his action is virtually the action of the Director. The only difference is, says Mr. Mitter, that he has to obtain the Central Government's approval.

14. Mr. Mitter has also relied on another passage in Gower's "The Principles of Modern Company Law", Third Edition at page 583. It says—

"Normally, therefore, the Company itself is the proper plaintiff, and the only proper plaintiff, in an action arising out of a dispute within the company. And the appropriate agency to start an action on the company's behalf is the board of directors, to whom this power is delegated as an incident of managing the company."

15. Mr. Mitter's contention is that 'normally' the Company is the proper plaintiff. But when the Central Government has appointed an authorized controller under the Industries (Development and Regulation) Act, 1951, it is not the Company but the authorized controller who is the proper plaintiff in an action for and on behalf of the company. There is no difference, submits Mr. Mitter, between this action and an action launched on behalf of the Company by an authorised Director or by its Board of Directors.

16. Counsel for the respondent then proceeded to discuss what would happen when, in a case of this nature, an order for winding up is made. His argument is that when a contract is entered into between a Company and a Director or his firm it is a contract voidable at the option of the company. If any suit or proceeding is to be commenced with a view to cancellation of this contract, the suit or proceeding has to be commenced in the name of the company by its Directors who are its agents. An order for liquidation does not mean that the Company is declared dead. The Company survives this order, says Mr. Mitter, with this difference that the Directors are no longer its agents but the liquidator acts as its agent. An action commenced by the Company before liquidation can, therefore, be continued by the liquidator. The same principle, urges Mr. Mitter, applies to a proceeding under Section 18-C which is

commenced by the authorized controller on behalf of the company as its agent. On the facts of this case, according to Mr. Mitter, the proceedings under Section 18-C have not abated by reason of the order of liquidation and the liquidator is entitled to continue such proceedings on the Company's behalf. The sum and substance of Mr. Mitter's contention is that a proceeding under Section 18-C is a suit by the Company to have a voidable contract set aside. And such a suit can be instituted either by the Board of Directors or by a single authorised Director or by the authorised controller as agents or an agent of the Company. On the company being wound up the liquidator can continue the proceedings. We are unable to uphold this contention.

17. Firstly, Section 18-C confers the right to sue not on the Company but on the authorized controller. The Legislature has given this right to a nominated person or body of persons.

18. In the Third Edition of Halsbury's Laws of England, Vol. 6, Art. 862 at page 445 it is stated:

"As regards litigation by an incorporated company, the directors are, as a rule, the persons who have authority to act for the company; but, in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of a company cannot institute proceedings in the name of the company in the absence of express authority to do so, but proceedings started without proper authority may subsequently be ratified"

If the Legislature's intention was that the rights under Section 18-C were to be enjoyed not by the person or body of persons authorized under Section 18-A but by the company as such more explicit expressions should have been used. It is true that the authorized controller is in a sense a Director of the Company (vide Sec. 18-B (1) (e)) and, as such, is its agent. This agent created by the Industries (Development and Regulation) Act, 1951 has been given a number of powers by the Act and one of such powers is to institute and continue a proceeding under Section 18-C.

19. We may, incidentally, refer to a decision of the Bombay High Court in D. P. Kelkar v. Ambadas Keshav Bajaj, AIR 1971 Bom 124, where some of the provisions of the Industries (Development and Regulation) Act, 1951 have been considered. In paragraph 45 of the judgment at page 139, the Bombay High Court analyses the provisions of Section 18-A, Section 18-B and Section 18-E. The Bombay High Court comes to the conclusion that under these provisions—

"The directors cease to function, the share-holders cannot pass effective resolutions unless approved by the Central Government; the share-holders cannot appoint directors under any circumstances; the authorized controller is given the control and management in place of the directors, and no proceeding for winding up can lie even though resolutions are passed to that effect without the consent of the Central Government. What remains of the powers of the Directors of the company after these provisions come into operation, it is difficult to envisage. The authorized controller is not fettered by limitations. On the other hand, he enjoys all the powers under the Companies Act subject to the overriding powers of the Central Government to give powers or to create exceptions, restrictions or limitations upon those powers under the Companies Act. Three conclusions may be drawn from these provisions. Firstly, that after the notifications and the operation of these sections come into force, what is left of the company is the mere outward shell of incorporation and every vestige of power to manage and control is taken away from the directors and share-holders. Secondly, the authorized controller becomes all powerful and enjoys all the authority under the Companies Act except to the extent that he is controlled by the Central Government. Thirdly, the plenary and overriding power of the Central Government to give directions and to make exceptions, restrictions and limitations to the Indian Companies Act and thereby further to control the authorized controller and the company is absolute and unrestricted. We have no manner of doubt that under this dispensation the establishments of which the management and control were taken away in the cases before us, were carried on under the authority of a department of the Central Government."

Again at p. 137 in paragraph 38 of the judgment, the Bombay High Court has construed the provisions of Section 18-B. Referring to clause (e) of Section 18-B (1), which we have quoted above, the Bombay High Court says—

"....., not only is the power of the Manager and Director put an end to, not only are all the contracts which the manager and director entered into put an end to but by the automatic operation of clause (e) the persons put in management alone are entitled to exercise all the powers of the directors and no exception is made because of the words—

"Whether such powers are derived from the said Act or from the memorandum or articles of association of the Industrial undertaking or from any other source."

20. The Bombay High Court proceeds to add:

"....., in whatever form or shape the power of the directors is derived and from whatever source, that power is put

an end to..... Clause (a) taken away the substance of the power conferred by the memorandum and articles of association because it puts an end to the powers of the manager and directors and all contracts entered into with them and instead in terms says that the persons authorised to be in management shall be the directors....."

21. From these observations of the Bombay High Court, it follows that the authorized controller is not the agent of the company in the sense, Mr. Mitter, for the respondent, was describing him as the agent. In fact, he is the agent of the Central Government. In other words, the directors of a company are the agents of its share-holders but the authorized controller is the agent of the Central Government except that his powers are similar to those of the directors. From this point of view, the suit or proceeding under Section 18-C cannot be said to be a proceeding on behalf of the company as the controller does not represent the company in the same manner as the directors do.

22. Secondly, a close examination of the provisions of Section 18-C reveals that it is in no sense a suit. Indeed, it is a summary proceeding which can be decided even on affidavits. It is a new provision altogether. And the mode of enforcing this new right conferred on the authorized controller is a new mode prescribed by the section itself.

23. Thirdly, this is a right which can be exercised in spite of the fact that a suit which the company could have instituted either through its share-holders or Board of Directors or an authorized director is barred by limitation. The section itself says that a proceeding under this section can be instituted "at any time".

24. Fourthly, Section 18-C gives power to the authorized controller not only to ask for cancellation of the contract but also to ask for variation of the contract either conditionally or unconditionally.

25. Fifthly, the nature of the right which the authorized controller enjoys under this section is greater than what the company can enjoy. A contract between a company and a director or his firm or a company in which he is interested as a director or share-holder even though only a trustee of the shares, is voidable at the option of the company, unless sanctioned by the articles expressly or by necessary implication and made in conformity therewith. (Vide Halsbury's Laws of England, Third Edition, Volume 6, page 302, Article 609). Under Section 18-C whether or not a contract of this nature is sanctioned by the articles expressly or impliedly the authorized controller can launch a proceeding if he is "satisfied after due enquiry that such contract or agreement had been entered into in bad faith and is detrimental to

the interests of the industrial undertaking." This is again a new right which the company did not possess.

26. Sixthly and, lastly, in the absence of any contract to the contrary in the articles of association, the majority of the members of the Company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the Company should be commenced or allowed to proceed: (Vide Halsbury's Laws of England, Third Edition, Volume 6, page 445, art. 862). In the case of an action under Section 18-C the majority of the members of the company cannot overrule the authorized controller and direct him to launch the proceeding.

27. For all the reasons aforesaid, we are of opinion that a proceeding under Section 18-C of the Industries (Development and Regulation) Act, 1951 is a proceeding which the person or body of persons authorized under Section 18-A of the Act alone can institute. And when the said person or body of persons becomes or become functus officio the proceedings already launched must abate. That is one of the reasons why in Section 18-E (1) (c) it has been expressly provided that when the management of an industrial undertaking is taken over by the Central Government no proceeding for the winding up of the undertaking or for the appointment of a Receiver in respect thereof shall lie in any Court except with the consent of the Central Government. In other words, when the Central Government gives its consent to an application for winding up the Central Government is expected to take into consideration the fate, inter alia, of a proceeding under Section 18-C, if eventually an order for winding up is made and the authorised controller has to make over possession to the liquidator appointed by the Court.

28. As we have come to the conclusion that the proceeding under S. 18-C has abated, we cannot sustain the order of the Seventh Subordinate Judge at Alipore made on the 28th July, 1964.

29. We incidentally observe, however, that our attention has been drawn to the pleadings in the Delhi Court as they now stand. And we find that the issues which could have been raised in the proceeding under S. 18-C can also be raised in the Delhi suit. We also note that under the provision of sub-section (3) of Section 446 of the Companies Act, 1956 the winding up Court has the power to have the Delhi suit transferred to it for disposal by it. Whether or not the company court will use such power is for that Court to decide, and we have no jurisdiction to express any opinion thereon. We are merely mentioning that such a power exists.

30. In the result, this appeal is allowed; the order made on the 28th July,

1964 by Shri M. M. Haldar, Subordinate Judge, Seventh Court, Alipore, is set aside.

31. There will be no order as to costs.

32. The Rule in connection with this appeal is also disposed of on the above terms. There will be no order as to costs of the Rule.

33. The application under Sec. 115 of the Code of Civil Procedure is not pressed and C. R. 998 of 1965 is discharged. There will be no order as to costs.

34. In view of the judgment we have delivered in the appeal today, we do not pass any order on the alternative application under Section 115 of the Code of Civil Procedure.

JANAH, J. — 35. I agree.

Order accordingly.

AIR 1972 CALCUTTA 366 (V 59 C 72)

CHITTATOSH MOOKERJEE, J.

Pashupati Roy and others, Petitioners
v. State of West Bengal, Respondents.

C. R. Nos. 2993(W), 3001(W) of
1966, D/- 17-4-1972.

(A) Constitution of India, Arts. 31 (2), 19 (1) (f) and (g) and 14 — Provisions of West Bengal Fisheries (Requisition and Acquisition) Act for requisition of fisheries and payment of compensation for same do not violate Arts. 31 (2), 19 (1) (f) and (g) and 14 — They are not colourable piece of legislation. (X-Ref:— W. B. Fisheries (Requisition and Acquisition) Act (20 of 1965), Ss. 2 (5) and 8).

The provisions of the West Bengal Fisheries (Requisition and Acquisition) Act for requisition of fisheries and for payment of compensation for the same are not colourable piece of legislation. They do not violate Arts. 31 (2) and 19 (1) (f) of the Constitution because (i) the Act does not confer arbitrary power on the executive for determining public purpose (ii) the method of determining compensation is not inappropriate (iii) the authorisation to the Collector and the Commissioner to determine compensation is not unreasonable as they act subject to the jurisdiction of the High Court and the Supreme Court (iv) the Act has been enacted to develop fisheries for supplying fish to the public and therefore, is in the interests of general public; nor do the aforesaid provisions violate Art. 14. AIR 1952 SC 96, Relied on; AIR 1971 SC 961, Distinguished. Case law discussed.

(Paras 10, 11, 24, 25, 28, 31, 32)

(B) West Bengal Fisheries (Requisition and Acquisition) Act (20 of 1965), S. 2 (5) (iii) — Words "any other object" — Meaning of.

EP/FP/D135/72/GNB/HGP

The words "any other object" in S. 2 (5) (iii) mean only those objects which are akin or similar to and also incidental and ancillary to the objects in S. 2 (5) (i) and (ii) and hence arbitrary powers have not been conferred on the executive for determining public purpose. (Para 15)

(C) West Bengal Fisheries (Requisition and Acquisition) Act (20 of 1965), S. 8 (4), Explan. (c) — Words "average income" — Meaning of.

The words "average income" in S. 8 (4), Explan. (c) mean the total or gross receipts from a fishery received or receivable during the period of five years preceding the date of requisition and do not mean net income after deducting all expenses incurred or liable to be incurred.

(Para 20)

Cases Referred: Chronological Paras

AIR 1972 Cal 8, Mihir Kumar Sarkar v. State of W. B.	32,
AIR 1971 SC 961 = 1971 UJ (SC) 279, Sachindra Mohan Nandi v. State of W. B.	29
AIR 1970 SC 564 = (1970) 3 SCR 580, R. C. Cooper v. Union of India	12, 21, 23, 24
AIR 1969 SC 634 = (1969) 3 SCR 341, State of Gujarat v. Shantilal Mangaldas	22
AIR 1969 SC 1126 = (1969) 3 SCR 645, Lachman Dass v. Municipal Committee, Jalalabad	21
AIR 1968 SC 1053 = (1968) 3 SCR 489, State of Madhya Pradesh v. Ranojirao Shinde	8, 21
AIR 1967 SC 637 = (1967) 1 SCR 255, Union of India v. Metal Corporation of India Ltd.	21
AIR 1965 SC 1017 = (1965) 1 SCR 614, Vajravelu v. Special Deputy Collector	4, 21
AIR 1959 SC 308 = (1959) Supp (1) SCR 319, G. Nageswar Rao v. Andhra Pradesh State Road Transport Corporation	4
AIR 1953 SC 375 = 1954 SCR 1, K. C. Gajapati Narayan Deo v. State of Orissa	4
AIR 1952 SC 196 = 1952 SCR 597, State of Madras v. V. G. Row	30
AIR 1952 SC 252 = 1952 SCR 889, State of Orissa v. Kameshwar Singh	8

P. N. Mitter and B. C. Roy, for Petitioners; P. K. Sengupta, Suprokas Banerjee and S. N. Mukherjee, for Respondents.

ORDER:— The petitioners in these Rules have challenged the validity of the requisition orders made under the West Bengal Fisheries (Requisition and Acquisition) Act, 1965, on the ground that the said Act is a colourable piece of legislation and also in violation of Article 19 (1) (f) and (g) and Article 31 of the Constitution of India.

2. The West Bengal Fisheries (Requisition and Acquisition) Act, 1965 was

enacted "to provide for the requisition and speedy acquisition of fisheries for the purpose of improvement or development of such fisheries and supplying fish to the public therefrom. Under Section 2 (3) of the Act fishery means any land whereon water is confined naturally or artificially whether periodically or throughout the year for pisciculture or for fishing and includes a 'tank fishery' as defined in the explanation to clause (c) of sub-section (1) of Section 6 of the West Bengal Estates Acquisition Act as also fish in such fishery or 'tank fishery' does not include a tank not exceeding one acre in area adjoining a homestead and used for purposes of irrigation or domestic purpose".

3. Mr. P. N. Mitra learned advocate for the petitioners has submitted that the Act purports to requisition also the fish in the fisheries and tank fisheries although such fish is by its very nature incapable of requisition. The property in the fish is such that its requisition would really mean appropriation of the fish itself i.e. acquisition. Mr. Mitra has also submitted that the provisions in the Act for payments of compensation for requisitioned property is illusory. For these reasons, Mr. Mitra has asked me to pronounce the Act as a colourable piece of legislation.

4. Mr. Mitra learned advocate for the petitioner has placed before me the judgment of Mukherjee, J. as he then was, in K. C. Gajapati Narayan Deo v. The State of Orissa, AIR 1953 SC 375 and the later Supreme Court decisions in G. Nageswar Rao v. Andhra Pradesh State Road Transport Corporation, AIR 1959 SC 308 and in Vajravelu v. Special Deputy Collector, AIR 1965 SC 1017 (Para 16). Mukherjee, J., as he then was in AIR 1953 SC 375 (supra) at p. 379 of All India Reporter pointed out that

"the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law.

The idea conveyed by colourable legislation is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise". The aforesaid two other decisions give similar meaning to the expression "colourable legislation".

5. I am unable to hold that provision for requisition of the fish along with the fishery comes within the mischief of the aforesaid dicta. After Constitution (Seventh Amendment) Act, 'Acquisition and requisitioning of property' have been in-

cluded in the entry No. 42 of Schedule III of the Constitution. Therefore the West Bengal State Legislature has legislative competence to make laws relating to acquisition and requisitioning of the fisheries. The fish in the fisheries as defined in Section 2 (3) of the West Bengal Fisheries (Requisition and Acquisition) Act in question also was a property capable of being owned and possessed. Further, the Act was passed with the object of improvement or development of fisheries and for supplying fish to public therefrom. Therefore, the West Bengal Legislature thought it fit to define the term 'fishery' in a wide fashion. Unless both the land wherein water is confined and the tank fishery together with the fish reared therein be taken possession of, the aforesaid objects of the Act cannot be fulfilled. Further it may not be also quite feasible to acquire or requisition a land wherein water is confined for pisciculture or for fishing or a tank fishery minus the fish contained therein. If only the land and the water be requisitioned the fish therein be excluded, then it may cause serious hardship and loss to the persons interested in the fisheries which might be requisitioned or acquired under the Act. Such persons interested in the fisheries in question may not succeed in catching all the fish reared in the said fisheries before the Government would take possession of the fisheries or the tank fisheries as the case might be. In that event persons interested in the fisheries in question would be deprived of the fish remaining in such fisheries and they would not also get any compensation for such fish.

6. Further for the purposes of acquisition or requisition there is hardly any similarity between the fish contained in a fishery and money. Such fish is a kind of property and may be owned, possessed and exchanged. Its money value is capable of being estimated. Deprivation of rights of ownership and possession over the fish can be assessed in monetary terms. The fish once caught and removed from the water is no doubt liable to be quickly perished, and also might be consumed. But thereby one cannot hold that the fish is at all not capable of being requisitioned; when State takes possession thereof the ownership continues to remain with the owner of the fishery. In a particular instance the State may not catch any fish from a requisitioned fishery and after developing and improving the fishery might release from requisition the fishery together with the fish therein.

7. I am unable to accept the contention that under the Act the fish of the requisitioned fishery is bound to be appropriated and that the nature of the fish totally excludes the possibility of its requisition. Further in the event the fish in the requisitioned fishery be depleted

and any other damage be caused other than what may have been sustained by natural cause, under Section 8 (3) (b) of the Act compensation would be payable to the persons interested.

8. Three of the learned judges in State of Orissa v. Kameshwar Singh, AIR 1952 SC 252 were of the view that the provision for the State taking over all outstanding arrears and to refund fifty per cent thereof was unconstitutional. The Supreme Court in its later decision in State of Madhya Pradesh v. Ranojirao Shinde, AIR 1968 SC 1053 at 1055-58 considered this question again and held that chos in action and money could not be acquired under Article 31 (2). Hegde J., gave two reasons. In the first place public purpose under Article 31 (2) does not include enrichment of the coffers of the State. In the next place if for every rupee acquired, fifty paise or less is made payable, the violation of Article 31 (2) would be patent and the exercise of the powers by the legislature would be a fraud on its powers and the law would be struck down as a colourable piece of legislation. But these observations have no relevance so far as requisition of the fish in a fishery is concerned.

9. I propose to separately examine the provisions relating to payment of compensation in the West Bengal Fisheries (Requisition and Acquisition) Act. But the fish in a fishery is neither a chose in action nor money in specie. The requisition and acquisition of fishery is also not for enrichment of the State coffers but for development and improvement of fisheries etc.

10. A law providing for requisition of fishery including the fish therein was not beyond the powers of West Bengal Legislature and thereby the legislature did not seek to do anything indirectly which it could not do directly.

11. For the reasons given herein after I am also unable to accept the submission that the provisions in the Act regarding payment of compensation for requisition of fisheries is in contravention of Article 31 (2) and Article 19 (1) (f) and (g) of the Constitution. Therefore I hold that the West Bengal Fisheries (Acquisition and Requisition) Act is not a colourable piece of legislation.

12. Mr. Mitra learned advocate for the petitioners has further submitted in view of the decision in R. C. Cooper v. Union of India, AIR 1970 SC 564 a law relating to acquisition and requisitioning of property must be in compliance both with Article 31 (2) and Article 19 (1) (f) and (g) of the Constitution. Mr. Mitra has placed strong reliance upon paragraphs 56-63 of the majority judgment in case which was delivered by Shah, J., as he then was. In paragraph 62, the learned judge observed,

"We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31 (2). Article 31 (2) requires that property must be acquired for a public purpose and that it must be acquired under a law with the characteristics set out in that Article. Formal compliance with the conditions under Art. 31 (2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Article 19 (1) (f) and Art. 31 (2) are mutually exclusive."

13. The learned advocate for the petitioners has submitted that the Act allows the State to requisition for any purpose which the State chooses to declare as public purpose. According to the petitioners the Act provides for requisition for purposes which need not be public purpose. Further conferment of arbitrary power upon the State to declare any object as a public purpose was capricious and unreasonable.

14. In my view the above submission proceeds upon a misconception of the definition of 'public purpose' given in Section 2 (5) of the Act. The said sub-section lays down:—

"The expression "public purpose" means a purpose having or being connected with, any of the following objects, namely:—

(i) the improvement or development of a fishery,

(ii) supplying fish to the public from such fishery, or

(iii) any other object which the State may by notification in the official Gazette, declare as ancillary or incidental to the aforesaid objects."

15. The petitioners do not dispute that clauses (i) and (ii) of Section 2 (5) would be public purposes within Article 31 (2) of the Constitution and that requisition of property with the two aforesaid objects or any one of them cannot be questioned on the ground of absence of public purpose. The general words 'any other object' in clause (iii) follow the specific and particular words in the two preceding clauses (i) and (ii). Further "any other object must be ancillary or incidental" to the objects of improvement or development of a fishery or supplying fish to the public. Therefore, the meaning of this expression "any other object" must be interpreted and its meaning limited according to *Ejusdem Generis* rule, 'any other object' accordingly must mean only those objects which are similar and akin to the objects in clauses (i)

and (ii) and any other object must be also incidental and ancillary to objects enumerated in clauses (i) and (ii). There is thus sufficient guiding principles in the statute, and no arbitrary or uncontrolled powers have been conferred on the executive.

16. In view of the preponderance of decided authorities the opinion of the State Government about a particular object being a public purpose would not be conclusive and the Courts would have powers to examine the matter. The Section 2 (5) does not make the executive determination of the public purpose final and non-justiciable. As the existence of public purpose within the meaning of the Act would be justiciable, in a particular case when a requisition is purported to be made other than for a public purpose the Court may strike down the individual order, but the statute itself cannot be held to be invalid.

17. The petitioners have also urged that the provisions for compensation in the West Bengal Fisheries (Requisition and Acquisition) Act are illusory and these provisions lay down irrelevant principles for determination of compensation. The petitioners have further contended that the Act confers power upon the executive to assess the compensation and the persons interested have no right to move the Civil Court against such award of compensation. Thereby the executive has been made the judge of its own cause. These provisions amount to unreasonable restrictions upon the freedom of the petitioners to own property and to carry on their fishery business.

18. Section 8 (1) lays down "whenever fishery or lands are requisitioned under S. 4 of the Act or acquired under Section 5, there shall be paid in the manner prescribed to every person interested, compensation, the amount of which shall be determined by the Collector in the prescribed manner in accordance with the principles hereinafter set out." Sub-section (2) of Section 8 deals with acquisition and the sub-section (3) of Section 8 states that compensation for requisitioned fishery or land shall be paid for

(a) the requisition of fishery or land

(b) damages done during the period of requisition except those sustained by natural cause.

When the Collector and the person interested agree as to the compensation, the Collector under Section 8 (4) (i) will award the payment of such agreed compensation. When there is no agreement, the Collector under Section 8 (4) (ii) shall award compensation which shall be determined at the rate of the net average annual income from the requisitioned fishery or land and also for damage referred to in Section 8 (3) (b).

19. The explanation to Section 8 (4) states what 'net average annual income' means:

(a) in the case of agricultural land, one-third of the average value of the produce derived or derivable from such land during a period of five years immediately preceding the date of requisition;

(b) in the case of other land, the average income, less two per cent of such income, derived or derivable therefrom during a period of five years immediately preceding the date of requisition;

(c) in the case of a fishery one-third of the average income from the fishery during a period of five years immediately preceding the date of requisition.

20. Mr. P. K. Sengupta learned advocate for the respondents has rightly submitted that the expression "average income" in clause (c) of the explanation to sub-section (4) of the Section 8 means the total or gross receipts from a fishery received or receivable during a period of five years preceding the date of requisition. In the present context the said expression "average income" cannot mean net income i. e. after deducting all expenses incurred or liable to be incurred. According to the explanation to Section 8 (4) the net income would be determined by finding out the one-third of the average income during last five years. The remaining two-thirds of the total income would presumably represent the expenditure incurred for running the fishery.

21. After the enactment of the Constitution (Fourth Amendment) Act 1955, it was inter alia provided in Article 31 (2) that no law providing for acquisition or requisitioning of property 'shall be called in question in any Court on the ground that the compensation provided by that law is not adequate. Shah J. (as he then was) who delivered the majority judgment in AIR 1970 SC 564 (supra) in paragraphs 97 to 100 has referred to two lines of decisions given by the Supreme Court regarding the effect of the fourth amendment of the Constitution. Even after the aforesaid amendments in Article 31 (2) the Supreme Court pronounced that compensation continued to mean 'just equivalent'. *Vajravelu Mudaliar v. Special Deputy Collector*, AIR 1965 SC 1017; *Union of India v. Metal Corporation*, AIR 1967 SC 637; *Lachhman Dass v. Municipal Committee*, AIR 1969 SC 1125; *Ranojirao Shinde v. State of M. P.*, AIR 1968 SC 1053.

22. But in the *State of Gujarat v. Santilal Mangaldas*, AIR 1969 SC 634. The Supreme Court held that the Article 31 (2) (after Constitution (Fourth Amendment) Act) guarantees a right to receive compensation for loss of property compulsorily acquired but compensation no longer meant an equivalent of the property acquired. If

compensation provided by law is not illusory or is not determinable by the application of irrelevant principles the law is not open to challenge on the ground that the compensation is inadequate.

23. Shah J. (as he then was) in AIR 1970 SC 564 at pp. 608-609, held that the both these lines of cases converge in the ultimate result and support the view that the principle specified by law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of compensation and is a recognized principle applicable in the determination of compensation for the property acquired and the principle is appropriate in determining the value of the class of property sought to be acquired.

24. In my opinion the method of determining the compensation for requisition of a fishery by finding out the net average income is neither irrelevant nor inappropriate. The procedure laid down in the explanation to Section 8 (4) of the Act is also a recognized method for deducting expenses from the gross collection or receipts in order to arrive at the net average income. Therefore, the Majority decision of the Supreme Court in AIR 1970 SC 564 (supra) does not assist the case of petitioners. The provisions of the West Bengal Fisheries (Acquisition and Requisition) Act are not ultra vires of the Art. 31 (2) of the Constitution.

25. I am also unable to accept the submission made on behalf of the petitioners that the Act imposes unreasonable restriction on the freedom of the petitioners to hold property and to carry on their trade and business. The Act which has been made for improvement and development of fisheries and for supplying fish to the public is certainly in the interests of general public. The Act has not left the determination of compensation for requisition of fisheries to the executive authorities. I have already referred to the provisions of Section 8 which lay down the principles for determination of compensation for requisition.

26. The sub-section (4) of Sec. 8 enjoins the Collector to pass award on the basis of agreement and in the absence of such agreement on the basis of net average income. Under S. 9 the Collector has been given power to apportion compensation. Under Section 10 an award made by the Collector would be notified in the manner prescribed. The Section 11 provides for appeal against an award of the Collector, the forum of which would depend upon the fact whether the particular award has been made by the Collector of the district or by any other officer. Under Section 17 of the Act, the Collector and the Commissioner for the purpose of carrying out their functions have been vested

with the powers of Civil Courts in respect of the matters enumerated in clauses (a) to (d).

27. The Collector under the Act and the Appellate Authority hearing appeal from an award of a Collector are required to act quasi-judicially and in consonance with the principles of natural justice. The said authorities would be clearly statutory tribunals and subject to superintendence and control under Art. 227 and also amenable to jurisdiction under Article 226 of the Constitution. Awards and appellate decisions would be also appealable to the Supreme Court under Article 136 of the Constitution. Therefore, the ouster of jurisdiction of Courts under Section 15 can have no relevance so far as the exercise of powers under Articles 136 and 226 and 227 of the Constitution are concerned. The Collector and the Appellate Authority in exercising their powers under Sections 8 (4), 9 and 11 and 17 would be acting not in their executive capacities but they would function quasi-judicially and as tribunals.

28. Mr. P. K. Sengupta learned advocate for the respondents has drawn my attention to a large number of decisions in which the Courts upheld the validity of law albeit the fact that civil Courts' jurisdiction was ousted and authority was conferred upon special tribunals to adjudicate rights of persons affected. It cannot be said that thereby the executive has been made judge of their own cause in violation of the principles of natural justice. In order that the law for requisition or acquisition may be reasonable it is not necessary that adjudication of compensation must be by a civil Court. If the law lays down principles for determination of such compensation and confers power upon a special agency to determine compensation in an objective manner and after hearing the persons interested, there is no reason why such law should be declared to be in violation of Art. 19 (1) (f) and (g) of the Constitution. The present Act creates two tier tribunals for adjudication of the compensation according to the principles laid down in the Act. Such tribunals would act subject to the jurisdiction of the High Court and the Supreme Court. Therefore provisions of the Act constituting the Collector and Commissioner as the authorities for determination of compensation are not unreasonable.

29. The observations of the Supreme Court in *Sachindra Mohan Nandi v. State of West Bengal*, AIR 1971 SC 961 at p. 962 (para 7) do not assist the petitioners. No doubt the Supreme Court in considering whether the West Bengal Land Requisition and Acquisition Act, 1948 was in violation of Article 19 of the Constitution referred to adjudication of claim for compensation by the Court with a right of appeal to the High Court. But thereby the Supreme Court did not mean that adjudi-

cation of compensation for requisition or acquisition of properties by special tribunal would amount to unreasonable restriction on fundamental right to property.

30. In this context I may refer to the following well-known observations of Patanjali Sastri C. J. in *State of Madras v. V. G. Row*, AIR 1952 SC 196 at p. 200.

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorising the imposition of the restrictions, considered them to be reasonable."

31. In the instant case it is common knowledge that fish constitutes a very important item in the diet of majority of the inhabitants of West Bengal and that due to scarcity a high price of the fish now prevails. Therefore, the West Bengal Legislature in its wisdom has thought it fit to enact a law for its improvement etc. In this context the provisions for requisitioning of fisheries and land and for assessment of compensation are not in violation of Articles 19 (1) (f) and (g) and 31 (2) of the Constitution.

32. There is also no substance in the last contention made on behalf of the petitioners that the West Bengal Fisheries (Requisition and Acquisition) Act is violative of Article 14 of the Constitution. The Government has a choice whether fisheries and land should be requisitioned under this Act or under any other requisitioning law. In order to reject this argument it would be sufficient to refer to the recent observations of the Division Bench in *Mihir Kumar Sarkar v. State of West Bengal*, AIR 1972 Cal 8. Further my attention has not been drawn to any law providing for requisition of fisheries for their improvement and development and for increasing supply of the fish.

33. For the foregoing reasons the petitioners' challenge to the validity of the provisions for requisition contained in the West Bengal Fisheries (Requisition and Acquisition) Act fails.

34. I record that in the instant case I have confined my finding only with regard to the provisions for requisition and for payment of compensation for the same. In the facts of this case I had no occasion to examine the provisions in the Act relating to acquisition.

35. I, therefore, discharge these Rules. There will be no order as to costs.

36. Let the operation of this order remain stayed for three weeks from date.

Rules discharged.

AIR 1972 CALCUTTA 372 (V 59 C 73) HAZRA, J.

Shri Iswar Jagannath Deb Jew, Plaintiff-Petitioner v. Fatik Chandra Seal and others, Defendants-Respondents.

Suit No. 32 of 1964, D/- 14-3-1972.

(A) Civil P. C. (1908), O. 6, R. 17 — Written statement was amended to clarify and elucidate facts already in the pleadings and to formulate new questions of law from such facts for decision by Court. Amendment after 7 years held did not, in the circumstances, cause injustice to plaintiff. AIR 1970 Cal 8 and AIR 1969 SC 1267 and AIR 1950 Cal 379, Followed; AIR 1970 SC 42, Distinguished.

(Paras 11, 12 & 16)

(B) High Court Rules and Orders — Calcutta High Court Original Side Rules, Ch. 4, R. 5 and Ch. 38, R. 44 — Summons returnable on 31-1-72 served on the respondent at 4-40 P. M. on 28-1-72, i. e., before close of Court hours, would leave 2 clear days and hence provisions are not violated. (Para 16)

(C) High Court Rules and Orders — Calcutta H. C. Original Side Rules, Ch. 4, R. 5 and Ch. 38, Rr. 44 and 46 — Where circumstances demand the Court can abridge time (Ch. 38, R. 46) notwithstanding provisions in Ch. 4, R. 5 and Ch. 38, R. 44 relating to service of summons. (Para 16)

(D) High Court Rules and Orders — Calcutta H. C. Original Side Rules, Ch. 4, R. 5 and Ch. 38, R. 44 — Just relief should not be refused for some infraction of rules of procedure, mistake, inadvertence or negligence. AIR 1969 SC 1267, Followed.

(Para 16)

Cases Referred: Chronological Paras
AIR 1970 SC 42 = (1970) 1 SCR 428,
Raj Kumar Mohan Singh v. Raj
Kumar Pasupatinath Saran Singh 16

EP/FP/C908/71/TVN/HGP

AIR 1970 SC 110 = (1970) 1 SCR 530, Ram Dayal v. Brijraj Singh 16

AIR 1970 Cal 8 = 74 Cal WN 390, Nanak Chand Shadiram v. Amin Chand Payarilal 9

AIR 1969 SC 1267 = (1970) 1 SCR 22, Jai Jai Ram v. National Building Materials Supply, Gurgaon 9, 16

(1966) 70 Cal WN 1055, Bata Shoe Co. Ltd. v. National Properties Ltd. 16

AIR 1950 Cal 379 = 54 Cal WN 445, Abdul Rahim Naskar v. Abdul Jabbar Naskar 10

P. K. Sen, for Plaintiff-Petitioner; S. Das, for (Defendant Phatik Chandra Seal) and Gopal Law, for (Defendant Umesh Chandra Seal), for Respondents.

ORDER — This is an application for amendment of the written statement. This application has been made by Umesh Chandra Seal, the defendant No. 3. The summons has been taken out on January 28, 1972 for leave to amend the written statement. The grounds taken in the application have been stated in paragraph 3 of the petition. It is stated that through inadvertence and/or mistake the effect of surrender and/or relinquishment of sebaiship or trusteeship of Manindra Chandra Seal, the father of the plaintiff No. 2 Prem Chand Seal has not been specifically pleaded. According to the petitioner, the claim of the plaintiff No. 2 in this suit for sebaiship and trusteeship is barred by the law of limitation and/or ouster and the suit is not maintainable as there was no proper or any appointment of the next friend of the plaintiff deity. The proposed amendment has been annexed to the petition. In the affidavit-in-opposition filed by Prem Chand Seal the plaintiff No. 2, it is stated that the applicant has filed his written statement about 7 years ago and if he was serious, he would have made his application for the proposed amendment much earlier, as the suit appeared in the peremptory list from time to time since 1968. It is denied that the proposed amendment did not find any place in the original written statement due to inadvertence or mistake. It is stated that the applicant has come forward with a belated, frivolous application, mala fide with the intention of further delaying the hearing of the suit. It is submitted that the application is mala fide and is abuse of the process of the Court or that the applicant will suffer, if the proposed amendment is disallowed. On the contrary, if it is allowed the hearing of the suit will be unnecessarily delayed.

2. In the affidavit-in-reply Umesh Chandra Seal stated that during the conference held with his counsel on January 16, 1972 last, it transpired that certain amendment of the written statement filed by him was necessary for the purpose of

determining the real question in controversy. It is denied that the application is belated or frivolous or mala fide or is made with intention of further delaying the hearing of the suit. It is denied that the proposed amendment is quite new and/or foreign to the defence already taken.

3. In order to appreciate the nature of proposed amendments, it is necessary to enumerate certain facts, which appear from the pleadings. It is also necessary to state the nature of the defence as originally made, and the proposed amendments for the purpose of determining whether, I shall grant the amendments at this stage.

4. On October 1, 1916 one Durga Das Seal executed a deed of endowment, dedicating his vast properties to the plaintiff Deity Sri Sri Jagannath Deb Jew. The deed provided, inter alia, that Durga Das would be the first trustee and Sebait and after his death the trusteeship and sebaiship would devolve upon his legal heirs according to the Bengal School of Hindu Law by which he was governed. On September 19, 1925, Durga Das died leaving 7 sons to wit; Manindra, Girish, Umesh, Ashutosh, Ganesh, Subal and Jadav as his heirs and legal representatives. From 1925 to 1943 various litigations took place between the trustees and sebaits for the administration of the debutter estates. Ganesh, Subal and Jadav died intestate and unmarried. Manindra relinquished his office as sebaait and trustee. On May 3, 1943 Prem Chand who is the only son of Manindra and heir of Durga Das Seal instituted a suit in this Court, inter alia, for removal of the defendants from their office of trusteeship and sebaiship, for a declaration that the plaintiff be appointed as the sole trustee and sebaait, accounts, administration and other reliefs. In the said suit Sri Sri Iswar Jagannath Deb Jew Deity was represented by the said Prem Chand as the first plaintiff. Umesh Chandra Seal, Ashutosh Seal, since deceased and also Girish Chandra Seal since deceased as also Ganesh and Jadav were the defendants in the said suit.

5. On September 7, 1948 by an order passed in the said suit No. 593 of 1943 Mr. H. K. Bose, Barrister-at-law (as he then was), was appointed Special Referee for framing a scheme in accordance with the deed of endowment. In or about September, 1950, the Special Referee framed a scheme for the administration of Debutter properties and for the due performance of the periodical and daily seba of the Deity and for carrying out of other religious and charitable trust. By the said scheme Girish, Ashutosh and Umesh were declared as the then sebaits and trustees of the plaintiff Deity. Mr. Kumud Behari Bose, Barrister-at-Law was appointed as

the first Manager for five years. The scheme further provided that the subsequent Manager will be elected from amongst themselves. On July 21, 1949 final decree was passed in the said suit No. 593 of 1943 confirming the said scheme. In 1952 Ashutosh died leaving his widow Raj Kishen, the defendant No. 4 in this suit and only son Fatik, the defendant No. 1 as his heirs and legal representatives. Besides, he left 3 daughters Manika, the defendant No. 4a, Binapani, the defendant No. 4b and Mayarani, the defendant No. 4c.

6. In 1954 Fatik became a sebaait in place of Ashutosh and was appointed Manager by the sebaits. On March 6, 1963 Manindra died intestate leaving Prem Chand, plaintiff No. 2, the only son and Ranimoni, the defendant No. 5, and Rashmoni, the defendant No. 6 his two daughters as his heirs and legal representatives. On February 13, 1956, Girish, defendant No. 2, in this suit died intestate leaving Badamkumari, the defendant No. 2 as his widow and Mohan Chand defendant No. 2b as his only child who are his heirs and legal representatives. In 1970 Raj Kishen the defendant No. 4 died intestate leaving her only son Fatik, the defendant No. 1 and daughter Manika defendant No. 4a, Binapani defendant No. 4b and Mayarani, defendant No. 4c as heirs and legal representatives. In 1962 Prem Chand claimed his sebaiship and trusteeship under the endowment and his remuneration therein. Such claim was turned down by the defendants Fatik, Umesh and Girish since deceased. On January 2, 1964 this suit was instituted, inter alia, for declaration that plaintiff No. 2 is a sebaait of the plaintiff Deity and one of the trustees of the endowed estate, permanent injunction restraining the defendants, their servants and agents from interfering with the lawful exercise of the rights of the plaintiff No. 2 as such sebaait, remuneration of defendants other than defendants Nos. 2a, 2b, 4, 5 and 6, remuneration of present manager, appointment of the plaintiff No. 2 as the sole sebaait and trustee; declaration as to who are the present sebaits and trustees, administration, accounts, decree for such sum as the plaintiff No. 1 is entitled to upon taking all accounts, decree for such sum as the plaintiff No. 2 is entitled to as remuneration, cancellation of present scheme, framing of a scheme of amendment for administration of the estate, worship of the plaintiff Deity, performance of the ceremonies, discovery, inspection, receiver, injunction and other reliefs.

7. On March 23, 1964 the defendant No. 3 Umesh Chandra Seal filed his written statement. In paragraph 1 of the written statement Umesh Chandra Seal stated that paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the plaint are mat-

ters of record and the defendant relied on the same for ascertainment of the true scope and effect thereof. With regard to these paragraphs of the written statement Umesh Chandra Seal now wants to amend the written statement by stating that in view of the surrender and/or relinquishment of sebaiship and trusteeship by the said Manindra Chandra Seal in favour of his co-sebais and co-trustees as will appear from the deed of surrender and relinquishment dated May 9, 1931, the plaintiff No. 1 did not and could not have hereditary or any right of sebaiship and/or trusteeship in accordance with the provisions of the deed of endowment dated October 1, 1916 or at all in respect of the said endowed estate. Mr. Law appearing for Umesh Chandra Seal submitted before me that the proposed amendments were by way of elucidation of the statements which are already there in the pleading. This is not a new case but the defendant is indicating the point of law which arises. He wants that an issue should be framed on this point and argued. The plaintiff will not be prejudiced because the facts are already there in the pleading.

8. The further amendment proposed is with reference to paragraph 6 of the plaint. The defendant wants to raise the plea of *res judicata*. The defendant wants to amend the written statement by stating that the plaintiff No. 2 instituted a suit in this Court being suit No. 593 of 1943 (*Sri Sri Ishwar Jagannath Deb Jew v. Girish Chandra Seal*, wherein, *inter alia*, he alleged and claimed for appointment of himself as the sole trustee and sebaish of the plaintiff Deity and for remuneration of the other sebais and trustees including this defendant. On or about July 21, 1949 final decree was passed by this Court in the said suit No. 593 of 1943. This Court, however, was pleased not to entertain the said claim of the plaintiff No. 2 as to sebaiship and trusteeship of the plaintiff deity which claim was rejected and refused by this Court. In the premises, the said claim of the plaintiff No. 2 in this suit is barred by the principles of *res judicata* and/or principles analogous thereto. This amendment is purely a question of law on the facts which are already there in the previous suit. The defendant wants that this Court will also consider whether the present suit is barred by the principles of *res judicata* or other principles analogous thereto. The other amendment sought for is in paragraph 12 of the original written statement. In the original written statement, it was stated that the suit is not maintainable inasmuch as the plaintiff Prem Chand Seal has no right to the office of the trusteeship and sebaiship and has no *locus standi* to represent the plaintiff Deity. By way of amendment the defendant Umesh Chandra Seal now wants to add that inasmuch as

the plaintiff No. 2 was not appointed by this Court to represent the plaintiff Deity as its next friend nor any leave was granted to him for the said purpose, this suit is not maintainable and should be dismissed with costs. Or, in other words, the defendant wants an additional plea should also be considered on the facts and circumstances which are already there. The last amendment that the defendant wants is that, the claim of the plaintiff No. 2 for sebaiship and trusteeship is barred by the law of Limitation and/or ouster.

9. Mr. Gopal Law for the defendant Umesh Chandra Seal relied on AIR 1970 Cal 8 (*Seth Nanak Chand Shadiram v. Amin Chand Payarilal*). In this case certain amendments of the plaint were sought for by way of elucidation of the allegation and further that by mistake or through inadvertence the petitioner failed to incorporate the elucidation and/or particulars in the original plaint. The proposed amendment was allowed by A. N. Ray, J. (as he then was) and S. K. Mukherjea, J. The next case relied on is AIR 1969 SC 1267 (*Jai Jai Ram v. National Building Materials Supply, Gurgaon*). In this case, it was held that the power to grant amendment of the pleading is intended to serve the needs of justice and is not governed by any narrow or technical limitation. The Court always grants leave to amend the pleading of a party unless it is satisfied that the party applying was acting mala fide or that by his acts he had caused injury to his opponent which may not be compensated by an order for costs. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.

10. The next case relied on by Mr. Law is AIR 1950 Cal 379 (*Abdul Rahim Naskar v. Abdul Jabbar Naskar*) where Harries, C. J. and Sarkar, J. (as he then was) held:

"If the amendment is necessary to decide the real issue between the parties the amendment should be granted, even though the Court may think that the plaintiff or the defendant who seeks the amendment will not be able to establish the facts necessary to support the amendment plea of defence."

11. Dr. S. Das who was appearing for the defendant Fatik Chandra Seal supported the petitioner and submitted before me that in the conference which was held with him these points also struck him as important questions which arise for consideration of the Court and accordingly he also advised that an application for amendment should be made. *Prima facie*, I am satisfied that the amendment should be allowed. The proposed amendments are questions of law which arise from the pleadings or from facts which are already

there in the plaint or in the written statement of the parties. Only the defendant Umesh Chandra Seal has clarified and/or formulated the points of law which he wants that the Court should consider for determination of the real question of controversy between the parties.

12. As to whether amendment should be allowed or not; the ultimate test is:— (a) whether the amendment is necessary for the purpose of determining the real question of controversy, (b) whether the amendment can be allowed without injustice to the other side. It is not the case that these amendments are made mala fide. The whole question is whether by reason of delay for making this application any injustice is caused to the plaintiff. There is some delay no doubt but however much the delay may be, it is a question of law which the defendant wants to raise in the suit and the suit has not been heard.

13. Mr. P. K. Sen, the learned advocate for the petitioner urged before me that the amendments should not be allowed. He first of all argued that the petition has been made in violation of the rules of this Court and as such is liable to be thrown out. He referred to Chapter VI, Rule 5 of the Rules of the Original Side which provides as follows:

“Unless otherwise ordered, such summons, not being an originating summons shall be served 2 clear days before the return thereof. A summons may be made returnable in a shorter time by leave of the Registrar or Master which shall be endorsed on it.”

He also referred to Chapter 38, Rule 44 which provides as follows:

“Where any particular number of days, expressed to be clear days, is prescribed by the rules and practice of the Court the same shall be reckoned exclusive both of the first and the last days.” Relying on these rules, Mr. P. K. Sen argued that the Master's summons in this case was taken out by Messrs. A. K. Chatterjee and Co. Solicitors for the applicant on 28th January, 1972, and made returnable on 31st January, 1972. A copy of the summons with the grounds was served on Shri Pulak Chandra Das, Solicitors for the plaintiffs on January 28, 1972. From the endorsement in the original summons it appears that Ashit Kumar De, clerk to Shri Pulak Chandra Das, Solicitor received the summons at 4-40 P.M. He argued that the office hours of the Court are up to 4-30 P.M.

14. In view of Chapter 38, Rule 47, the summons should be deemed to have been served on January 29, 1972, and it was made returnable on January 31, 1972. He submitted that January 29, and January 31 should be excluded and there-

fore there are no 2 clear days for service before the return thereof as provided in Chapter VI, Rule 5 of the Rules of the Original Side. He submitted that the petitioner has not complied with the rules. He also contended that a summons may be made returnable in a shorter time by leave of the Registrar or Master, which shall be endorsed on it. There is no such leave endorsed on the summons, and no such leave was taken beforehand, for short service and therefore, this summons, according to him, should be thrown out.

15. After receipt of the summons the parties appeared before the Court on the returnable date, namely, January 31, 1972 and by consent the matter was adjourned and permission for filing affidavits was obtained. Thereafter, by consent the matter was adjourned from time to time and affidavits were filed by the respective parties. As a matter of fact the suit was called on for hearing before me and after it was opened by Mr. P. K. Sen, the learned counsel for the defendant Umesh Chandra Seal submitted that his client has been advised to make an application for amendment for the written statement and the matter was then adjourned for the same.

16. In Chapter 53, Rule 46 of the Rules of the Original Side, it is provided that “the Court or a Judge shall have power to enlarge or abridge the time appointed by these rules upon such terms (if any) as the justice of the case may require and any such enlargement may be ordered, although the application for the same is not made only after the expiration of the time appointed or allowed”. After all rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence or infraction of the rules of procedure. This is a salutary principle and this principle has been recognised by the Supreme Court in AIR 1969 SC 1267 at p. 1268. Mr. Sen did not say that his client suffered injustice because of shortness of time. As a matter of fact the clerk of Mr. Pulak Chandra Das, Solicitors for the plaintiff received the summons on January 28, 1972. I think the Court has ample power to abridge time to do justice to a litigant. This is not a case where due to shortness of time the plaintiff has suffered in any way. However, since then I enquired from the Registrar, Appellate Side as to the office hours of the Court and I ascertained that the office hours are between 10-15 A.M. to 4-45 P.M. In that event, the summons being received at 4-40 P.M. on January 28, 1972 by the clerk of Shri Pulak Chandra Das, was received in time on January 28, 1972, and the summons being returnable on January 31, 1972, there are two clear days before the returnable date. In the premises, there is no substance in the

point raised by Mr. P. K. Sen. The next point submitted by Mr. P. K. Sen is that the delay in making this application has not been explained in the petition. Mr. Sen relied on AIR 1970 SC 42 (Raj Kumar Mohan Singh v. Raj Kumar Pasupatinath Saran Singh) and contended that this amendment should not be allowed. In Raj Kumar Mohan Singh's case litigation continued for 22 years and the defendant applied in the Supreme Court for amendment of the written statement to raise new contention. The Supreme Court was not satisfied, *prima facie*, in the contention raised and held that the amendment could not be allowed at such a late stage. In my view the Supreme Court did not allow the amendment under entirely different circumstances which has not much relevance to the facts of this case. In this case all the facts are there in the pleadings of the parties. Only certain points of law are sought to be raised by way of amendment which arise from the facts which are already stated. The defendant stated in his affidavit that there is no inconsistent averment. The proposed amendment has been asked for in elucidation and amplification of the averments already made in the written statement. I do not think that there will be any injustice caused to the plaintiff if I allow such amendment. Mr. P. K. Sen relied on (1966) 70 Cal WN 1055, (Bata Shoe Co. Ltd. v. National Properties Ltd.). In this case, the defendant asked for amendment of the written statement after 7 years. The plaintiff opposed the amendment on the ground that by the amendment the defendant is seeking to make a third party responsible for the injury and contended that what is sought to be pleaded by way of amendment were pleaded in the original written statement. He could have sued the third party which he cannot do now in view of lapse of time. I do not know how this case has any relevance under the facts of this case. In any event, in the case reported in (1966) 70 Cal WN 1055, S. K. Mukherjee, J. held: "the amendment of the defence should not be refused on the ground that the defendant is making a new case if the plaintiff does not suffer some injury by the amendment which cannot be compensated by costs". I think that this case is against the contention of Mr. P. K. Sen and this case does not support him. In this case leave to amend the written statement was granted by S. K. Mukherjee, J. even after 7 years. The other case cited by Mr. P. K. Sen, AIR 1970 SC 110, does not apply. In the premises, I will allow the prayers in the Master's summons. Orders in terms of prayers (a), (b) and (c) of the Master's summons are granted. With regard to costs, the petitioner must pay costs of this application and the costs thrown away by reason of the suit being taken out of the list when the suit was

actually called on and opened by Mr. P. K. Sen. Mr. Sen submitted that his client will not be able to realise the cost from the petitioner unless it is made condition precedent. He stated that there is a decree in favour of his client for Rupees 28,000/- which is mentioned in his affidavit and the said decree could not be realised. There is no doubt that in the instant case there is delay for several years. Cost of the day was reserved. This prayer for amendment of the written statement has been made more than 7 years after the date of the filing of the original written statement. In view of the above fact, the petitioner do pay to the plaintiff's Solicitors the sum of 30 Gms. within 4 weeks from date for one set of costs of their application and the costs thrown away pursuant to the application made herein and the said 30 Gms. be held subject to taxation on usual undertaking of the parties to repay or refund whatever the amount may be on taxation. The amendment should be effected within 4 weeks from this date, on a signed copy of the minutes, on usual undertaking of the applicant's Solicitors to have the order drawn up and completed. Order to be drawn up expeditiously. All parties concerned including the department to act on a signed copy of the minute. Suit to appear in the peremptory list 8 weeks from this date. Certified for counsel.

Petition allowed.

AIR 1972 CALCUTTA 376 (V 59 C 74).
SANKAR PRASAD MITRA AND S. K.

DATTA, JJ.

Jahar Lal Manna, Plaintiff-Appellant
v. Sri Tarakeswar Jew's Shebait and others,
Defendants-Respondents.

A. F. A. D. No. 1041 of 1959, D/-
4-2-1972.

Bengal Tenancy Act (8 of 1885), Schedule III, Art. 3 — To attract the provisions of the Art. 3 of the Schedule III of the Bengal Tenancy Act, dispossession must be effected by the landlord in his capacity as landlord. AIR 1961 Cal 75 and AIR 1930 Pat 256, Relied upon.

(Para 12)

Cases Referred: Chronological Paras
AIR 1961 Cal 75 = 65 Cal WN 420
(FB), Kubir Malla v. Manik Mallik 10
AIR 1930 Pat 256 = 125 Ind Cas
585 (FB), Gajadhar Rai v. Ram
Charan Gope 11

C. C. Ganguly with Gour Prasad Mukherjee, for Appellant.

SANKAR PRASAD MITRA, J. —
This is a second appeal from the judgment of the Additional Subordinate Judge,

EP/FP/D133/72/SB/VBB

Hooghly, delivered on the 4th January, 1958. The dispute relates to about 6.89 acres of land under khatian No. 238 in Mouza Chowtara, P.S. Dhaniakhali in the district of Hooghly. One Bholanath Jana was a tenant in respect of this land under Satis Giri, the Mohunt of the Hrishikesh Asram of Tarakeswar. On the 22nd December, 1932 Bholanath sold some portions of this land to the defendants Nos. 7 and 8. The defendants Nos. 3 to 6 are the heirs of Bholanath and the defendant No. 1 is the present landlord.

2. In 1937, the landlord filed a rent suit against the defendants Nos. 3 to 8. This was Rent Suit No. 999 of 1937. The suit was decreed on February 2, 1938. Before this decree was put into execution, the plaintiff purchased the suit plots from the defendants Nos. 7 and 8 with notice to the landlord. The date of plaintiff's purchase is the 19th December, 1938.

3. Thereafter on the 12th March, 1941 in the Rent Execution Case No. 763 of 1940 the suit lands were put to sale by (Contd. on Column No. (2)).

Description of suit.

Period of limitation.

Time from which period begins to run.

To recover possession of land claimed by the plaintiff as a raiyat or an under-raiyat.

Two years.

The date of dispossession.

7. The plaintiff preferred an appeal which was marked as Title Appeal No. 187 of 1954. On the 4th February, 1958, the Additional Subordinate Judge of Hooghly dismissed the appeal. The Appellate Judge did not disturb the Munsif's finding on the question of title. He agreed with him on the question of limitation. He was also of the view that Art. 3 in Schedule III to the Bengal Tenancy Act, 1885 stood in the way of the plaintiff's obtaining a decree.

8. On the 29th April, 1958 the present appeal was filed. On May 5, 1965 P. N. Mookerjee, J. referred the appeal to a Division Bench as it raised important question of law.

9. The only point that arises for consideration is whether the plaintiff's suit for declaration of title and recovery of possession would be governed by Art. 3 in Schedule III to the Bengal Tenancy Act, 1885 or by the ordinary law of limitation, in other words, whether the period of limitation would be two years or twelve years. If the period of limitation is twelve years the suit was instituted within time.

10. Now, Art. 3 in Schedule III to the Bengal Tenancy Act, 1885 applies to a suit by a raiyat or an under-raiyat who is seeking to recover possession. Obviously the Article contemplates that the raiyat or the under-raiyat was in possession: he has been dispossessed; and he is trying to recover possession. There was a difference of opinion in our Court as to the nature of

auction. In this sale the defendant No. 1 became the auction-purchaser.

4. Pursuant to this auction-purchase, delivery of possession of the suit lands was given to the defendant No. 1 on the 8th December, 1941. The defendant No. 1 obtained possession through Court, and thereafter settled the suit lands to the defendant No. 2.

5. The plaintiff, who is the appellant before us, on the 28th September, 1951, filed Title Suit No. 230 of 1951 in the Munsif's Court at Chinsurah. In the plaint, inter alia, declaration of title and recovery of possession were claimed.

6. On the 24th April, 1954 the Second Munsif of Chinsurah disposed of this title suit. He held that "the plaintiff's title to the suit lands acquired by Ext. 3 has remained unaffected by the sale in execution of the decree in Rent Suit No. 999 of 1937 of the 1st Court of Munsif, Hooghly". But he dismissed the suit on the ground of limitation. According to him, to a suit of this nature Art. 3 in Schedule III to the Bengal Tenancy Act, 1885 applies. This Article is as follows:

dispossession which Article 3 envisaged. One view was that the dispossession must be by the landlord himself. The other view was that any form of dispossession was enough to bring the suit within the scope of Art. 3. Fortunately for us, the controversy has now been settled by a Full Bench decision of our Court in the case Kubir Malla v. Manik Mallik, AIR 1961 Cal 75 (FB). Our Full Bench is of the view that since Schedule III, Art. 3 finds place in a statute which, according to its preamble, is intended "to amend and consolidate enactments relating to the law of landlord and tenant", the word 'dispossession' in the third column of this Article means dispossession by the landlord or by an authorised agent of the landlord acting within the scope of his authority; the mere fact that the landlord brought the holding to sale does not justify an inference of implied undertaking by him to recognise the third party auction-purchaser as his tenant in the absence of any evidence to that effect: further under the present law the recognition of the purchaser as a tenant does not depend upon any 'implied offer' by the landlord to recognise him as a tenant: the purchaser's right is now a statutory right as provided in Section 26-C which can be enforced even against the will of the landlord: hence in the execution of a decree for rent obtained against a tenant by the landlord a third party purchases the right, title and interest of the defaulting tenant or the holding itself and

dispossesses the original tenant the dispossession is not to be deemed to be dispossession by or on behalf of the landlord so as to attract the special limitation provided in Schedule III, Art. 3.

11. A Full Bench of the Patna High Court in *Gajadhar Rai v. Ram Charan Gope*, 125 Ind Cas 565 = (AIR 1930 Pat 256) (FB) has also taken the same view. The Patna High Court's Full Bench has held that the special period of limitation prescribed by Art. 3 of Schedule III to the Bengal Tenancy Act does not apply to a case of dispossession by the landlord as purchaser of the holding in execution of a decree for rent.

12. The Patna High Court's decision is more apposite to the facts of our case. The position is that unless the dispossession complained of is a dispossession by the landlord in his capacity as the landlord, Art. 3 of Schedule III to the Bengal Tenancy Act is not attracted. From this point of view the judgments of the Courts below with respect to limitation cannot be sustained. In the instant case there was a purchase by the defendant No. 1 who was the landlord in Rent Execution Case No. 763 of 1940 but the landlord did not purchase as a landlord but as any other auction-purchaser in a rent execution sale. On these facts, the special period of limitation cannot apply to the plaintiff's Title Suit No. 230 of 1951.

13. We, therefore, allow the appeal and set aside the findings of the Court below in regard to limitation as also the order of the Court below dismissing the suit. The plaintiff's suit is decreed as prayed. There will be no order as to costs of this appeal.

S. K. DATTA, J. :— 14. I agree.
Appeal allowed.

AIR 1972 CALCUTTA 378 (V 59 C 75)
SABYASACHI MUKHARJI, J.

Durga Prasanna Gupta, Petitioner v. State of West Bengal and others, Respondents.

C. R. No. 3094(W) of 1966, D/- 29-11-1971.

Constitution of India, Article 309 —
No specific rule under Article — Resignation when takes effect.

The fact that resignation is to be effective from a future date does not mean that it was not accepted before and that the Government servant continued in service till that date. AIR 1954 SC 584, Relied on. (Para 2)

In the absence of any rules under the Article to that effect a communication of

acceptance of resignation is not essential for its being effective. A Government servant cannot urge that he should be deemed to be in service till acceptance of his resignation was communicated to him and he could withdraw it before the date of such communication though it was accepted by Government before the date of its withdrawal by the him. Art. 311 does not apply to such a case. (X-Ref:— Art. 311). AIR 1969 SC 180, Followed. AIR 1963 SC 395, Referred; AIR 1956 All 511, Distinguished. (Para 4)

Cases	Referred :	Chronological	Paras
AIR 1969 SC 180 = 1969 Lab IC 310, Raj Kumar v. Union of India			4
AIR 1963 SC 395 = (1962) Supp 3 SCR 713, Bachhittar Singh v. State of Punjab			4
AIR 1956 All 511 = 1956 All LJ 421 (FB), Bahori Lal Paliwal v. Dist. Magistrate, Bulandshahr			8
AIR 1954 SC 584 = 1954 SCJ 809, Jai Ram v. Union of India			8

A. P. Chatterjee and Sm. Sabitri Devi (Sen), for Petitioner; Addl. Govt. Pleader, for Respondents.

ORDER :— The petitioner was appointed Law Officer in the Directorate of Mines and Minerals, Government of West Bengal by the order dated 19th April, 1965. The petitioner was appointed substantially to that post though on probation for two years with effect from the date he actually joined the said post as Law Officer. The petitioner actually joined on 27th April, 1965. On 16th May, 1966 the petitioner tendered his resignation to the Deputy Secretary, Commerce and Industries Department, Government of West Bengal through the Chief Mining Officer, Government of West Bengal. In the said letter, the petitioner stated that his resignation might be accepted at an early date with a request to relieve him of his present post as early as possible. It has been said on behalf of the respondents in the affidavit-in-opposition that the said resignation was accepted by the then Minister of State on the 30th May, 1966. After submission of the resignation, the petitioner changed his mind and wrote a letter on 3rd June, 1966 to the Deputy Secretary, Commerce and Industries Department withdrawing his resignation. On 8th June, 1966 the Deputy Secretary to the Government of West Bengal, Commerce and Industries, Mines Branch forwarded a Notification accepting the petitioner's resignation from the post of the Law Officer. The petitioner was informed by the said letter that his resignation had been accepted with effect from 10th June, 1966. On 9th June, 1966 the petitioner was informed that the petitioner's resignation had already been accepted with effect from 10th June, 1966 and the Government expressed its inability to consider the petitioner's letter dated 3rd June, 1966

withdrawing his resignation. Upon these facts, the petitioner moved this Court under Article 226 of the Constitution.

2. Counsel for the petitioner contended that inasmuch as the resignation letter was withdrawn before the order communicating acceptance of the resignation was received by the petitioner, the petitioner was entitled to withdraw the said resignation and the respondents were required to consider the said withdrawal. In not having done so, it was urged that the respondents acted illegally. It was further submitted that inasmuch as the resignation was accepted with effect from June 10, 1966 the petitioner continued to be in the Government service until that date and, therefore, the petitioner had the right to withdraw the said resignation until that date. It was urged that the Government decision was not a decision until it was communicated. In the premises, inasmuch as no decision was communicated to the petitioner accepting the resignation of the petitioner prior to 3rd or 4th June, 1966, the petitioner was entitled to withdraw the letter of resignation. It was submitted further that the Government had acted illegally in accepting the resignation.

Counsel for the petitioner drew my attention to the decision of the Supreme Court in the case of *Jai Ram v. Union of India*, AIR 1954 SC 584. There it has been observed that it might be conceded that it was open to a servant, who had expressed a desire to retire from service and to his superior officer to give him the requisite permission, to change his mind subsequently and ask for cancellation of the permission thus obtained; but the Government servant should be allowed to do so as long as he continued in service and not after it had terminated. But where the service of the servant had ceased, because of the retirement he could not be held to have continued in his service, though at the time he was on post-retirement leave granted to him under special circumstances. It was urged by counsel for the petitioner on the basis of the authority of this aforesaid decision that in the instant case, firstly, the resignation was accepted from 10th June, 1966, therefore, the Government servant was entitled until that date to be considered to be in service and as he was in service until June 10, 1966 the Government servant was entitled to withdraw the resignation. I am however of the opinion that it cannot be contended that the resignation was accepted on 10th June, 1966. The resignation was accepted long before that and in the affidavit-in-opposition it had been stated that it was so accepted on 30th May, 1966. The fact that the resignation was effective from a future date does not, in my opinion, mean that the resignation was not accepted until that future date. Therefore, it is not possible to hold that until 10th June, 1966,

the petitioner continued to be in service. In the premises, I am unable to accept the first contention urged in support of this application.

3. Counsel for the petitioner also relied on the Full Bench decision of the Allahabad High Court in the case of *Bahori Lal Paliwal v. District Magistrate, Bulandshahr*, AIR 1956 All 511 (FB). There, a bye-election was held on a casual vacancy supposed to have been created by the acceptance of resignation of the former Chairman of a Town Area Committee. The Chairman had, however before his resignation was accepted by the District Magistrate, withdrawn it. In reply to the writ petition filed by the Chairman, questioning the order of the District Magistrate to hold the bye-election, it was contended that the election having been held it could only be set aside in accordance with the provisions of the U. P. Town Areas Act or the rules framed thereunder, and hence the writ petition was not maintainable. It was held that as upon the validity of the acceptance of resignation depended the validity of the order to hold the bye-election and the bye-election itself, the petition was maintainable. The majority of the learned Judges of the Allahabad Full Bench observed that the Chairman of the Town Area Committee had, before the resignation was accepted, a right to withdraw it and he having done so, there was no resignation left which could be accepted by the District Magistrate. Hence, even after its withdrawal if the District Magistrate accepted the resignation, the purported acceptance of the resignation by the District Magistrate was a nullity and so was his communication to the Town Area Committee. The facts of that case, in my opinion, were entirely different. It is not necessary for me to refer in detail to the said judgment in considering this issue.

4. It was further contended that the decision was no decision until it was communicated to the party concerned and in the instant case the decision to accept the resignation was communicated to the petitioner on 8th June, 1966. Therefore, it was urged it could not be said that prior to 8th June, 1966 there was any decision to accept the resignation. Therefore, it was submitted that the petitioner was entitled to withdraw his resignation. Reliance was placed on the Supreme Court decision in the case of *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395. There, the Supreme Court observed that before something amounted to an order of the State Government two things were necessary. The order had to be expressed in the name of the Governor as required by clause (1) of Article 166 of the Constitution and then it had to be communicated. The Constitution requires that the action must be taken by the authority concerned in the name of the Governor. It was not

till this formality was observed that the action could be regarded as that of the State. Constitutionally speaking, the Minister was no more than an adviser and that the head of the State, the Governor was to act with the aid and advice of his Council of Ministers. Therefore, until such advice was accepted by the Governor whatever the Minister or the Council of Ministers might say in regard to a particular matter would not become the action of the State until the advice of the Council of Ministers was accepted or deemed to be accepted by the Head of the State. Indeed, it was possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers might express quite a different opinion, one which might be completely opposite to the earlier opinion. Therefore to make the opinion amount to a decision of the Government it should be communicated to the person concerned. The Supreme Court further observed that it was of the essence that the order had to be communicated to the person who would be affected by that order before the State and that person could be bound by that order. For, until it was communicated to the person affected by it, it was open to the Council of Ministers to consider the matter over and over again and, therefore till its communication the order could not be regarded as anything more than provision in character. Relying upon these observations, counsel for the petitioner contended that in the instant case also there was no decision and such communication was received only after 8th June, 1966 before which the petitioner had already written withdrawing his resignation. This point would have required very serious consideration but this point is no longer open to counsel for the petitioner in view of the judgment of the Supreme Court in the case of *Raj Kumar v. Union of India*, AIR 1969 SC 180. The petitioner in that case was a member of Indian Administrative Service and he had asked the Government to relieve him from service. The Government accepted it. But before communication of the order accepting his resignation reached him, he withdrew his offer of resignation. The petitioner in that case wrote to the Government on 21st August, 1964 and on 30th August, 1964 submitted his resignation. On 31st October, 1964 the Government of India accepted the resignation and requested the Chief Secretary to the Government of Rajasthan to intimate to the petitioner the date on which the petitioner might be relieved of his duties so that a formal notification could be issued in that behalf. After some time the petitioner changed his mind and by the letter dated 27th November, 1964 the petitioner requested the Chief Secretary to the Government of Rajasthan to recommend acceptance of the

withdrawal of his resignation from the Indian Administrative service. He also addressed a separate letter to the Secretary to the Government of India, Ministry of Home Affairs, intimating that he was withdrawing his resignation from the Indian Administrative Service. On 29th March, 1965 an order accepting the resignation of the appellant from the Indian Administrative Service was issued and the petitioner was directed to hand over the charge to the Additional Collector, Kota. The petitioner then moved a petition in the High Court of Punjab at Delhi for the issue of a writ of certiorari quashing the order passed by the Government of India accepting the resignation of the petitioner and also for quashing the order issued by the State of Rajasthan. The High Court rejected the petition. On an appeal to the Supreme Court, it was held that in view of the facts and circumstances the petitioner had no *locus paenitentiae* to withdraw his offer of resignation after it was accepted. It was further held that the principle that an order terminating the employment was not effective until it was intimated to the employee could not apply to the facts of this case. The Supreme Court held that there was no rule framed under Article 309 of the Constitution dealing with the question as to when a resignation became effective. In the facts and circumstances of the case, the Supreme Court also held that there was no question of application of Article 311 of the Constitution.

In my opinion, the facts of the instant case are apposite to the facts of the aforesaid case. In view of the Supreme Court's judgment that an order of termination of service would not become effective until it was communicated would not apply to a case of acceptance of resignation, in the instant case also it must therefore be held that in order to be effective it was not necessary for an order of acceptance of the resignation to be communicated. According to counsel for the petitioner the Supreme Court was not concerned with that contention in the aforesaid case. I am unable to accept this position. It is not necessary for me to speculate whether a particular contention was considered or not but the Supreme Court has in unequivocal terms expressed the opinion that in case of an acceptance of resignation to be effective communication was not essential and a decision of the Government to accept the resignation would be effective without communication. After the said decision of the Supreme Court it cannot be contended that it was open for this Court to hold that the decision of a Government was not effective until it was communicated. It follows from the said decision that after decision was taken to accept the resignation of the petitioner he had no right to

claim consideration of its withdrawal. In the instant case it is stated in the affidavit-in-opposition that the Minister of State concerned had accepted the resignation on 30th May, 1966. That was a date before the petitioner withdrew his resignation. Counsel for the petitioner then suggested that there was no proper decision by the Minister of State on 30th May, 1966. This point was not specifically taken either in the petition or in the affidavit-in-reply. Furthermore, in view of the statements made in the affidavit-in-opposition and in the context of the points urged in the petition it must be held that the decision was taken on 30th May, 1966. Counsel for the petitioner also drew my attention to Section 5 of the Contract Act and contended that in this case the withdrawal of the resignation was made at a time when the resignation had not become effective. However, in view of the judgment of the Supreme Court, I am of the opinion that it was not possible for counsel for the petitioner to urge that point any longer.

5. In the aforesaid view of the matter, this application must fail and is accordingly dismissed. The Rule nisi is discharged without any orders as to costs. Interim orders, if any, are vacated.

Application dismissed.

AIR 1972 CALCUTTA 381 (V 59 C 76)
MURARI MOHAN DUTT, J.

Ram Kumar Kajaria, Petitioner v. M/s. Chandra Engineering (India) Ltd., Opposite Party.

Civil Rules Nos. 618 and 619 of 1969, D/- 7-9-1971.

(A) Limitation Act (1963), S. 137 — Scope — Article applies to application under special laws also. (Para 10)

(B) Limitation Act (1908), S. 181 — Scope — Article applied only to applications under Civil P. C. (Para 6)

(C) W. B. Land Reforms Act (10 of 1956), S. 8 (1) — Application for pre-emption — Limitation. (Para 10)

(A) (B) (C) It is true that Article 181 of Limitation Act (1908) applied only to application under Civil P. C. but under the Limitation Act (1963), the scope of Art. 137 which corresponds to Article 181 has been widened. Unlike Article 181, Article 137 is not restricted only to applications under Civil P. C., but it also applies to applications and petitions under other enactments. Therefore, Article 137 applies to applications for pre-emption under Section 8 (1), W. B. Land Reforms Act. Where the petitioner is not served with a notice under Section 5 (5) of W. B. Act, the period of limitation applicable would be under Arti-

cle 137 Limitation Act and not under Section 8 (1) of W. B. Act and hence an application filed within 3 years of the transfer would not be barred by Limitation. (Case law discussed). (Paras 9, 10)

(D) W. B. Land Reforms Act (10 of 1956), S. 2 (10) — 'Raiyat' — Test to determine. (Para 12)

(E) W. B. Land Reforms Act (10 of 1956), S. 8 (1) — Application for pre-emption — Co-sharer raiyat — Condition precedent for enforcing right of pre-emption. (Para 13)

(D) (E) The only test whether a person is a raiyat or not is the purpose for which the land was settled. If the purpose for which the settlement is made is agricultural purpose, the person in whose favour such settlement is made is a raiyat. If the purpose is other than agricultural purpose, and the person in whose favour the settlement is made cannot be regarded as a raiyat even though the land is actually used for agricultural purpose. (Para 12)

Where the predecessor-in-interest of the petitioner under Section 8 (1) was a raiyat in respect of the disputed holding it cannot be said that he does not hold the land for purposes of agriculture. So long as the tenancy subsists, the raiyat is entitled to avail of the right of pre-emption under Section 8 (1), even though he does not cultivate land of his holding. Cultivation of the land or actual user of the same for agricultural purpose by a co-sharer raiyat is not a condition precedent to enforce the right of pre-emption under Section 8 (1). AIR 1931 PC 314, Distinguished. (Pr. 13)

Cases	Referred	Chronological	Paras
AIR 1965 SC 540 = (1964) 4 SCR 69, Prativa Bose v. Rupendra Deb Raikat			6
AIR 1964 SC 752 = (1964) 3 SCR 709, Bombay Gas Ltd. v. Gopal Biva			6
AIR 1953 SC 98 = 1953 SCR 351, Sha Mulchand & Co. v. Jawahar Mills Ltd.			6
AIR 1948 Cal 48 = 52 Cal WN 64 (SB), Asmatoli v. Mujaharali			4
AIR 1931 PC 314 = 36 Cal WN 29, Turner Morrison & Co. Ltd. v. Monmohan Chowdhury			11

Manindra Nath Ghose and Janendra Coomar Dutt, for Petitioner; Nalini Ranjan Bhattacharji, Bireswar Bhattacharji, Bhupati Bhusan Dalal and L. K. Chatterjee, for Opposite Party.

ORDER:— These two Rules arise out of two pre-emption proceedings under Section 8 (1) of the West Bengal Land Reforms Act, 1955.

2. It appears that some of the co-sharers of the disputed holding sold portions of the same to the opposite party M/s. Chandra Engineering (India) Ltd. by two registered sale deeds dated April 2, 1966 and April 4, 1966. It is not disputed that the

opposite party is a stranger in respect of the disputed holding. The petitioner alleged that he was a co-sharer raiyat of the holding and that the transfers were made without service of any notice upon the petitioner under Section 5 (5) of the West Bengal Land Reforms Act. After the petitioner came to know of the said two transfers, the petitioner made the said two applications before the Senior Land Reforms Officer on August 17, 1966, praying for pre-emption under Section 8 (1) of the Act.

3. The opposite party opposed the said two applications of the petitioner. It was alleged by the opposite party that the petitioner was not a co-sharer raiyat of the disputed holding and that the applications not having been filed within the period of limitation prescribed by Section 8 (1) of the Act, the applications were barred.

4. The Senior Land Reforms Officer by two orders both dated March 27, 1967, passed in the two pre-emption cases arising out of the said two applications of the petitioner, came to the findings that the petitioner was a co-sharer raiyat of the holding and that no notice of the transfer was served upon the petitioner. Relying on the decision of the Special Bench of this Court in *Asmatoli v. Mujaharali*, 52 Cal WN 64 = (AIR 1948 Cal 48) (SB), the Senior Land Reforms Officer held that the applications having been filed within three years of the respective dates of the transfers, the applications were not barred by limitation. Upon these findings, the Senior Land Reforms Officer allowed the applications of the petitioner for pre-emption under Section 8 (1) of the Act. The opposite party preferred two appeals to the Second Court of the Munsif at Arambagh. Both these appeals were heard analogously by the learned Munsif.

5. The learned Munsif took the view that Article 181 of the Indian Limitation Act, 1908, was not applicable to an application under Section 8 (1) of the Act. According to him, Article 181 would apply only to an application under the Code of Civil Procedure and that the applications under Section 8 (1) of the Act not being applications under the Code of Civil Procedure, the petitioner was not entitled to avail of the three years' rule of limitation as prescribed by Article 181. The learned Munsif held that the applications of the petitioner were barred by limitation. On the question whether the petitioner was a raiyat or not, the learned Munsif was of the view that as the petitioner who is the successor-in-interest of the raiyat in respect of the disputed holding, not being himself a cultivator was not a raiyat and as such the petitioner's applications under S. 8 (1) was not maintainable as the petitioner could not be said to be co-sharer raiyat. On the aforesaid findings, the learned Munsif by his order dated January 7, 1969, allow-

ed the appeals and dismissed the applications of the petitioner under Section 8 (1). Hence, these two Rules by the petitioner.

6. It may be stated at the outset, that the learned Munsif was right in holding that Article 181 applied only to applications under the Code of Civil Procedure and that the applications of the petitioner under Section 8 (1) not being applications under the Code of Civil Procedure, the provision of Article 181 was not available to the petitioner. Whatever doubts there might have been previously as to the applicability of Article 181 to applications under other enactments, it has now been settled by the successive decisions of the Supreme Court that Article 181 will apply only to applications under the Code of Civil Procedure (*Sha Mulchand & Co. v. Jawahar Mills Ltd.*, 1953 SCR 351 at p 361 = (AIR 1953 SC 98); *Bombay Gas Ltd. v. Gopal Biva*, AIR 1964 SC 752; *Protiva Bose v. Rupendra Deb Raikat*, AIR 1965 SC 540).

7. It has been already stated that the two transfers were made on April 2, 1966 and April 4, 1966, that is, after the Limitation Act of 1963 had come into force. The learned Munsif did not, however, consider the applicability of Art. 137 of the Limitation Act, 1963, which corresponds to Article 181.

8. Article 181 was held to be applicable only to applications under the Code of Civil Procedure in a long series of decisions, for the reason that since all other applications mentioned in the third division of the Schedule were applications under the Code of Civil Procedure, the applications referred to in Article 181 should be construed *ejusdem generis*, that is, it would apply to applications under the Code of Civil Procedure. The same view was maintained even after the amendment of Articles 158 and 178 of the Limitation Act, 1908, by the Indian Arbitration Act, 1940.

9. Under the Limitation Act, 1963, the scope of Article 137 has been widened. In clause (b) of Section 2 a new definition of the word 'application' has been inserted. Clause (b) provides that 'application' includes a petition. In view of the said new definition of the word 'application' the scope of the Limitation Act has been enlarged by making it applicable to applications as also petitions under special enactments.

10. The statement of objects and reasons of the Limitation Act, 1963, declares as follows:

"A new definition of application is being inserted so as to include a petition, original or otherwise. The object is to provide a period of limitation for original applications and petitions under special laws as there is no such provision now." It is, therefore, clear that the intention of the legislature was that the Limitation Act,

1963, would apply also to applications and petitions under the special laws. Unlike Article 181, Article 137 is not restricted only to applications under the Code of Civil Procedure, but it also applies to applications and petitions under other enactments. In my view, therefore, Article 137 applied to applications for pre-emption by the petitioner under Section 8 (1) of the West Bengal Land Reforms Act. The petitioner not having been served with a notice under Section 5 (5) of the Act, or in other words, the petitioner being a non-notified co-sharer, the period of limitation prescribed by Section 8 (1) was not applicable, but the period of limitation as prescribed by Article 137 was applicable. The petitioner having made the applications within three years of the transfers, the applications were not barred by limitation.

11. As to the other question, namely, whether the petitioner was a co-sharer raiyat or not, it has been already stated that the learned Munsif has taken the view that the petitioner who is the successor-in-interest of the raiyat in respect of the disputed holding, not being himself a cultivator cannot be held to be a co-sharer raiyat. In support of the said view the learned Munsif has relied upon the decision of the Privy Council in *Turner Morrison & Co. Ltd. v. Monmohan Chowdhury*, 36 Cal WN 29 = (AIR 1931 PC 314). In my opinion, the learned Munsif has misread and misunderstood the said decision of the Privy Council. In that decision the Privy Council has held that the proviso to Section 37 of the Revenue Sales Act (XI of 1859), the term 'raiya' is limited to cultivator and does not include the successor-in-interest of a raiya who is not a cultivator himself. That decision of the Privy Council does not apply to the case of a raiya under the West Bengal Land Reforms Act.

12. Section 2 (10) of the West Bengal Land Reforms Act defines the term 'Raiya' as 'Raiya' means a person who holds land for purposes of agriculture. It is clear from the definition of the term 'Raiya' that the only test whether a person is a raiya or not is the purpose for which the land was settled. If the purpose for which the settlement was made is agricultural purpose, the person in whose favour such settlement was made, is a raiya. On the other hand, if the purpose is other than agricultural purpose for which the land was settled, in that case, the settlement cannot be said to be a raiyati settlement and the person in whose favour the settlement was made cannot be regarded as a raiya within the meaning of Section 2 (10), even though the land is actually used for agricultural purpose.

13. There is no dispute that the predecessor-in-interest of the petitioner was a raiya in respect of the disputed hold-

ing. It may be that the land has not been used by the petitioner for agricultural purpose, but it cannot be said that he does not hold the land for purposes of agriculture. So long as the tenancy subsists, the raiya is entitled to avail of the right of pre-emption under Section 8 (1), even though he does not cultivate the land of his holding. Cultivation of the land or actual user of the same for agricultural purpose by a co-sharer raiya is not a condition precedent to enforcing the right of pre-emption under Section 8 (1).

14. In the instant case, there being no dispute that the purpose of the tenancy is agriculture, the petitioner must be held to be a raiya of the holding. The finding of the learned Munsif that the petitioner not being himself a cultivator, is not a raiya within the meaning of Section 2 (10), is erroneous.

15. In the result, the order of the learned Munsif dismissing the applications of the petitioner under Section 8 (1) is set aside and the orders of the Senior Land Reforms Officer allowing the applications of the petitioner are restored. The Rules are made absolute. There will, however, be no order as to costs.

Rule made absolute.

AIR 1972 CALCUTTA 383 (V 59 C 77)

A. C. GUPTA AND AMIYA KUMAR
MOOKERJI, JJ.

M/s. K. C. Chatterjee, Appellants v.
The Durgapur Projects Ltd., Respondents.

A. F. O. O. No. 102 of 1969, D/- 24-8-1971.

(A) Arbitration Act (1940), S. 20 — Arbitration clause for referring disputes to "Chief Engineer of Company" — Post of Chief Engineer vacant at the time of dispute — Court can appoint arbitrator.

Where under the arbitration clause in the contract between the contractor and the company disputes were to be referred to the arbitration of the Chief Engineer of the Company and when disputes arose the post of Chief Engineer was lying vacant, the Court in such circumstances can appoint an arbitrator. AIR 1948 Cal 230 and AIR 1964 Pat 468, Relied on. (Para 4)

(B) Arbitration Act (1940), S. 20 — Where the person to whom disputes between the parties are to be referred for arbitration under the arbitration clause intermeddles in the dispute by giving his suggestions, without there being any reference to him for arbitration, which are unacceptable to one of the parties, the person renders himself incapable of acting as arbitrator. (Para 4)

CP/EP/B527/72/GNB/VBB

Cases Referred: Chronological Paras

AIR 1964 Pat 468 = 1964 BLJR 665,
Hindustan Steel Ltd. v. Ingeniurs and Contractors 4

AIR 1948 Cal 230 = 52 Cal WN
288, Governor General in Council v. Associated Live Stock Firm (India) Ltd. 4

S. K. Guha and Amiya Bikash Dutta
Sarma, for Appellants; Mrs. Archana Sen
Gupta, for Respondent.

GUPTA, J.:— This appeal is under Section 39 (1) (iv) of the Arbitration Act from an order refusing to file an arbitration agreement. The appellant, a firm of building contractors, submitted tender for the construction of an Auto Exchange at Durgapur which was accepted by the respondent, Durgapur Projects Ltd., and a formal contract was executed on the 11th March, 1964. The contract contained an arbitration clause namely Cl. 25, the relevant part of which is as follows:

"Except where otherwise provided in the contract all questions and disputes.... shall be referred to the sole arbitration of the Chief Engineer of the Department. Should the Chief Engineer be for any reason unwilling or unable to act as such arbitrator, such question and dispute shall be referred to an arbitrator to be appointed by the Chief Engineer. The award of the arbitrator shall be final, conclusive and binding on all parties to this contract."

2. The appellant alleges that the respondent subsequently revised the design and the drawings for the building introducing radical changes. Admittedly in terms of Clause 12 of the contract the appellant was entitled to payment at revised rates for the changes. Under Clause 12 the Engineer-in-charge has the "power to make any alterations in, omissions from, additions to and substitutions for the original specification, drawings, designs and instructions that may appear to him to be necessary or advisable." Clause 12 states inter alia that in such a case the Engineer-in-charge shall revise the rates at which payment was to be made by "determining the rates on analysis worked out from (a) the basic rates of materials and labour provided in the current schedule of rates or (b) the current market rates of materials and labour when even basic rates for the work are not available in the schedule." Cl. 12 further provides that

"In the event of any dispute regarding rates determined on analysis for any altered, additional or substituted work under this clause, the decision of Superintending Engineer of the Circle shall be final and binding".

According to the appellant the respondent failed and neglected to refix the rates as required under Cl. 12 while the work

was in progress. On 28th May, 1965, the appellant addressed a letter to the Chief Engineer of the respondent Company complaining that they had "come to understand that your office had drastically reduced the costing to an unworkable level" and requesting the favour of his intervention and "restoration of the cuts". This letter is Ext. A (11) in the case. On 12th July, 1965 the Chief Engineer wrote back to the appellant offering certain revised rates which were not found acceptable by the appellant. Then on 11th March 1966 the appellant again wrote to the Chief Engineer of the respondent Company requesting him to "refer the matter in dispute to the sole arbitration of the Chief Engineer of the Department as per contract" in view of the "differences of opinion" that had arisen between the contracting parties. It does not appear that this letter, Ext. 1/X, was answered by the Chief Engineer. Ultimately on 28th September, 1966 the appellant made an application under Section 20 of the Arbitration Act in the Court of the Subordinate Judge at Asansol wherein they contended that the Chief Engineer having already "meddled" in the dispute had "committed himself to a certain position in the matter" and had thereby disabled himself from acting as the sole arbitrator as also from nominating any one else as arbitrator. On these statements the appellant prayed that the arbitration agreement contained in the contract between the appellant and the respondent for the construction of the Auto Exchange Building at Durgapur be filed, a sole arbitrator be appointed by the Court and an order of reference to arbitration be made. The respondent filed a written statement contending that as the Chief Engineer on reference to him by the appellant had fixed and revised the rates in his letter dated 12th July, 1965 there was no further scope for reference to arbitration.

3. The learned Subordinate Judge held that the case came within the purview of Clause 12 of the contract which itself provided for reference of disputes as to rates etc. to the Superintending Engineer and that as such there was no scope for application of Clause 25. On this finding the Court below dismissed the application made under Section 20 of the Arbitration Act.

4. Before us it was also contended on behalf of the respondent that in view of the revised rates fixed by the Chief Engineer in his letter dated 12th of July, 1965, there was no further scope for reference to arbitration. We do not find this contention acceptable. The letter dated 12th July, 1965 was addressed by the Chief Engineer to the appellant in reply to their letter dated 28th May, 1965, Ext. A (11). We have reproduced above the substance of the letter, Ext. A (11); it cannot be maintained that this letter, Ext. A (11), was a

reference to the Chief Engineer for arbitration as provided in Clause 25. We also find it difficult to agree with the learned Judge that on the facts of this case Cl. 12 would apply. Clause 12 applies when rates are determined on analysis by the Engineer-in-charge for any altered, additional or substituted work and a dispute arises regarding rates so determined; it is only in such a case that the decision of the Superintending Engineer of the Circle becomes final under this clause. Admittedly in this case no rates had been determined as contemplated in Clause 12. In our opinion, therefore, Clause 12 has no application. In our view the dispute that has arisen between the parties in this case is covered by the terms of Clause 25, the relevant portion of which I have already set out. We are also inclined to accept the appellant's contention that the Chief Engineer having suggested certain rates in his letter dated 12th July, 1965 which were found unacceptable by the appellant, had rendered himself incapable of acting as an arbitrator in this matter. Further, it was submitted on behalf of the appellant that there was no officer now functioning as Chief Engineer. Seeking clarification on the point, we asked the respondent to file an affidavit stating the correct position. The affidavit filed by the respondent pursuant to our direction, though somewhat vague, states that the post of Chief Engineer is now lying vacant, though it is not clear from the affidavit whether the post has been abolished or not. The question now is, what should be done in such circumstances. The arbitration agreement does not indicate that the parties intended that in such circumstance the agreement would come to an end; it was also not argued before us that the agreement would stand cancelled in such a case. On the contrary, it seems clear from the contract between them that the parties wanted their disputes and differences to be settled through arbitration. It seems established on the authorities that there is no bar to the Court appointing an arbitrator in such a case (see 52 Cal WN 288 = (AIR 1948 Cal 230); Governor General in Council v. Associated Livestock Firm (India) Ltd., AIR 1964 Pat 468; Hindustan Steel Ltd. v. Ingeniurs and Contractors).

5. This being the position, the Court below was wrong in refusing to file the arbitration agreement as prayed for by the appellant. We, therefore, allow this appeal, set aside the judgment of the learned Subordinate Judge and remit the case to the Court below. The learned Subordinate Judge shall order the agreement to be filed and shall make an order of reference to an arbitrator to be appointed by him. We are making this order upon the footing that the post of Chief Engineer is now lying vacant; if, however, in the meantime a fresh appointment is made to

the post of Chief Engineer, the learned Judge will make an order of reference to him in terms of Clause 25 of the Contract. Considering the circumstances of the case, we direct the parties to bear their own costs in this Court and in the Court below.

AMIYA KUMAR MOOKERJI, J. —

6. I agree.

Appeal allowed.

AIR 1972 CALCUTTA 385 (V 59 C 78)

A. K. SINHA, J.

Sachindra Nath Mahapatra, Petitioner v. The State of West Bengal and others, Respondents.

C. R. No. 6660 (W) of 1968, D/- 17-8-1971.

(A) Bengal Police Regulations (1943), Reg. 884 — For exercise of revisional power matter need not be pending before the Original or Appellate authority — Revisional authority has power to interfere with final order of Disciplinary authority even where a person is suffering the punishment imposed. (Para 6)

(B) Interpretation of Statutes — When can Court supply omission in language of a statute. (X-Ref.— Bengal Police Regulations (1943), Regs. 884 & 883).

Court will supply any omission in the language of a statute only when the omission, having regard to the legislative intent, makes the statute absurd or unreasonable or where the intent is clear from other provisions but the omission is accidental or unintentional. (Para 8)

It was held that the revisional authority exercising the power suo motu under Reg. 884 of Bengal Police Regulations could do so within 37 days from date of original or appellate order as the case may be, which is the time prescribed by Reg. 883 for a petition being filed therefor. (1889) 41 Ch. D. 52, Followed. (Para 9)

(C) Bengal Police Regulations (1943), Reg. 884 — Exercise of revisional power after 2 years from date of original order without any justifiable cause for the delay held resulted in needless mischief and injury to the delinquent. Order quashed. (Paras 10 & 11)

(D) Bengal Police Regulations (1943), Regs. 883 & 884 — Since Revisional Authority acts quasi judicially, its order should be a reasoned one especially when it is one of reversal.

Order in revision enhancing penalty of reduction of Rs. 4/- from salary per month for 3 years imposed by Original authority to one of dismissal merely stating that it had heard the party, considered pros and cons and saw no reason why maximum penalty should not be imposed, held,

EP/FP/C936/72/TVN/KSB

was not a speaking order. It ought to have given reasons to show that order imposing lesser punishment was arbitrary or untenable. AIR 1966 SC 871 and AIR 1961 SC 1669 and AIR 1967 SC 1606 and AIR 1971 SC 862, Followed. (Para 13)

(E) Bengal Police Regulations (1943), Regs. 883 & 884 — Appeal against order in revision is incompetent. (Para 14)

Cases Referred: Chronological Paras

AIR 1971 SC 862 = (1970) 3 SCR
40, Travancore Rayons v. Union of India 13

AIR 1967 SC 1606 = (1967) 3 SCR
302, Bhagat Raja v. Union of India 13

AIR 1966 SC 871 = (1966) 1 SCR
466, M. P. Industries Ltd. v. Union of India 12, 13

AIR 1964 SC 477 = (1964) 5 SCR
64, Syed Yakoob v. Radhakrishnan 13

AIR 1961 SC 1669 = (1962) 2 SCR
339, Harinagar Sugar Mills Ltd. v. Shyam Sunder 12

(1889) 41 Ch. D 52, Re: Yeadon Local Board and Yeadon Water Works Co. 8

K. K. Maitra and Sushil Kumar Bajpayee, for Petitioner; Samir Kumar Mukherjee, for Respondents.

ORDER:— This is a Rule obtained by the petitioner for quashing an order of dismissal from his service in writ jurisdiction of this Court.

2. The petitioner served as a Constable for more than 11 years under the West Bengal Police. While he was attached to the Dubrajpur Police Station in the district of Birbhum he was charged with gross misconduct unbecoming of a Police Officer. The charges briefly were firstly, outraging the modesty of a woman, secondly of assaulting a Dafadar and thirdly, demanding illegal gratification from few Rickshaw Paddlers of Dubrajpur. An enquiry proceeding was started by one Mr. D. N. Panda, the then Superintendent of Police, Birbhum, but as he was subsequently transferred, one Mr. J. Barman who came in his place proceeded with the enquiry and found that the first and the third charges were proved. The petitioner was not dismissed as "considering the hard days and also his service records" he felt inclined "to give him a chance to rectify himself", and accordingly imposed on November 17, 1965, a penalty of reduction of Rs. 4/- from his pay per month for a period of three years from 18-11-65 without affecting his future increments and service. The petitioner did not prefer any appeal but suffered the penalty.

3. Thereafter, one Mr. D. Dhar, Deputy Inspector General of Police, Burdwan Range, again issued a show cause notice on May 16, 1967, upon the petitioner in exercise of his revisional power against his proposed punishment of dismissal from his service agreeing with the finding of Super-

intendent of Police on the identical charges Nos. I and III. Although the petitioner submitted an explanation, Mr. Dhar dismissed him from his service. An appeal preferred by the petitioner against the order of dismissal was also dismissed by the Additional Inspector General of Police. That is how, in short, the petitioner felt aggrieved and obtained the present Rule.

4. Quite a large number of grounds were taken but Mr. Maitra on behalf of the petitioner has raised four points as follows:

1. The revisional proceeding not having been initiated during the pendency of the case against the petitioner according to Regulation 884 of Police Regulations Bengal 1943 it was entirely illegal and without jurisdiction.

2. In any event, the proceeding not having been started within the time fixed under Regulation 883 or within a reasonable time but after lapse of about two years from the date of imposition of penalty such proceeding culminating in the order of dismissal was invalid.

3. Regulation 884 of Police Regulations is ultra vires Article 311 (2) of the Constitution.

4. Alternatively, the petitioner in revisional proceeding was not given a reasonable opportunity consistent with the provisions of Article 311 (2) of the Constitution, and therefore, order of dismissal cannot be sustained as valid.

5. In developing the first point Mr. Maitra has argued that in order to exercise revisional powers under Regulation 884 of the Police Regulations the case must be pending. It is said that in the instant case after the imposition of penalty the case was closed since the petitioner did not prefer an appeal but suffered the penalty. To appreciate the correctness of this contention I should read the Regulation 884 which is in these terms:

"The Inspector-General or the Deputy Inspector-General may call for the proceedings of any case, even where no appeal lies, and pass such orders as may seem fit provided that no order under this regulation shall be made to the prejudice of any person unless he has had an opportunity of showing cause against the proposed order. If he so desires he shall be granted a personal hearing and this fact should be recorded in the proceedings."

6. It is nowhere stated that the Revisional Authority may call for the proceedings only where the case is pending. The contention raised by Mr. Maitra cannot be accepted as a sound proposition for it is only after the completion of the original proceeding before the Disciplinary Authority or disposal of appeal from the order passed in such an original proceeding or where no appeal lies against original order of disciplinary authority, the question of revision of such order can arise and this re-

gulation clearly contemplates interference by the revisional authority only where the final orders have been passed in a disciplinary proceeding. So, it cannot be doubted that if the final order is passed in a proceeding by the disciplinary authority or the appellate authority as the case may be it cannot be deemed to be pending any longer. Mr. Maitra, however, points out that, in the instant case, the petitioner has suffered penalty and there is no case against him. Even if it is so, I do not think, that fact by itself will preclude the revisional authority from interference if it is not otherwise barred by the Regulation. In the present case, however, it is not quite correct to say that the petitioner has served out the punishment for the penalty appears to be of recurring nature and it is still continuing. I do not find anything under the regulations which warrants the conclusion that the revisional authority has no power to interfere where a person is suffering the punishment imposed by the Disciplinary Authority or the Appellate Authority. I am, therefore, unable to accept the contention of Mr. Maitra as correct.

7. This brings me to the second point which is that such proceeding in absence of any period of limitation must be made within the time limit fixed in Regulation 883 or within a reasonable time. Mr. Maitra argues that having regard to the various procedural clauses for the disciplinary proceeding and the time limit prescribed for preferring an appeal or revision the Revisional Authority must exercise its power within a certain time otherwise, it is contended, it would lead to impossible result. Can it be said then in such cases where there is no time limit for exercise of a suo motu revisional power by Revisional Authority, the only reasonable view that ought to be taken is that such power must be exercised within a time limit or at any rate within a reasonable time?

8. It cannot be gainsaid that there must be finality of a proceeding not only in a Court of law but also before the Administrative Authority. A line must be drawn somewhere to set the parties at rest permanently over their rights involved in a particular proceeding. Under Regulation 883 of the Police Regulations the petition of appeal or revision is required to be presented by the petitioner within 37 days from the date of receipt of the order, but there is no time limit under Regulation 884 in exercising the revisional powers by the authorities on their own motion. The question is what then should be time limit in such cases in exercising revisional powers in a disciplinary proceeding under the Police Regulations? It is well settled that the Court will not normally supply any omission in the language of the statute unless it becomes imperative to do so where such omission having regard to the

legislative intent makes a statute absurd or unreasonable or where legislative intent is clearly indicated by the context or other parts of the statute but there was accidental slip or unintentional omission. In the instant case omission of the time limit in Regulation 884 in exercising revisional powers will undoubtedly make the regulation "absurd, irrational or unreasonable." In such a situation I think the Courts are not precluded in applying the rule of "Casus Omissus." Maxwell in his "Interpretation of Statutes" 10th Edition (at page 250) while dealing with such cases of omission in statutes states:

"An omission which the context shows with reasonable certainty to have been unintended may be supplied, at least in enactments which are construed beneficially, as distinguished from strictly."

In support of this statement of law he has referred to amongst others an English decision in *In re Yeaton Local Board and Yeaton Waterworks Co.* (1889) 41 Ch D 52. In this case while considering somewhat similar questions under Public Health Act, 1875, where no time limit was fixed in the statute for making an award by the Umpire, Cotton, L. J. expressed himself as follows (at page 58):

"But what ought we to do? It is perfectly clear to my mind that the framers of the Act considered there was a time limited originally for the umpire to exercise his powers, which might be extended, in the proper sense of the word, by extending the original limited time. There is no clause in the Act expressly limiting the time during which the umpire is to act, but in my opinion it would be right on our part to act by analogy to that which is the limited time given to the arbitrators, namely, the date of appointment. Then the limit must be twenty-one days from the time when the reference of the matters to the umpire took place."

9. Following the principles indicated above it seems quite reasonable to suppose that in the instant case it was the intention of the framers of the Police Regulations that the revisional proceeding even without the petition of the delinquent servant must be commenced within the same time prescribed for presentation of petition of appeal or revision under Regulation 883. This omission to my mind as to time limit in Regulation 884 was unintentional. In my view in exercising powers under Regulation 884 the period of 37 days from the date of the final order in the original proceeding must be considered normally to be the time limit unless the delay for commencing the proceeding at a later date is unavoidable and sufficiently explained by the revisional authority.

10. Even assuming that I am wrong in reading such a time limit in Regulation 884 where it is not, then also there

is an implied obligation to exercise such power with due diligence in such manner as it may not cause hardship and injustice to the person affected thereby. In construing implied powers and obligation in a Statute Maxwell again in his Interpretation of Statutes 10th Edition at page 364 states thus:

"But when an Act confers such powers, it also impliedly requires that they shall be exercised only for the purposes for which they were given and subject to the conditions which it prescribes, and also with due skill and diligence and in a way to prevent a needless mischief or injury."

11. So, considering the matter from this aspect also the revisional authority is under an implied obligation to commence the proceeding with diligence to prevent the "needless mischief or injury". In this connection I may refer also to Craies on Statute Law 5th Edition page 261, where it is stated that a statutory power of interference with property must be exercised within a reasonable time. I do not find any reason why this principle should not be extended to a case where the Administrative Authority is conferred under statutory rules to perform its quasi-judicial duty affecting the rights of a person relating to his employment under the State. In this case no affidavit has been filed by any of the respondents or revisional authority countering the allegations in the petition or explaining that the delay caused was unavoidable nor there is any material on record to show that the delay in initiating the proceeding was justified. I may mention that direction to file affidavit-in-opposition was given on September 25, 1969; but no steps were taken. At the hearing of the Rule Mr. Mukherjee wanted me to consider whether time should be given to file such affidavit, if necessary. I cannot allow such prayer at this stage. It seems, therefore, clear that the proceeding started by the Revisional Authority after the lapse of about two years from the date of the imposition of penalty by the disciplinary authority no doubt resulted in breach of its implied obligation to commence the proceeding with diligence under Regulation 884 and this caused serious "mischief and injury" to the petitioner. Considering the matter, therefore, from both the aspects the entire revisional proceeding with the resultant order of dismissal cannot be sustained as valid.

12. There is yet another aspect of the matter. Apart from the disputed question whether in absence of any condition imposed in the rule in exercising revisional power the concerned authority ought to on principle exercise such power only in the manner and under the circumstances set forth in Section 115 of the Code of Civil Procedure, the administrative authority, as it acts quasi-judicially in exercising power of revision, must have to give his decision

with reasons. The Supreme Court in *M. P. Industries Ltd. v. Union of India*, AIR 1966 SC 671, while examining a similar rule conferring powers of revision upon the Central Government under Rule 54 of Mineral Concession Rules 1960 of order passed by the State Government held (at p. 674) as follows:

"The conception of exercise of revisional jurisdiction and the manner of disposal provided in Rule 55 of the Rules are indicative of the scope and nature of the Government's jurisdiction. If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are to be given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard."

It is to be noticed, however, that Bachawat, J. (with Mudholkar, J.) in a separate judgment made a distinction between the case where the order of the inferior Tribunal was followed and where such order is reversed or set aside by the Tribunal exercising power of revision. On a reference to earlier decision of the Supreme Court in AIR 1961 SC 1669, Bachawat, J. while dealing with this aspect of the matter *inter alia* observed (at page 677):

"In that case, it appears that the Central Government acting as an appellate tribunal under Section 111 (3) of the Companies Act, 1956, had without giving any reasons for its order, set aside a resolution of the directors of a company refusing to register certain transfers of shares. There was nothing on the record to show that the Central Government was satisfied that the action of the directors in refusing to register the shares was arbitrary and untenable and, moreover, on the materials on record it was not possible to decide whether or not the Central Government transgressed the limits of its restricted power under Section 111 (3). The Central Government reversed the decision appealed from without giving any reasons; nor did the record disclose any apparent ground for the reversal."

13. The majority view in this case has been consistently followed by the Supreme Court in later decisions. See AIR 1967 SC 1606, *Bhagat Raja v. Union of India* and AIR 1971 SC 862, *Travancore Rayons v. Union of India*. Even, in either view of the matter expressed in *M. P. Industries* case AIR 1966 SC 671 (*supra*), the impugned order passed in revision in the instant case imposing penalty of dis-

missal upon the petitioner cannot be sustained. For, here also the order of the disciplinary authority was reversed and punishment of dismissal was inflicted without giving any reasons. It is simply said that after giving personal hearing and after going through the show cause explanation and considering "the pros and cons of the serious nature of charges Nos. 1 and 3 proved against the delinquent I see no reason why the maximum punishment of dismissal should not be inflicted on the delinquent...." and thus the petitioner was dismissed. There is nothing in the order to show that the order of the disciplinary authority in imposing a lesser punishment was arbitrary and untenable or it went beyond its limits in imposing a lesser punishment upon the petitioner. Having regard to the principles indicated in the above decisions of the Supreme Court it seems clear that the impugned order of dismissal passed by the revisional authority is not a "reasoned order" at all. Mr. Mukherjee on behalf of the respondent relying on a decision of the Supreme Court in *Syed Yakoob v. Radhakrishnan*, AIR 1964 SC 477, has submitted that in any case on agreeing with the disciplinary authority on finding of fact the punishment was enhanced to one of dismissal by the Revisional Authority and, therefore, no error either of jurisdiction or of procedure resulting in violation of rules and principles of natural justice is involved. This case is not of any assistance to the respondents, for, failure to give reasoned order constitutes a breach of duties of Revisional Authority enjoined under the Rules to act quasi-judicially and involves clearly consequential failure to exercise its jurisdiction vested in it. In this view of the matter. I think, the impugned order passed by the Revisional Authority imposing penalty of dismissal upon the petitioner suffers from serious infirmities and must be struck down as invalid.

14. Turning now to the appellate Order I do not find any provision in the Police Regulation for such an appeal. The order passed on this appeal is, therefore, of no consequence. In any case, even in the appellate order no reason has been given. The Appellate Authorities have only agreed with the revisional authority in justifying the penalty of dismissal. Such being the case, it is clear, the appellate order is equally invalid.

15. In view I have taken on the second point it is unnecessary to examine the correctness of contention of Mr. Maitra on the third and fourth points and I do not express any opinion on them.

16. The result, however, is, the petition succeeds. The impugned order of penalty of dismissal is quashed. The Rule is made absolute accordingly but there will be no order as to costs.

17. Let a writ both in the nature of Mandamus and Certiorari issue accordingly.

18. Stay of the operation of the order made today as prayed for by Mr. Samir Kumar Mukherjee learned Advocate on behalf of the respondents is not allowed.

Petition allowed.

AIR 1972 CALCUTTA 389 (V 59 C 79)

SABYASACHI MUKHARJI, J.

Nazla Rob, Petitioner v. The Commissioner of Wakf, West Bengal and others, Respondents.

C. R. Case No. 830 (W) of 1966, D/- 14-7-1971.

(A) Constitution of India, Art. 226 — Who can apply — President of Administrative Committee formed by Wakfs Commissioner cannot by himself challenge order dissolving the Committee without either being authorised by other members on the Committee or making them parties to Writ Petition. (Bengal Wakf Act (13 of 1934), Ss. 27 (2) (iii) and 29).

Neither the President nor the Committee has any vested right as such in the wakf estate. The Committee as such has only the right to administer the estate and that right cannot be arrogated by any individual member be he President or Secretary. (X-Ref:— Bengal Wakf Act (13 of 1934), Ss. 27 (2) (iii) and 29). (Para 2)

(B) Bengal Wakf Act (13 of 1934), S. 32 and R. 1 — "Persons affected" in R. 1 (a) — Meaning.

"Persons affected" in a case where the Wakf Commissioner orders dissolution of Administrative Committee is the Administrative Committee as such and not individual members thereof. (Para 2)

(C) Bengal Wakf Act (13 of 1934), Ss. 27 (2) (iii) and 29 and R. 4 — Rule 4 does not necessarily bar inclusion of mutawalli in the Administrative Committee that is formed under the above Sections.

But, where serious allegations of mismanagement and acts prejudicial to the Wakf estate were made against the mutawalli, an Administrative Committee formed with a close relative of mutawalli as the President and mutawalli himself as the Secretary was held improper. Its dissolution was not interfered with. (1964) 68 Cal WN 509, Referred. (Paras 2 & 5)

(D) Bengal Wakf Act (13 of 1934), Ss. 27 (2) (iii) and 29 — Commissioner who has the power to appoint Administrative Committee has the concomitant power to dissolve it by reason of S. 17 of the Bengal General Clauses Act. (X-Ref:— Bengal General Clauses Act (1 of 1898), S. 17). (Para 4)

(E) Bengal Wakf Act (13 of 1934), S. 27 (2) (iii). — Allegation of mismanagement is not sine qua non for dissolving Administrative Committee formed under the section. (Para 4)

(F) Constitution of India, Art. 226 — Principles of natural justice — Decision dependent on finding whether petitioner was heard or not — Petitioner to seek remedy other than by writ petition. (Para 3)

Cases Referred: Chronological Paras
(1964) 68 Cal WN 509, Sk. Abdur

Rahaman Mutwalli v. Commr. of Wakf 2

AIR 1956 SC 285 = 1956 SCA 79;

Pradyat Kumar Bose v. Chief Justice of Calcutta High Court 4

Balai Ch. Roy with Samaresh Banerjee, for Petitioner; Bhabesh Ch. Mitter and Miss Aruna Mukherjee (for Nos. 1 and 3-8) and Sabita Ranjan Pal (for No. 9), for Respondents.

ORDER: — This is an application under the Bengal Wakf Act, 1934. The petitioner one Nazla Rob claims to be in charge as the President of an Administrative Committee appointed in respect of Hazi Belayet Hossain's Estate of Arna. It appears that Hazi Belayet Hossain, in March, 1927 created a Wakf estate which was enrolled in the office of the Commissioner of Wakfs. The said Hazi Belayet Hossain appointed himself to be the first Mutwalli. On his death, his wife Musamat Badrunessa Bibi was appointed under the deed of Wakf to be the Mutwalli. Thereafter, one Abdul Hoque became the Mutwalli. He is respondent No. 10 in the present application. By an order dated 26th of July, 1962, the Commissioner of Wakfs appointed an Administrative Committee of seven members of which the petitioner was the President. The said appointment was made under Section 27 (2) (iii) of the Bengal Wakf Act, 1934 read with Section 29 of the said Act. According to the petitioner the said Administrative Committee functioned very well and gave proper directions for the management of the Wakf estate. It appears, however, that the Mutwalli is the father-in-law of the petitioner, that is to say, the petitioner is the son-in-law of the Mutwalli. The Mutwalli was appointed the Secretary of the said Committee. The petitioner was appointed the treasurer as well as the President of the said Committee. According to the petitioner, the petitioner received on the 24th of April, 1966 the order dated 20th of April, 1966 passed by the Commissioner of Wakfs dissolving the Administrative Committee and appointing a new Committee. It appears that prior thereto there was a sub-committee appointed and the sub-committee made a report, and thereafter the Commissioner dissolved the present Administrative Committee and re-

constituted a new Committee. The propriety and the validity of the order of the Commissioner dated 20th of April, 1966 passed by the Commissioner of Wakfs are under challenge in this application under Article 226 of the Constitution. It is the case of the petitioner that prior to the receipt of the notice the petitioner had no knowledge of the constitution about the alleged sub-committee. It is, further the case of the petitioner that the petitioner did not have any opportunity or was given no notice to show cause against the constitution of the sub-committee. Thirdly, it was urged that there was no power to appoint sub-committee as such by the Board or the Commissioner while there was an Administrative Committee. Fourthly, it was urged that the Administrative Committee could not be dissolved in the manner purported to be done. Fifthly, it was urged that the constitution of a new Committee was illegal and beyond the powers of the Commissioner and the Board. Lastly, it was urged that the Commissioner in dissolving the Administrative Committee was not functioning as a delegate of the Board and as such he had acted in excess of his powers in the facts and circumstances of the case. Appearing for the petitioner learned counsel contended that there was no hearing given to the petitioner. It was contended that the same amounted to violation of the principles of natural justice as well as infringement of the relevant Rules framed under the Bengal Wakf Act and that the said sub-committee was not lawfully constituted and as such could not exercise lawful powers while there was an Administrative Committee. It was urged that the constitution of the sub-committee under the Act by the Commissioner before dispensing with the Administrative Committee or before appointing a Committee to look into the matter was illegal. It was contended that the new Committee could not be of more than three members but seven members had been appointed. It was then contended that without any allegation of mismanagement, the Administrative Committee could not be dissolved. It was also urged that the sub-committee in making the report never functioned as a Committee.

2. It appears from the records as mentioned hereinbefore that the petitioner is the President of a dissolved Administrative Committee. The Committee, according to the petitioner and according to the respondents was appointed by virtue of Section 27, sub-clause (2) (iii). The said provision provides for constituting committees, where necessary, for the administration of wakfs. Section 29 of the Act provides as follows:—

"29. The Board may, from time to time, authorize the Commissioner to exercise and perform, subject to the control of the Board, any of the powers and duties

conferred or imposed on the Board by or under this Act."

Section 32 also is in the following terms:—

"32. In the case of a wakf-al-ul-aulad, a beneficiary or any person entitled under the wakf deed to receive pecuniary or other material benefits either on his own account or on behalf of a religious or charitable institution, and in the case of any other wakf, any person interested may make an application to the Commissioner supported by an affidavit to institute inquiry relating to the administration of wakf or for the examination and audit of the accounts of a wakf, and the Commissioner, on receipt of such application and the prescribed fee, and on being satisfied from facts set forth in the affidavit that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, shall take such action thereon as he thinks fit:

Provided that an application for the examination and audit of accounts shall not be made in respect of accounts relating to a period more than three years prior to the date of such application."

Counsel for the Commissioner of Wakfs contended that the petitioner had no locus standi to make the application. It was urged that the petitioner was a President of a Committee which was illegally constituted. In this connexion reliance was placed on the observations of P. B. Mukharji, J. (as his Lordship then was) in the case of *Sk. Abdur Rahaman Mutwalli v. The Commr. of Wakfs*, (1964) 68 Cal WN 509, at page 513 after discussing the relevant provisions of Rules and the Rule 4 read with Section 27 (2) (iii) of the Bengal Wakf Act, 1934 P. B. Mukharji, J. observed as follows:—

"Therefore, it is not intended either by the Act or the rules made thereunder that the Mutwalli himself should be a member of such a committee to supervise himself. But this is exactly what has been done by the Commissioner by his second order introducing the Mutwalli also in this committee of administration. This again therefore is clearly beyond the Act and the rules made thereunder."

In the instant case it was urged that the constitution of the Administrative Committee of which the petitioner was the President, was illegal in view of the aforesaid observations. Looking at the facts of the instant case from that point of view it appears that the constitution of the Administrative Committee of which the petitioner was President, was improper and its dissolution was proper. It is, however, not necessary for me to decide the present case on the basis of the aforesaid observation of P. B. Mukharji, J. that the Commissioner could not under any provision or under Section 27 (2) (iii) of the Bengal Wakf Act, 1934 appoint a Committee consisting of the Mutwalli himself. It may be

urged that Rule 4 cannot in any way curtail the amplitude of the powers given under Section 27 (2) (iii) and there may be cases where for the purpose of maintaining proper liaison between the administration of Wakf estate and the public a committee might be constituted which would include the Mutwalli. But for the purpose of this application it suffices to say that the constitution of the Administrative Committee of which the petitioner was the President, was an undesirable step. I am, however, of the opinion that the petitioner himself as such cannot maintain this application. The petitioner is the President of the Administrative Committee. The Administrative Committee has no vested right as such in the wakf estate. The only right it has is the authority or the power to administer or hold the administration or management of the wakf estate. That is a right belonging to the Committee as such. It cannot be arrogated in any event by any individual member, be he the President or the Secretary. There is no averment in the petition that the petitioner was authorised by the other members of the Committee to make this application nor is the application purported to be made on behalf of the other members of the Administrative Committee. The other members of the said dissolved Administrative Committee are not parties to the present proceeding. In the premises the petitioner, in my opinion, is not entitled to maintain an application under Article 226 of the Constitution. Learned counsel for the petitioner contended that by the report of the sub-committee appointed by the Board the reputation of the petitioner as such had been affected and the petitioner being the person affected was entitled to receive notice under the rules framed under the Bengal Wakf Act. He drew my attention to the following rule framed under Section 32 of the Bengal Wakf Act, which runs as follows:—

"1. On receipt of an application under Section 32 and on being satisfied from the facts set forth in the affidavit accompanying the application that there is a prima facie case for enquiry under the said section, the Commissioner may, if he thinks necessary—

(a) fix a date for the hearing of the application, and cause a notice to be served on the mutwalli or persons affected by the allegations, together with a copy of the application, to appear on the date fixed and

(b) on the date fixed for such hearing, or any subsequent date to which the hearing may be adjourned, the Commissioner may allow an opportunity to both sides to represent their case and to adduce evidence, if necessary, and may make any further inquiries as he may consider desirable and pass such orders as he thinks fit."

As such there was no allegation against any individual member of the Administrative Committee. Persons affected, if any, in my opinion, would be the Administrative Committee. Therefore, the petitioner as such has no locus standi to maintain this application.

3. It was contended that there was no hearing given to the petitioner and there was violation of the principles of natural justice and also the aforesaid rule. It has been stated in the report of the sub-committee that the notice had been given and the petitioner as well as the mutwalli appeared before the sub-committee. It has been reiterated in the affidavit that notice had been served and, on the other hand, it has been controverted on behalf of the petitioner that such a notice had been given or that the petitioner in fact appeared. Where in a case the question whether hearing has been given or not is dependent upon adjudication of such disputed question of fact, the petitioner should ordinarily seek remedy in proceedings other than by an application under Article 226 of the Constitution. Prima facie it appears to me that the allegations made in the report of the sub-committee are correct but even if they are not correct and the petitioner wants to establish to the contrary, he should seek remedy by proceedings other than an application under Article 226 of the Constitution.

4. It was then contended that the sub-committee which was appointed to investigate into the affairs was not lawfully constituted. I am unable to accept this contention. The Commissioner and the Board who had the power to appoint the Administrative Committee had the power to dissolve the Committee always. That is inherent in the power of appointment under Section 17 of the Bengal General Clauses Act and for the purpose of carrying out this power if the Board or the Commissioner wants to enlighten itself by an enquiry by a sub-committee there is nothing in the Act and the rules framed under the Act which prevented such a course of action. In this connexion learned counsel for the respondents drew my attention to the decision in the case of Pradyat Kumar Bose v. Chief Justice of High Court at Calcutta, 1956 SCA 79. = (AIR 1956 SC 285). In the view I have taken of the facts it is not necessary for me to discuss this decision in detail. It is contended that the Commissioner was not acting as a delegate in making the appointment and as such the order was bad. I am unable to agree. Reading the order as a whole, it is clear that both in making the dissolution of the Administrative Committee as well as in the appointment of the new committee the Commissioner was acting as a delegate of the Board under Section 29 of the Act. Even, however, that construction is eliminated, it appears

to me that under Section 17 of the General Clauses Act when the Commissioner had the power delegated by the Board to appoint the Committee under the Act it carried with it the power to suspend or dissolve the Committee. In view of the same, looking at the order of 20th of April, 1966 it appears to me that it cannot be said that the Commissioner had acted beyond jurisdiction. In view of the new amendment of the Rules the new committee could be constituted as was done. It was then urged that the sub-committee which went into the allegation did not meet as a sub-committee. Reliance was made to the signatures of three members on different dates—two of them Lutfal Haque and M. Israil has signed on 19th of January, 1966 while Abdul Ashan signed on the 21st of December, 1965. It was urged, therefore, that the Committee did not meet as such as the sub-committee. I do not think it is proper to consider the events in that manner. Sub-committee's report is the result of the decision of the committee and it may be that the members signed on different dates, that does not prove that the sub-committee did not meet as such. It was urged that without any allegation of the mismanagement the Administrative Committee could not be dissolved. I am unable to agree. In view of the provisions of Section 27 (2) (iii) read with Section 17 of the Bengal General Clauses Act, the Board and the Commissioner had the power to dissolve the Administrative Committee.

5. Apart from any legal consideration it appears to me that the order passed by the Commissioner of Wakfs in this case is pre-eminently a desirable order. President of the dissolved Administrative Committee is the son-in-law of the Mutwalli. The Committee had lasted for long time. The President was also the treasurer of the Committee and the Mutwalli, who is the father-in-law of the President, was the Secretary. The sub-committee which was appointed by the Board of Wakf had made serious aspersions against the Mutwalli in the sense that he had not deposited moneys, realised on behalf of the estate from the Land Acquisition Department. He had already built a house in his own name and that his own remuneration had been enhanced at Rs. 1,200/- per annum. It appears from annexure 'D' to the petition that the Mutwalli had leased out a big tank adjacent to his house to his wife at a very low rate of rent. In view of such kind of allegations it is better to have the property managed by a committee different from the present dissolved Administrative Committee. In the premises, I am of the opinion that it cannot be and it should not be interfered with by this Court under Article 226 of the Constitution.

6. In the view I have taken, this application must fail and is, accordingly,

dismissed. Rule Nisi is discharged. Interim order, if any, is vacated. There will be no order as to costs.

Petition dismissed.

AIR 1972 CALCUTTA 393 (V 59 C 80)

ARUN K. MUKHERJEE AND M. M.

DUTT, JJ.

Bhattacharjee (Agency) & Co. Pvt. Ltd., Appellant v. Tarak Nath Banerjee, Respondent.

A.F.O.D. No. 247 of 1970, D/- 16-6-1971.

(A) Limitation Act (1963), Art. 22 — Deposit or loan — Determination of — In ascertaining whether a debt is a loan or a deposit the intention of the parties and all circumstances of the case have to be considered. Where a deposit is to be kept money with him till payment of it is demanded by the depositor the transaction is a deposit and not a loan where the depositor is obliged to seek out the depositor and merely because of an agreement for repayment on demand will not make the transaction a loan. AIR 1936 PC 171 and AIR 1956 SC 12, Relied. (Paras 12, 18)

(B) Evidence Act (1872), S. 101 — Burden of proof — Where a defendant alleges payment of amount deposited with him in a suit for its recovery the onus is on him to prove such payment. (Para 20)

Cases Referred: Chronological Paras

AIR 1965 Mad 427 = (1965) 2 Mad

LJ 368, Abdul Hamid v. Rahmat Bi 16

AIR 1956 SC 12, V. E. A. Annamalai

Chettiar v. S. V. S. Veerappa. Chet- 17

tiar

AIR 1956 All 63 = ILL (1956) 1

All 156, Jagannath Prasad v. 16

Ram Dularay

AIR 1951 Nag 255 = 20 Com Cas- 16

225, Kashinath v. New Akot Cotton

Ginning and Pressing Co. Ltd. 15

AIR 1940 PC 132 = 44 Cal WN

1041, Suleman Haji v. Haji Abdulla 10

AIR 1936 PC 171 = 63 Ind App

279, Mahomed Akbar Khan v. Attar 10

Singh

Sudhir Kumar Bose and Hari Narayan

Mukherjee, for Appellant; J. K. Sen Gupta

and Biraj Mohan Roy, for Respondent.

M. M. DUTT, J.:— This appeal is at the instance of the defendant and it arises out of a suit for recovery of money.

2. The case of the plaintiff as made in the plaint is as follows:—

The plaintiff is the nephew (Sister's son) of one Paritosh Bhattacharjee. Paritosh Bhattacharjee and some of the members of his family had been, at the material time, the directors of the defendant company named Bhattacharjee (Agency) & Co.

Pvt. Ltd. The plaintiff was an employee of the defendant company on a monthly salary of Rs. 300/- which was subsequently increased to Rs. 500/-. During the period of his employment in the defendant company, the plaintiff used to deposit moneys with the defendant company and he also used to keep in deposit with the defendant company his monthly salaries. The said deposits were used to be made by the plaintiff at the request of his maternal uncle Paritosh Bhattacharjee. It was agreed that the amount of deposit would be payable to the plaintiff on demand. The plaintiff discontinued his services under the defendant company since Baisakh 11, 1362 B.S. corresponding to April 25, 1955, and thereafter joined another company named Bhattacharjee (Tea Blenders) Private Ltd. which was sponsored and incorporated at the instance of the said Paritosh Bhattacharjee and his brother Bankim. The plaintiff became a director of this Company.

3. The amounts deposited by the plaintiff with the defendant Company were shown in the annual balance sheets and the books of accounts of the Company under the head "Deposit of Staff". The defendant company by its letter dated July 4, 1960, admitted that a sum of Rupees 15,963.28 was lying with the defendant company to the credit of the plaintiff. The plaintiff resigned from the office of the director of Bhattacharjee (Tea Blenders) Private Ltd. on November 2, 1967, on account of differences with Paritosh Bhattacharjee relating to the management of the said company. As the defendant company failed and neglected to pay to the plaintiff the said amount lying in deposit with the defendant company, the plaintiff by his letter dated November 2, 1967, sent to the defendant company under registered post with acknowledgment due, demanded payment of the said amount, but although the defendant company received the said letter on November 6, 1967, it remained silent. The plaintiff sent a letter of reminder dated January 5, 1968. In reply to this letter, the defendant company by its letter dated January 16, 1968, for the first time denied that any sum was due to the plaintiff by the defendant company and made certain false allegations. The plaintiff through his Advocate's letter dated January 24, 1968, denied the said allegations. This letter was replied to by the defendant company whereby the defendant company reiterated the said false allegations.

4. On the aforesaid allegations, the plaintiff filed the suit for the recovery of Rs. 15,963.28 being the amount of deposit and Rs. 378.72 on account of interest, in all Rs. 16,342/-.

5. The defendant company contested the suit by a written statement. The case of the defendant company was that

the plaintiff used to draw against the deposit account, and his drawing in the year 1361 B.S. was Rs. 3000/- and in the year 1362 B.S. it was Rs. 15,940/- leaving a balance of Rs. 15,963.28 as on Chaitra 30, 1362 B.S. and that there being no deposit or drawing during the years between 1363 B.S. and 1370 B.S., the same amount of balance of Rs. 15,963.28 was shown in the books of accounts to the credit of the plaintiff as on Chaitra 30, 1370 B.S.

6. It was alleged by the defendant company that in the year 1371 B.S., the plaintiff withdrew from the deposit account a sum of Rs. 10,000/- in cash on Magh 19, 1371 B.S. (February 2, 1965) and after the said withdrawal the balance sum of Rs. 5,963.28 lay in deposit with the defendant company to the credit of the plaintiff. It was further alleged that the plaintiff withdrew the said balance sum of Rupees 5,963.28 on Jaistha 20, 1362 B.S. (June 3, 1965). The defendant company denied that the said sum of Rs. 15,963.28 or any part thereof was due by the defendant (continued on Col. 2)

21. For money lent under an agreement that it shall be payable on demand

Three years

When the loan is made.

22. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable

Three years

When the demand is made.

9. The distinction between a 'loan' and a 'deposit' is to some extent difficult to ascertain. The Limitation Act does not define either of the expressions 'loan' or 'deposit', but judicial decisions have laid down certain tests for distinguishing a loan from a deposit. Both the articles require that there shall be an agreement that the money lent or money deposited shall be payable on demand. It is therefore clear that the agreement that the money shall be payable on demand is not a relevant fact to be considered in determining whether a particular transaction is a loan or a deposit. The only fact which has to be ascertained is whether by the advance of the money, a relationship of debtor and creditor has been created between the parties. Apparently it may seem that there is no distinction between the two terms, and a deposit is also a loan, but really a deposit is something more than a loan.

10. In *Mahomed Akbar Khan v. Attar Singh*, AIR 1936 PC 171, it has been laid down by the Privy Council that the distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him, that he is to keep the money till asked for it and that a demand by the depositor would therefore

company to the plaintiff, as alleged. It was also contended by the defendant company that the suit was barred by limitation.

7. The learned Subordinate Judge by his judgment dated December 24, 1969, held that the defendant Company failed to prove its plea of payment of the said sum of Rs. 15,963.28 to the plaintiff and that the suit was not barred by limitation. In view of the said findings, the learned Subordinate Judge by his said judgment decreed the suit in full. Hence this appeal by the defendant Company.

8. Mr. Sudhir Kumar Bose, learned Advocate for the appellant strenuously urged before us that the suit was barred by limitation. It was contended that on the facts alleged in the plaint, it should be held that it was a case of loan and not a deposit and as such Art. 21 and not Art. 22 of the Limitation Act, 1963, would apply. It was submitted that as the suit was instituted more than three years from the date of the loan, the suit was barred. Articles 21 and 22 are as follows:—

seem to be a normal condition of the obligation of the depositee to repay. In a later decision in *Suleman Haji v. Haji Abdulla*, AIR 1940 PC 132, the Privy Council has reiterated the same principle as laid down in *Mohammad Akbar Khan's* case.

11. From the aforesaid Privy Council decisions it follows that in order to determine whether a particular transaction is a deposit or a loan, it has to be ascertained whether the depositee is obliged to seek out the depositor for repayment or whether the depositee is to keep the money with him till payment of it is demanded by the depositor. In the former case it will be a loan and in the latter case it will be a deposit.

12. In the instant case, there is no evidence that the defendant Company ever tried to seek out the plaintiff to repay. It was the plaintiff who from time to time approached the defendant Company for the purpose of withdrawing money out of the amounts deposited by him. Mr. Bose drew our attention to paragraph 3 of the plaint wherein it was pleaded that the agreement was that the amount of deposit would be payable on demand. Mr. Bose submitted that an agreement to pay on demand would attract the provisions of Article 21 and not Article 22. We are

unable to accept this contention of Mr. Bose. It has been already pointed out that both the Articles require an agreement that the money advanced shall be payable on demand and accordingly that cannot be a point of distinction between a deposit and a loan. To quote the language of the Privy Council in Mohammad Akbar Khan's case referred to above, "a demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay." Whether it is a case of deposit or a loan, there shall be an agreement for repayment on demand. There is therefore no force in the contention of Mr. Bose that as the amount advanced was payable on demand, it was a loan and not a deposit.

13. The plaintiff alleged in the plaint that he used to keep in deposit with the defendant Company the amounts of his monthly salaries. The defendant Company did not in its written statement specifically deny the said allegation nor did the defendant Company allege that the money deposited by the plaintiff was by way of loan. D.W. 3 Paritosh Bhattacharjee, a director of the defendant Company in the examination-in-chief of his evidence says as follows:—"The plaintiff's salary used to be kept in deposit in our Company. Sometimes, he also used to make additional deposits of money in our Company." Throughout his evidence he did not allege that the defendant Company used to take loan from the plaintiff or that the plaintiff used to lend money to the defendant Company out of his salary. Instead, D.W. 3 characterised the transactions as deposit.

14. In paragraph 5 of the plaint the plaintiff states that the amount of Rs. 15,963.28 has all along been shown as deposit under the head 'Deposit of staff' in the annual balance sheets and the account books of the defendant Company. This statement in paragraph 3 of the plaint has been admitted by the defendant Company in paragraph 3 of the written statement. There is no explanation by or on behalf of the defendant Company why the amount has been shown under the item 'Deposit of staff', if it was really a loan as contended on behalf of the Company. It is unthinkable that a limited Company will describe a loan as a deposit in its books of accounts and in the annual balance sheets.

15. In *Kashinath v. New Akot Cotton Ginning and Pressing Co. Ltd.*, AIR 1951 Nag 255, a Division Bench of the Nagpur High Court consisting of Vivian Bose, C. J. and Mangalmurti, J. has held that if the parties deliberately chose to consider their transaction a deposit and not a loan, then it is difficult to hold that it was not intended to be a deposit. It has been further held in that case, that although the mere use of the term 'deposit'

cannot alter the substance of the transaction, but as the dividing line between a 'deposit' and a 'loan' is so fine, and as the difference must to a large extent depend upon the intention of the parties, the fact that they agree to regard their act as 'deposit' is of importance.

16. In *Jagannath Prasad v. Ram Dularey*, AIR 1956 All 63, it appears that the parties at the time of making the payment used the word 'Amanat' or 'Jama' and it has been held that prima facie the intention of the parties would appear to be that the payment was made by way of a 'deposit'. The Madras High Court in *Abdul Hamid v. Rahmat Bi*, AIR 1965 Mad 427, has expressed the view that the use of the term 'loan' or 'deposit' may not in itself be conclusive though, of course, it is a circumstance which would be taken into account and that what should be regarded is the cumulative effect of the evidence which bears on the character of the debt as a loan or a deposit.

17. In *V. E. A. Annamalai Chettiar v. V. S. Veerappa Chettiar*, AIR 1956 SC 12, the Supreme Court has laid down that whether a transaction is a transaction of loan or deposit does not depend merely on the terms of the document but has got to be judged from the intention of the parties and all the circumstances of the case.

18. The decisions referred to above have laid down the same principle, namely, that in ascertaining whether a debt is a loan or a deposit the intention of the parties and all the circumstances of the case have to be considered.

19. In the instant case, it has been already stated that the debt appears in the balance sheets and the audited books of accounts of the defendant Company as 'deposit of staff'. D.W. 3 Paritosh Bhattacharjee in his evidence refers to the amount in question as deposit. There is no evidence that the defendant Company ever tried to seek out the plaintiff to repay and further, it has not been alleged on behalf of the defendant Company either in its written statement or in the evidence of its witnesses that the transaction was a loan transaction and not a deposit. From the circumstances stated above, it cannot but be held that the intention of the parties was that the amount should be regarded as a deposit and not a loan. The suit having been instituted within three years when the demand for payment was made by the plaintiff, it is not barred by limitation.

20. Now coming to the merits of the case, it has been stated already that the defendant Company admitted that the sum of Rs. 15,963.28 had been shown in the books of account of the defendant Company as lying to the credit of the plaintiff as on Chaitra 30, 1370 B.S. It is,

however, alleged by the defendant Company that the said amount was paid to the plaintiff in two instalments, namely, Rs. 10,000/- on February 2, 1965, and the balance sum of Rs. 5,963.28 on June 3, 1965. There can be no doubt that the defendant Company having alleged payment of the amount, the onus is on the defendant Company to prove the same.

21. In support of the plea of payment, strong reliance was placed on the books of accounts of the defendant Company. Exhibit A (17) is the entry dated February 2, 1965, in the Jabeda Khata of the defendant Company. That entry no doubt records payment of the sum of Rs. 10,000/- to the plaintiff, but it is not supported by any voucher or receipt. D.W. 3 Paritosh Bhattacharjee says in his evidence that vouchers were not demanded from the plaintiff as he was a close relative of Paritosh. The plaintiff in his evidence denies that he never granted receipts for the money which he withdrew from the defendant Company. Further, the plaintiff says that whenever he took money from the defendant Company receipts were demanded from him and that he also granted receipts therefor. The amount of Rupees 10,000/- has alleged to have been paid to the plaintiff by D.W. 1 Ganesh Chandra Bhattacharjee, the Accountant of the defendant Company. Ganesh was appointed in the year 1969 B.S. i.e. long after the plaintiff left the defendant Company. It is hardly believable that Ganesh would pay Rs. 10,000/- to the plaintiff without any receipt. No reason has been given by Ganesh why he made payment of such a considerable amount to the plaintiff without any receipt instead, it has been simply said by him that the plaintiff did not sign any receipt or voucher. There is no evidence that Ganesh requested the plaintiff to give a receipt for the payment. It appears from another entry of the same date i.e., February 2, 1965 (Exhibit 1/b) that Rs. 1,500/- was paid to the Director Paritosh Bhattacharjee against voucher No. 1392. It is curious that while the plaintiff who had no connection with the defendant Company would be paid Rupees 10,000/- without any voucher, the Director of the defendant Company would be paid much lesser amount i.e. Rs. 1,500/- against voucher.

22. It appears from the cash book of the defendant Company that the cash balance at the close of February 1, 1965, i.e., the day previous to the day on which payment of Rs. 10,000/- has been alleged to have been made to the plaintiff, was Rs. 1,256.13. Ganesh says that on the following day, i.e., on February 2, 1965, Paritosh Bhattacharjee gave him Rupees 10,000/- in cash and asked him to enter the amount in his name in the Jabeda Khata. The entry Ex. 1/c shows receipt of

Rs. 10,000/- from Paritosh. It appears from the evidence of Paritosh that he withdrew a sum of Rs. 10,000/- from the Bhattacharjee (Tea Blenders) Private Ltd. by encashing a cheque on Hong Kong Bank. The counter-part of the cheque (Ext. E) shows that the cheque was issued by the Bhattacharjee (Tea Blender) Private Limited in favour of Paritosh Bhattacharjee in his personal capacity on January 21, 1965. It appears from the Bank's statement of accounts that the cheque was encashed on the same date. Paritosh says that he gave the amount to Ganesh about 8/10 days after the encashment of the cheque and that he advised him to pay the amount to the plaintiff. There is no evidence on record that the plaintiff demanded payment so as to justify withdrawal of the said amount from the said Company. There is also no explanation why the cheque was issued to Paritosh Bhattacharjee in his personal capacity and also why he kept the money for 8/10 days after encashment of the cheque.

23. The defendant Company has examined its auditor Nripendra Nath Sanjal (D.W. 2) of the firm of M/s. Sarkar & Co. D.W. 2 audited the accounts of the defendant Company for the relevant year. Regarding the disputed amount of Rupees 10,000/-, this witness admitted that he did not make any comment in his report, that he did not consider it to issue confirmation letter to the plaintiff nor did he ask for any confirmation letter from the plaintiff. We get from P.W. 1 Manash Kumar Bandopadhyay, a qualified Chartered Accountant that when a Company makes any payment not supported by any voucher the auditor requires written confirmation from the recipient before passing it. D.W. 2 in his evidence admitted that some auditors would issue confirmation letters but he did not consider it necessary. D.W. 2, however, alleged that he had a talk with the plaintiff regarding the payment shown under the entry (Ext. A17) at the latter's residence at No. 5, Hyde Road, Kidderpore. It is clear from the evidence of D.W. 2 that he departed from the established practice and procedure of auditing by not issuing a letter of confirmation to the plaintiff regarding the alleged payment to him of Rs. 10,000/- without any receipt. It may be that he was known to the plaintiff from before and that he frequently went to the plaintiff's house as alleged by him, but that is no reason why he should make a departure from the usual practice and procedure of auditing. In this state of facts it is difficult to place reliance on his evidence that he had talks with the plaintiff at his residence and that the plaintiff admitted receipt of the said sum.

24. Regarding the disputed amount of Rs. 5,963.28 the entry dated June 3, 1965, in the Jabeda Khata (Ext. A18) shows payment of the said amount to the

plaintiff. It also refers to a receipt. D.W. 3 Paritosh says in his evidence that a sum of Rs. 15,000/- was given by Bhattacharjee (Tea Blenders) Private Ltd. to the defendant company. It appears that a cheque for Rs. 15,00/- was issued by the said Company in favour of the defendant Company on June 3, 1965. The cheque was encashed on the same day. D.W. 2 alleged that out of the said amount, he paid Rs. 5,963.28 to the plaintiff at the latter's residence in full and final settlement of his dues and that the plaintiff gave him a receipt. It was further alleged by Paritosh that he sent a slip to Ganesh advising him to make necessary entries in the account books. The receipt alleged to have been granted by the plaintiff is not forthcoming. Ganesh alleged in his evidence that the letter of Paritosh Bhattacharjee and the receipt were both kept in a flat file, but the same could not be traced when he searched for the same in April, 1968. Ganesh, however, admitted that all other vouchers were available.

25. The D.W. 2 Nripendra Nath Sanyal says that he saw the voucher at the time of auditing the accounts of the defendant Company.

26. The case of the defendant Company is that no receipt was ever taken from the plaintiff. We fail to understand why this time, Paritosh took a receipt from the plaintiff for the said sum of Rupees 5,963.28. Be that as it may, the receipt has not been produced on the ground that it has been lost. It is significant that when all other vouchers are available, this particular voucher alleged to have been granted by the plaintiff for the first and the last time could not be traced out although it was the positive evidence of Ganesh that it was kept in a flat file. We are unable to rely on the evidence of D.W. 2 that he saw the receipt. The story alleged on behalf of the defendant Company that there was payment to the plaintiff of the said sum of Rs. 5,963.28, that the plaintiff granted a receipt for the said amount and that the said receipt could not be traced out, is difficult to believe. In view of the evidence of D.W. 2 which we are unable to believe and the manner in which the accounts were audited by him, we are of the opinion that the entries Exts. A17 and A18 are not true.

27. The plaintiff by his letter dated November 2, 1967 (Exhibit J) demanded from the defendant Company the sum of Rs. 15,963.28 as due to the plaintiff from the defendant Company. This letter of the plaintiff was not replied to by the defendant Company. Paritosh Bhattacharjee says that as he was seriously ill, he could not give any reply. Save and except the uncorroborated testimony of Paritosh, there is no evidence that he was seriously ill. He merely alleged that he was seriously ill and did not disclose the nature of the

illness. Even Ganesh, the Accountant of the defendant Company does not say that the director Paritosh Bhattacharjee had been seriously ill at the time of the letter (Ext. J). We are unable to accept the evidence of Paritosh that as he was seriously ill, he could not reply to the letter of the plaintiff. Even assuming that Paritosh was ill what prevented Ganesh to give a simple reply to the letter that the plaintiff had been paid the amount claimed by him by two instalments, one on February 2, 1965, and the other on June 3, 1965, particularly when it has been alleged that the payment of Rs. 10,000/- was through Ganesh and the other payment of Rs. 5963.28 was against receipt granted by the plaintiff and alleged to have been kept by Ganesh in a flat file. In this context it may be pointed out that the disputed entries in the books of accounts recording payment to the plaintiff were made by Ganesh. In our opinion, the letter of the plaintiff was not deliberately replied to as the defendant Company was not in a position to deny the plaintiff's claim.

28. The plaintiff not having received any reply from the defendant Company gave a letter of reminder on January 5, 1968. This letter was not replied to till January 16, 1968, when on that date Paritosh Bhattacharjee wrote to the plaintiff as follows:—

"With reference to your letter of the 5th instant we confirm that you came to our above office on the 12th instant and after personally inspecting the books satisfied yourself that nothing was due and owing to you by this company as wrongly alleged in your letter under reply".

Paritosh Bhattacharjee in his evidence alleged that on receipt of the demand letter from the plaintiff, he asked Ganesh to call the plaintiff and to show him the accounts in his name. But this allegation does not find corroboration from the evidence of Ganesh. Ganesh alleged that in August 1967 and again in January, 1968, the plaintiff came to the office of the defendant Company, that on being asked by the plaintiff, Ganesh showed him the account books and that on seeing the accounts, the plaintiff stated that it was all right. It appears from the evidence of Ganesh that the plaintiff came to the office of the defendant Company and looked into the books of accounts out of his own. The evidence of Paritosh is contradictory to that of Ganesh and we disbelieve the evidence of both of them. From the facts stated above, there can be no doubt that the allegations made in the letter dated January 16, 1968, are untrue and the letter containing the said allegations was written as a result of afterthought.

29. In view of the facts and circumstances stated above and after considering the evidence on record, both oral and

documentary, we hold that the defendant Company has failed to prove payment to the plaintiff of the said sum of Rupees 15,963.28 or any part thereof. The learned Subordinate Judge was perfectly justified in decreeing the plaintiff's suit.

30. In the result, the judgment and decree of the learned Subordinate Judge are hereby affirmed and the appeal is dismissed with costs.

31. There will be stay of operation of this Order for six weeks.

ARUN K. MUKHERJEA, J.:— 32. I agree.

Appeal dismissed.

AIR 1972 CALCUTTA 398 (V 59 C 81)

P. B. MUKHARJI C. J. AND B. C.

MITRA, JJ.

Ashoka Marketing Ltd., Appellant v. The Assistant Collector of Central Excise, Calcutta III and others, Respondents.

A. F. O. O. No. 281 of 1969; Matter No. 345 of 1968, D/- 30-3-1971.

Civil P. C. (1908), O. 43, R. 1 — Appeals from Orders — Order allowing inspection of seized documents — Whether appealable. (X-Ref:— Letters Patent (Cal), Cl. 15).

In pursuance of an authorisation for search and seizure of a person's premises search and seizure took place and various documents were seized. That person filed a petition and obtained an interim order directing the authorities not to examine the documents until further orders. Liberty was given to the authorities to apply for variation of the interim order. On application, the authorities were allowed to take inspection of the documents. They were however restrained from proceedings against the petitioner on the basis of such inspection.

Held, the order was only an order for inspection of the documents seized. Although to the extent that inspection has been allowed, the order was a variation of the interim order issued, such variation did not make the order anytheless an order for inspection of documents. Such an order was not an appealable order. Case law discussed. (Paras 6, 9)

The order is not a "judgment" within Clause 15 of the Letters Patent. The main and the real controversy between the parties is the issue of an authorisation for search and seizure of books and documents. The prayer for ad-interim injunction until disposal of the application is no part of the controversy between the parties and the order cannot be said to have affected the controversy between the parties as pleaded in the Writ Petition. AIR 1960 Cal 582, Distinguished. (Para 10)

Cases Referred: Chronological Paras
AIR 1971 SC 454 = (1971) 2 SCR
92, New Central Jute Mills Co.
Ltd. v. Asstt. Collector of Central
Excise 11, 12, 13
(1971) 75 Cal WN 233, Motilal
Singh v. Shib Chandra Bose 8
AIR 1961 Cal 578 (SB), Surajmull
Nagarmull v. Commr. of Income-tax 8
AIR 1960 Cal 582 = ILR (1961) 1
Cal 317, Mohd. Felu Meah v.
S. Mondal 7
(1909) 11 Bom LR 248 = 2 Ind Cas
167, Ahmed Bin Sheikh Essa Bin
Khalifa v. Ayeshabai 8
(1872) 9 Bom HCR 398, Sonbai v.
Ahmedbhai Habdibhai 8
J. Goho, for Appellant; A. C. Bhabra
with R. Pyne, for Respondents.
B. C. MITRA, J.:— A Company known
as New Central Jute Mills Co. Ltd. owns
and runs a factory by the name of Sahu
Chemicals and Fertilisers at Varanasi. The
appellant was the selling agent of the pro-
ducts of this Company including muriate
of ammonia and fertiliser. By a notification
dated May 28, 1962, Ammonia utilised in
the manufacture of fertiliser is exempted,
with effect from April 24, 1962; from so
much of excise duty as is in excess of
Rs. 25/- per metric tonne. The standard
rate of duty of ammonia is Rs. 125/- per
metric tonne.
2. The Excise authorities brought
to the notice of Sahu Chemicals and Ferti-
lisers that muriate was distinct from ferti-
liser and that ammonia used in the manu-
facture of muriate of ammonia was not en-
titled to concessional rate and was subject
to the standard rate of Rs. 125/- per
metric tonne.
3. According to the management
of Sahu Chemicals and Fertilisers, there
was no separate process in the manufac-
ture of muriate of ammonia. The owners
of the factory contended that they were
producers of fertilisers and the production
of muriate was the result of accidents and
vagaries of production connected with the
manufacture of fertiliser. According to the
Excise authorities, on the other hand,
muriate of ammonia was obtained in the
said factory by a process of manufacture
different from that for the manufacture
of fertiliser. The Respondent No. 1 claims
to have come into possession of informa-
tion that there were a number of relevant
papers, books and documents in the pos-
session of the appellant which were se-
creted in its Calcutta office. According to
Respondent No. 1 again, these papers,
books and documents would establish that
muriate of ammonia was produced in the
said factory in pursuance of a definite pro-
gramme and that the entries in the books
will further show that the contention of
New Central Jute Mills Co. Ltd., that there
was no separate process in the manufac-
ture of muriate of ammonia was false.
These books, it is further alleged, would

show that payment of excise duty has been evaded, and further that information will be available from such books regarding other parties connected with the appellant's transaction with the New Central Jute Mills Co. Ltd. who are involved in the evasion of excise duty. In these facts, the Respondent No. 1 issued an authorisation for search and seizure of the documents and books at the appellant's premises and pursuant to such authorisation, search and seizure took place and the search was conducted at the appellant's business premises at No. 18A, Brabourne Road, Calcutta, on May 11, 1968. Various books, documents and papers, which would be useful for the proceedings under the Central Excises and Salt Act and the Central Excise Rules, were seized.

4. Thereafter the appellant moved this Court under Article 226 of the Constitution, and obtained a Rule Nisi, and an interim order directing that the seized documents including all books and papers should be kept forthwith in steel boxes and these boxes should be sealed and the respondents should not examine or look into the books until further orders. Liberty was given to the respondents to apply for variation of the interim order upon notice to the appellant. Pursuant to this liberty, the Respondent 1 moved an application for variation of the interim order to enable the Assistant Collector of Central Excise, Calcutta, to examine and inspect the books and documents, a list of which was annexed to the petition. On this application, an order was made on December 3, 1969 by which it was provided that the Assistant Collector of Central Excise, Calcutta III, and Ahibhusan Chatterjee, Superintendent of Central Excise, should be at liberty to take inspection of the seized documents; but it was also provided that the respondents should not proceed against the applicants on the basis of such inspection. It was further ordered that the variation would not prevent the respondents from proceeding against other parties. There were certain other directions that inspection should be taken in the presence of the appellant and upon notice to it. This appeal is directed against this order.

5. In effect and in substance, the order which is the subject-matter of challenge in this appeal is one for inspection of certain documents which have been seized by the respondents. The question, therefore, is whether such an order is appealable. Mr. Goho, learned counsel for the appellant, contended that the order was a variation or modification of the original order of injunction made on May 16, 1968, by which the respondents were restrained from examining or looking into the books until further orders. It was argued that since the order under appeal has the effect of affecting the order of injunction, it should be held to be an appealable order.

It was also submitted that the order was an order under Order 39, Rule 4 of the Code of Civil Procedure and as such, it was appealable under Order 43, Rule 1 (r) of the Civil Procedure Code.

6. It seems to us that although the order partly has the effect of varying the order of injunction made on May 16, 1968, in effect and in substance it is an order for inspection of documents seized. All that the order provides is that inspection may be taken of the documents, but the respondents are restrained from proceeding against the appellant on the basis of such inspection. Liberty has been given to them to proceed against others on the materials obtained on such inspection. Therefore, the order for inspection does not in any manner prejudice or affect the appellant.

7. Counsel for the appellant next contended that it was a judgment within the meaning of Clause 15 of the Letters Patent, inasmuch as the respondents have been given the right to inspect the documents, and one of the prayers in the Writ Petition was for an injunction restraining such inspection. Therefore, he submitted that the claim to inspect documents was one of the disputes in the main Rule. In support of this contention, reliance was placed on the Bench decision of this Court reported in ILR (1961) 1 Cal 317 = (AIR 1960 Cal 582). In that case, an injunction was issued restraining issue of a cinema licence pending disposal of the Rule. This injunction was varied and modified by an order which provided that the injunction should be dissolved except that no permanent licence should be issued until disposal of the Rule but a temporary licence might be granted. The issue of a licence itself was the subject-matter of an order of injunction and it was that order of injunction which was dissolved by directing the issue of a temporary licence. It was, therefore, held that it was a judgment within the meaning of Clause 15 of the Letters Patent. We do not think that this decision is of any assistance to the appellant.

8. Mr. Bhabra, counsel for the Respondents submitted, on the other hand, that the order under appeal was a plain order for inspection and nothing more. He argued that such an order was not appealable. In support of this contention he relied on a decision in (1872) 9 Bom HCR 398. In that case, an order for inspection of books of account was made. It was held that such an order was not appealable. Reliance was next placed by Mr. Bhabra on another decision of the Bombay High Court in (1909) 11 Bom LR 248 in which it was held that no appeal lay from an interlocutory order allowing free and complete inspection of documents. Reliance was next placed on a decision of this Court in AIR 1961 Cal 578 (SB). This decision is an authority for the proposition that the

power of search and seizure is an overriding power of the State for the protection of social security and that power is regulated by law. The question in that case was whether a search and seizure was an interference with the right to hold property. Counsel for the respondents also relied on a decision of this Court in (1971) 75 Cal WN 233. In that case it was held that an order refusing ad interim injunction under Order 39, Rule 1 or Rule 2 was a final order and was appealable. This decision has no application to the facts in this case because we are not concerned with an order refusing an injunction but with an order varying or modifying an order of injunction for the purpose of giving inspection to certain documents.

9. In our view, the order under appeal is only an order for inspection of the documents seized. Although to the extent that inspection has been allowed, the order is a variation of the interim order issued, such variation does not, in our view, make the order any the less an order for inspection of documents. Such an order, in our view, is not an appealable order. It is to be noticed that in the Rule petition itself there was a prayer for injunction restraining the respondents from examining or looking into the books and documents seized by the respondents. An order for injunction was made by the Court when the Rule Nisi was issued. Thereafter the respondents made an application for variation of the order of injunction and it is on that application that the order under appeal was made.

10. We cannot also accept the contention of counsel for the appellant that the order is a judgment within the meaning of Cl. 15 of the Letters Patent. The order does not dispose of the controversy between the parties, nor does it affect the merit of the question between the parties by determining any right or liability. Although there is a prayer in the writ petition for an injunction restraining the appellants, their servants and agents from examining or looking into any of the seized documents until disposal of the application, that prayer is plainly a prayer for interim relief. The main and the real controversy between the parties, as appears from prayers (a) and (b) of the writ petition, is the issue of an authorisation dated May 11, 1968 for search and seizure of books and documents. The prayer for ad interim injunction until disposal of the application is no part of the controversy between the parties and the order under appeal cannot be said to have affected the controversy between the parties as pleaded in the writ petition.

11. There is one other matter to be considered which seems to us to have a good deal of bearing on this appeal. Counsel for the respondents relied on a decision of the Supreme Court in the New

Central Jute Mills Co. Ltd. v. Asst. Collector of Central Excise, AIR 1971 SC 454. In that case, the same questions were involved and the appellant was New Central Jute Mills Co. Ltd. An order for search and seizure of books and documents was issued upon information claimed to have been received by the Excise authorities that ammonia made for manufacture of fertiliser, on which the reduced duty of Rs. 25/- per metric tonne was paid as against the standard duty of Rs. 125/- per metric tonne, was diverted to other users. The appellant challenged the order for search and seizure as also the seizure itself on various grounds viz., (1) that Section 12 of the Central Excises and Salt Act 1944 was void as the powers delegated to the Central Government were excessive; (2) that the Sea Customs Act 1878 having been repealed, it was not open to the Central Government under Section 12 of the Act to apply Section 105 (1) of the Customs Act, 1962; (3) that the search and seizure made by the respondents were not in accordance with Section 105 of the Customs Act 1962. All these contentions, however, were rejected by the Supreme Court. Although the question of validity or legality of the search and seizure is not a matter for consideration in this appeal, the decision of the Supreme Court mentioned above is of considerable importance in this appeal for another reason. The appellant before the Supreme Court was New Central Jute Mills Co. Ltd. and the appellant before us is, according to the affidavit in reply affirmed by Lakshmi Narayan Burman on May 12, 1969, the selling agent of some other products of the same New Central Jute Mills Co. Ltd. The facts involved in the appeal before the Supreme Court are identical with the facts in the writ petition out of which this appeal arises. Two of the questions canvassed before the Supreme Court by the New Central Jute Mills Co. Ltd., are the same as the two questions raised in the appellant's writ petition in this Court. One of the grounds raised by the appellant in the writ petition is that S. 12 of the Central Excises and Salt Act, 1944 is ultra vires the Central Legislature on account of excessive and unauthorised delegation of essential legislative functions. This ground is the same as the first ground urged before the Supreme Court in the case noticed earlier. The second common ground is that the issue of the authorisation for search and seizure was without jurisdiction and null and void. The Supreme Court in dismissing the appeal of New Central Jute Mills Co. Ltd., rejected both these contentions.

12. We are not concerned in this appeal with the merits of the appellant's writ petition which is now pending and we refrain from expressing any views on them. But in considering if there are prima facie grounds for interfering with the order vary-

ing the order of injunction, we cannot overlook or ignore the impact of the decision of the Supreme Court on the appellant's pending writ petition. The challenge thrown by the New Central Jute Mills Co. Ltd., AIR 1971 SC 454 to the validity of the authorization has been rejected by the Supreme Court as mentioned earlier and to that extent, at any rate, the contentions advanced by the appellant in the writ petition now pending in the trial Court must fail. It is also to be noticed that although the writ petition appears to us to be ready for hearing since May 12, 1969, instead of taking steps for expeditious hearing of the rule itself the appellant has chosen to prefer this appeal against the interim order varying the order of injunction.

13. Keeping in mind the decision of the Supreme Court it seems to us that it cannot be said that the appellant is entitled to contend that the order under appeal should be set aside. In our view the appellant has failed to make out any grounds for interfering with the order under appeal. We should also notice that in the appeal before the Supreme Court the appellant was New Central Jute Mills Co. Ltd., AIR 1971 SC 454, who is the principal of the appellant before us. It appears to us that the first attempt to stall the proceedings by challenging the authorization on various grounds having failed, the appellant before us is now making a second attempt for the same purpose. We see no reason to interfere with the order of the Court below.

14. We should also notice that the order varying the interim order by the trial Court, which is the subject-matter of appeal, is a discretionary order and the Court below in making the order has taken into consideration the rights of the various parties and has fully protected the appellant by providing that no steps should be taken against the appellant on materials obtained upon inspection of the books and documents. In our view, both on the grounds that the appellant has no prima facie right to the variation sought for and also on the ground that the order is a discretionary order this appeal must fail and is accordingly dismissed with costs. All interim orders are vacated.

P. B. MUKHARJI, C. J.:— 15. I agree.

Appeal dismissed.

AIR 1972 CALCUTTA 401 (V 59 C 82)

P. B. MUKHARJI, C. J., AND B. C. MITRA, J.

The Collector of Customs, Calcutta and others, Appellant v. Biswanath Mukherjee, Respondent.

Appeal No. 183 of 1970, Matter No. 435 of 1968, D/- 18-2-1971.

EP/EP/C935/72/MNT/VBB

1972 Cal/26 X G—21

(A) Constitution of India, Article 226 — Domestic enquiry — Charge sheet — Interpretation of — Natural justice — Violation of.

The proper way of the interpreting charge-sheet in disciplinary proceedings is not to be technically and legalistically strict as in the case of a charge-sheet in criminal proceedings. It should be fairly and reasonably interpreted in a common sense way to see that there is a plain statement of the thing complained of as wrong so that the party complained against may be put on his defence to meet the allegation.

Where in disciplinary proceedings under the Customs Act the words in the charge-sheet were "Shri B. M. was found to be in possession of assets.... giving rise to a presumption that....." and the High Court quashed the order in disciplinary proceedings on the ground that the words 'found' and 'giving rise to presumption' indicated bias of the collector who himself was the punishing authority and the whole proceedings were vitiated the charge being defective and being in violation of principles of natural justice and it was found that the accused had cross-examined the witnesses of employing authority and had led his evidence thereafter it was held that a question of fair interpretation of a charge-sheet in a disciplinary proceeding depended on the context of facts in which the charge was laid. The two words 'found' and 'giving rise to the presumption' were not, enough by themselves to make the charge in this case in limine bad and void on the ground of violation of the principles of natural justice. (1919) 253 US 421, Rel. on. (Paras 2, 4, 5)

(B) Civil P. C. (1908), O. 41, R. 25 and S. 151 — Calcutta High Court Rules Rule 43 — Appeal from order in writ proceedings — Whether remand can be ordered.

The Calcutta High Court Original and Appellate Side Rules apply to appeals from orders in writ proceedings. These rules do not prevent remand in such appeals. Civil P. C. Order 41, Rule 25 also applies to such appeals. Apart from this express provision the High Court in exercise of its inherent powers can also pass an order of remand in such cases. AIR 1965 SC 1818, Foll; AIR 1969 Raj 41 and AIR 1961 SC 1457 and AIR 1966 SC 1153, Rel. on.

(Paras 10, 11)

Cases Referred: Chronological Paras

AIR 1969 Raj 41 = 1969 Raj LW

130, Ramsingh v. State of Rajasthan 11

AIR 1968 Cal 407 = 72 Cal WN 441

(FB), Jay Engineering Works Ltd. v. State of W. B. 11

AIR 1965 SC 1153 = (1965) 2 SCR

547, Gulabchand Chotalal Parikh v. State of Gujarat 11

AIR 1965 SC 1818 = (1966) 1 SCR

190, Narayan Row v. Iswar Lal 11
 AIR 1961 SC 1457 = (1962) 1 SCR
 547, Daryao v. State of U. P. 5
 (1919) 253 US 421 = 64 L Ed 993,
 Federal Trade Commission v. Gratz 4
 G. P. Kar with A. K. Banerjee, for
 Appellant; S. N. Chatterjee with A. Mitter,
 for Respondent.

P. B. MUKHARJI, C. J.:— This is an appeal from an order passed by T. K. Basu J., in an application under Article 226 of the Constitution.

2. This was an application by Biswanath Mukherjee challenging the order dated February 6, 1968 passed by the Collector of Customs, Calcutta whereby the petitioner was removed from service. The only point on which the learned judge decided the whole application was whether the charge-sheet was defective or not, leaving the other points undecided. The decision appealed from was based entirely on the interpretation of two expressions "found" and "giving rise to presumption" in the charge-sheet. The charge-sheet reads as follows:—

"That Sri Biswanath Mukherjee, who had been functioning as Preventive Officer, Grade I, during the period between 20-12-58 and 31-12-59, was found on 1-1-60 to be in possession of assets which are disproportionate to his known sources of income to the extent of about Rs. 61,000/- giving rise to the presumption that the aforesaid Sri Biswanath Mukherjee acquired the said disproportionate assets by obtaining pecuniary advantage to himself by corrupt and illegal means and thereby he had failed to maintain absolute integrity and devotion to the duty as a public servant."

The learned judge came to the conclusion on an interpretation of the expressions "found" and "giving rise to the presumption" that they were indicative of the mind of the Collector of Customs who was also the punishing authority and that he had not kept an open mind. Therefore the learned judge held that the whole proceeding was vitiated and the charge-sheet was defective, being in violation of the principles of natural justice, and vacated the entire proceedings.

3. The learned Judge expressly mentions four other points which were argued before him but on which he expressed no opinion. These are:

(1) the petitioner had been found guilty of a charge of "Benami" which was not in the charge-sheet;

(2) the findings of the Enquiring Officer were perverse as being based on no findings and on mere conjectures and surmise;

(3) certain documents were considered by the Enquiring Officer behind the back of the petitioner; and

(4) the onus of the proof was misplaced by the disciplinary authority as a

result of a confusion between the law regarding disciplinary proceedings under Section 178-A of the Sea Customs Act, 1878.

The learned Judge observed: "It is not necessary for me to express any opinion on the merits of these contentions".

4. The proper way, in our view, of interpreting a charge-sheet of this nature in disciplinary proceedings is not to be technically and legalistically strict as in the case of a charge-sheet in criminal proceedings. This principle is well known. It should be fairly and reasonably interpreted in a common sense way to see that there is a plain statement of the thing complained of as wrong so that the party complained against may be put on his defence to meet the allegation.

In Federal Trade Commission v. Gratz, (1919) 253 U.S. 421, a learned Judge of the American Supreme Court observed:—

"It does not purport to set out the elements of a crime like an indictment of information nor the elements of a cause of action like a declaration of law or a bill in equity. All that is requisite in a complaint for commission is that there be a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defence."

5. Now, a question of fair interpretation of a charge-sheet in a disciplinary proceeding depends on the context of facts in which the charge is laid. The two words "found" and "giving rise to the presumption" are not, in our judgment, enough by themselves to make the charge in this case in limine bad and void on the ground of violation of the principles of natural justice. The word "found" is a general word and it will depend on the context of the situation whether that expression means a bias or conclusion on the mind when the charge-sheet says that the officer is found to be in possession of assets disproportionate to his known sources of income. Secondly, the words "giving rise to the presumption" cannot also be conclusive in this particular context of facts because we find on examination of the records that no presumption in fact was drawn and that it was the employing authorities who led the evidence and there was no misplacing of onus of proof and there was cross-examination by the petitioner of the evidence led by the Customs authority. It was only after the Customs authorities had led their evidence and there was such cross-examination that the petitioner led his evidence. Therefore, in fact there was no misplacement of onus and nothing was presumed against the petitioner. This aspect of the problem was not considered by the learned Judge in his decision. But these considerations reflect on the question

of how the charge should be read in the context.

6. Besides, if principles of natural justice are said to be violated by the use of the two expressions abovenamed, then there are also the other questions of principles of natural justice on which the learned Judge has not come to a finding namely, (1) no evidence, and (2) documents considered by the Enquiring Officer behind the back of the petitioner. It is difficult therefore to judge piecemeal even this question of the principles of natural justice in the present context of facts. One of the four points noticed above includes the question of benami.

7. Now the question of benami does not appear to us to vitiate the proceedings because the whole point was whether the petitioner was in possession of assets disproportionate to his known sources of income. The enquiry is implicit as to whether the assets though may be standing in the name of his mother were in reality his assets. By itself such a consideration would not in our view vitiate the enquiry. It is therefore necessary to come to certain findings on those four questions.

8. With a view to enable us to come to an appropriate conclusion whether on a total view of the present context the charge-sheet was defective on the grounds mentioned above we feel that on the present materials it is difficult to draw that conclusion which the learned Judge has drawn without having before us the findings on the four questions mentioned above.

9. We, therefore, remand the case to the learned Judge for his findings and conclusions on the four points set out above. After the learned Judge comes to a finding on those four points then his findings may be placed before us or the appropriate Bench dealing with these appeals when we or the appropriate Bench dealing with these appeals will finally dispose of the appeal.

10. A point at one stage raised whether there could be a remand in an appeal from an order under Article 226 of the Constitution deciding only on one issue more or less preliminary in nature and leaving the other issues undecided. We have carefully considered the point and we think that our jurisdiction in this respect is unquestionable. This Court has jurisdiction to make an order of remand in such cases. No doubt Article 226 of the Constitution has its own rules and procedures and no doubt it may be arguable that Civil Procedure Code as such may not be wholly applicable without any limitations or qualifications. We support the jurisdiction to order a remand in such cases first by reference to Rule 43 of the Rules of the High Court at Calcutta relating to applications under Article 226 of the Constitution which provides as follows:—

"Appeals from final orders in this jurisdiction shall be made in the same manner as appeals from original orders in the Original Side and appeals from orders in the Appellate Side according as they arise out of Original Side and Appellate Side applications and all rules applicable thereto in the rules of the Original and Appellate Side, respectively, shall apply thereto *mutatis mutandis*."

That means all the Original Side and Appellate Side rules will apply in these appeals. It must necessarily, therefore, follow that as both the Original and Appellate Side rules do not prevent remand orders, remand orders are within the jurisdiction of this Court in these cases relating to appeals from orders under Art. 226 of the Constitution. Secondly there is inherent jurisdiction in this Court of appeal for ends of justice to make an order of remand, quite apart from the specific provisions of the Civil Procedure Code under Order 41, Rule 25.

11. Regarding the applicability of the Civil Procedure Code we need only refer to certain decisions to make the point clear. In *Ramsingh v. State of Rajasthan*, AIR 1969 Raj 41, a Division Bench of the Rajasthan High Court came to the conclusion that even though the provisions of Civil Procedure Code might not directly apply, such of the provisions as were not in conflict with any particular rules of the Rajasthan High Court could apply and in that case the provisions of Order 9, Rule 9 of the Civil Procedure Code were applied. In that decision some of the relevant cases on the point including those of the Supreme Court are discussed and it will be unnecessary for us to repeat them. See particularly the observations at page 47 of that report. The next case to which reference may be made is *Daryao v. State of U. P.*, AIR 1961 SC 1457, which considered the applicability of Section 11 of the Civil Procedure Code. Again in *Gulabchand Chotalal Parikh v. State of Gujarat*, AIR 1965 SC 1153, Section 11 of the Civil Procedure Code was applied. We shall conclude our citation of the authorities of this point by making a reference to the decision in *Narayan Row v. Iswar Lal*, AIR 1965 SC 1818, where the Supreme Court observed at p. 1823 as follows:—

"On a careful review of the provision of the Constitution we are of the opinion that there is no ground for restricting the expression 'civil proceeding' only to those proceedings which arise out of civil suits or proceedings which are tried as civil suits, nor is there any rational basis for excluding from its purview proceedings instituted and tried in the High Court in exercise of its jurisdiction under Art. 226, where the aggrieved party seeks relief against infringement of civil rights by authorities purporting to act in exercise of

powers conferred upon them by revenue statutes. The preliminary objections raised by Counsel for the assessee must therefore fail."

This authority was cited and followed in the *Jay Engineering Works Ltd. v. State of West Bengal*, a Full Bench decision of this Court in 72 Cal WN 441 at p 589 = (AIR 1968 Cal 407).

12. We, therefore, remand the appeal on the four specific points set out above. The costs of this proceeding will be reserved and will abide by the result of the final disposal of the appeal after it comes back from the remand and when it is finally disposed of. The parties will be at liberty to mention this matter to the learned Judge, for expeditious hearing and who will take it up and will deal with these four specific points according to his convenience and to the convenience of the parties.

B. C. MITRA, J.— 13. I agree.
Case remanded.

AIR 1972 CALCUTTA 404 (V 59 C 83)

S. K. CHAKRAVARTI, J.

B. P. Lahiri, Petitioner v. Smt. Jyotirmayee Devi, Opposite Party.

Civil Revn. Case Nos. 577-78 of 1970, D/- 3-2-1971.

(A) W. B. Premises Tenancy Act (12 of 1956), S. 13 — Tenant is not, in a suit for eviction under the Act, entitled to relief under S. 114, T. P. Act. (X-Ref:— T. P. Act. (1882), S. 114). (Para 1)

(B) W. B. Premises Tenancy Act (12 of 1956), Ss. 17, 18, 21 and 22 — Sections 21 and 22 even as amended by Act XXXIV of 1969 would not control S. 17 (1). (X-Ref:— Houses and Rents — W. B. Premises Tenancy (Second Amendment) Act (XXXIV of 1969), Ss. 8 and 9).

Hence, after suit for eviction is filed tenant should, under Section 18 (1), continue to deposit monthly rent before the 15th of the succeeding month. Failure would result in his defence being struck out under Section 17 (3). C. R. Nos. 3896 and 2897 of 1968 (Cal). Followed: (X-Ref: Houses and Rents — W. B. Premises Tenancy (Second Amendment) Act (XXXIV of 1969), Ss. 8 and 9 (Para 2)
Cases Referred: Chronological Paras
C. R. Nos. 3896 and 2897 of 1968 (Cal) 2

Nripen Bhattacharjee, for Petitioner;
S. C. Mitter with S. P. Roy Choudhury, for Opposite Party.

ORDER.— Two common questions arise for decision in these two Rules which were issued at the instance of the defendant in two suits for eviction. The

first one is whether the tenant is entitled to get relief under Section 114 of the Transfer of Property Act, in a suit for eviction under the provisions of the W. B. Premises Tenancy Act. The learned Munsif held that this relief is not open to him, and he is quite right in that view.

2. The second question that arises is as to whether the learned Munsif was justified in rejecting his application filed under Sections 8 and 9 of Act XXXIV of 1969 (West Bengal Premises Tenancy (Second Amendment) Act, 1969). Section 8 amends Section 21 of the Original Act and Section 9 amends Section 22. Section 13 of Act XXXIV of 1969 would show that the amendments by Sections 8 and 9 "shall have effect in respect of suits including appeals which are pending at the date of commencement of this Act." Mr. Bhattacharjee, learned Advocate appearing on behalf of the petitioners submits that the suits are still pending, though the defences against the delivery of possession had been struck out and that under the recent amended Sections 21 and 22 referred to above, the deposits made by the tenant would be quite valid and the order under Section 17 (3) striking out the defence against delivery of possession shall have to be re-opened. It would appear that one of the main grounds as to why the application under Section 17 (3) was allowed, was that the tenant did not make the deposit of rent in the office of the Rent Controller after the institution of the suit within the 15th of the succeeding month. Mr. Bhattacharjee contends that in view of the amended Ss. 21 and 22, the deposits would be valid and those two sections would control actually Section 17 (1) of the Act. I am not in a position to accept these propositions, as correct. Sections 21 and 22 occur in Chapter IV which relates to 'Deposit of Rent'. Sec. 17 occurs in Chapter III which relates to suits and proceedings for eviction. It is clearly stated in Section 18 (1) that after the institution of the suit the tenant "shall thereafter continue to deposit or pay month by month by the 15th of each succeeding month a sum equivalent to rent at that rate." Though thereafter there have been a number of amendments to Section 17 by successive Acts, still this position has not been affected at all. It is obvious, therefore, that after the institution of the suit irrespective of Section 21 or 22, the deposit must be made within the 15th of each succeeding month. In other words, this provision under Section 17 (1) is not controlled by Sections 21 and 22 as amended upto date. This view was also taken by my learned Brother Gupta, J. in C. R. Nos. 3896 and 2897 of 1968 (Cal) between the same parties and I respectfully agree with the observations made therein, though that decision was before Act XXXIV of 1969 had come into opera-

tion. The fact, therefore, remains that the petitioner has not made the deposit even in the office of the Rent Controller after the institution of the suit within the 15th of each succeeding month. In the circumstances, the order striking out the defence under Section 17 (3) cannot be reopened.

3. The Rules, therefore, fail and are accordingly discharged. Each party will bear its own costs in both these Rules.

Petitions dismissed.

AIR 1972 CALCUTTA 405 (V 59 C 84)

PRADYOT KUMAR BANERJEE, J.

M/s. Munilal Bhagwat Sharan and others, Petitioners v. The Chief Commercial Superintendent, Eastern Railway and others, Opposite Parties.

C. R. No. 1932 (W) of 1968, D/- 10-5-1972.

Index Note.— Essential Commodities (Amendment) Act (1967), Ss. 6-A and 6-B — Competent authority issuing show cause notice for confiscating goods without hearing representation of the person affected — Held, that the notice was bad in law.

(Para 6)

Brief note:— Section 6-B of the Essential Commodities Act makes it clear that no confiscation can be made unless the competent authority hears a representation from the person affected. If the authorities do not have an open mind before hearing, the provision for hearing under the statute becomes an idle formality. In this case even at the stage of issuing notice of hearing under Section 6-B of the Act the collector was himself satisfied that a contravention has been made. This cannot be done. The satisfaction that contravention, has in fact taken place can come only after the hearing and not before.

(Para 6)

R. C. Deb, A. C. Bhabra, Somnath Chatterjee, D. P. Bagaria, Ganandra Narayan Roy, Samresh Kumar Nandi, for Petitioners; S. D. Banerjee and Prasanta K. Ghose, for Union of India; S. K. Roy Choudhury, for the Railways; P. K. Sen Gupta and Paritosh Mukherjee, for the Collector; S. M. Sanyal and M. G. Mukherjee, for Opposite Parties.

ORDER:— The petitioner is a partnership firm and deals in foodgrains and oil seeds. The petitioner No. 1 Messrs. Munilal Bhagwat Sharan is the holder for value of several Railway Receipts having been negotiated through Bank in Calcutta, upon payment made by the petitioner firm. The Railway Receipts are quite a number issued between 14th October, 1967 and 15th October, 1967. The said Railway Receipt is for carrying on maize and

bazra from different stations in Haryana to Howrah. It is alleged that the State of Haryana is a surplus State in foodgrains but there was a ban on export of maize from the said State imposed by the Northern Inter Zonal (Movement Control) Order, 1967. It is alleged that the State Government of Haryana lifted the ban on export of maize and other coarse grains including bazra outside the State of Haryana from October, 1967. It is further alleged that an announcement to the said effect was made at Karnal by the then Hon'ble Chief Minister of Haryana on October 11, 1967. The said lifting of ban on the export of maize was broadcast in the news bulletin and was also published in various newspapers. The Tribune, a daily published from Ambala, within the State of Haryana, in its issue dated October, 12, 1967 published the following Press Note:

"Haryana Ban on coarse Grain Movement goes— F. O. S. O. Chandigarh October 11, 1967. The Haryana Government has decided to remove the restriction on the movement on coarse grains produced in the State of Haryana during the current Kharif season says an Official Press Note. The major coarse grains are Bazra, Maize and Jowar."

In the same issue of Tribune it has been published as follows:—

"The Chief Minister disclosed that Haryana Government today ordered the lifting of ban on the export of Bazra, Jowar and Maize to ensure grains of farmers. The Government would also do its best to ensure a suitable price of paddy."

On the basis of this announcement the wagons containing maize and bazra from various stations in the State of Haryana during the period between 12th October, 1967 to 16th October, 1967 were despatched and it was duly booked by the Railway authorities at the despatching stations and the movement was allowed by the Railway authorities without any objections whatsoever. Further in view of the lifting of the ban on export of maize and bazra by the Haryana Government, the District Food Controllers in the State of Haryana under whose jurisdiction the respective despatching Railway Stations referred to in the said Railway Receipts are situate duly authorised the despatch of the goods under the said Railway Receipts and endorsements of such authorisation were also made by the appropriate authorities of Food Department of the State of Haryana. Such authorisation of the export of foodgrains outside the State of Haryana also appears from the memo dated 28th October, 1967 written by the Secretary to the Government of Haryana to the Chief Commercial Superintendent, Eastern Railway wherein it has been stated that though the Government of Haryana allowed to despatch the maize and bazra at Howrah

but when it reached at Howrah the delivery was wrongfully refused. It is stated also that the Railway Receipts presented by the representatives at this office did not bear any export permit numbers and as such this office was not in a position to arrange delivery of the goods unless the petitioners can produce any permit from the Regional Director (Food), Government of India, 8, Esplanade East, Calcutta.

It is alleged that the similar consignment of maize despatched from Haryana to Delhi and other stations were duly released. It is also alleged that such delivery was effected in different stations of West Bengal. Be that as it may, the Railway authorities of Howrah refused to deliver the maize to the petitioner. Thereafter the Collector of Howrah issued a notice on the petitioner under Section 8-B of the Essential Commodities Act, 1955 to make representation in writing against the maize exported by the petitioner. It is alleged that the petitioners have abetted the export of or exported 229 bags of maize from Karnal to Howrah without any permit. Being aggrieved by the said notice the petitioner moved this Court and obtained the present rule. Under the order of the Court the maize etc. imported by the petitioner was allowed to be sold by the Joint Receiver appointed by this Court and after deducting their remuneration and also other expenses, the balance of sale proceed was directed to be deposited in Court.

2. Mr. R. C. Deb on behalf of the petitioner contended firstly that the maize was imported in accordance with law, inasmuch as, Haryana Government withdrew the ban for importation. Secondly Mr. Deb contended that by the notice in Annexure "B" to the petition, the authorities concerned have already made up their mind before the issue of the notice, about the confiscation and as such the officer concerned had no open mind which is essential in a matter of a quasi-judicial proceeding.

3. Mr. Sankar Das Banerjee on behalf of the respondent contended that there was no order made under the Essential Commodities Act withdrawing the ban imposed under Clause (3) of the Maize Control Order. Secondly it is contended by Mr. Banerjee that as the respondent invited the representation from the petitioner it cannot be said that the said respondent had already a closed mind in regard to the matter.

4. Under the Northern Inter Zonal Maize (Movement Control) Order, 1967, it is incumbent on the part of the exporter to take out a permit either from the Central Government or from the State Government. It appears that no statutory form of permits have been prescribed by the said order at the relevant time. Clause (3) of the Northern Inter Zonal Maize (Move-

ment Control) Order, 1967 runs as follows:—

"3. Prohibition of Export and Import of Maize.—

(1) No person shall export or attempt to export or abet the export of maize except under and in accordance with a permit issued by the Central Government or by the Government of the State from which such maize is to be exported or by an officer authorised in that behalf by the Central Government, or, as the case may be, by the Government of that State.

(2) No person shall import or attempt to import or abet the import of maize except under and in accordance with a permit issued by the Central Government or by the Government of the State into which such maize is to be imported or by an officer authorised in that behalf by the Central Government or, as the case may be, by the Government of that State:

Provided that nothing contained in sub-clause (1) or sub-cl. (2) shall apply to—

- (a) the export or import of maize—
 - (i) not exceeding one kilogram in weight in the aggregate by a bona fide traveller as part of his luggage;
 - (ii) on Government account;
 - (iii) under and in accordance with Military Credit Notes;
 - (iv) by or under the authority of the Food Corporation of India established under the Food Corporations Act, 1964 (37 of 1964);

(b) the export of maize from any place within the State of Haryana or Punjab to any place within the Union Territory of Chandigarh;

(c) the import of maize from any place within the State of Haryana or Punjab into any place within the Union Territory of Chandigarh."

It is quite clear therefore that no exportation of maize can be made without a permit from the prescribed authorities. In this case, the dispute is that though Haryana Government or its Chief Minister by public meeting or by a Press Note stated that the ban is withdrawn but no order under the statute was however passed. It is argued that the Railway Receipts were signed by the authorities of the Food Department but it does not appear that the authority which might have counter-signed the Railway Receipts was authorised person within the meaning of Clause (3) of the Northern Inter Zonal Maize (Movement Control) Order, 1967. At the point of time, therefore, the ban as contained in Clause (3) was in force and therefore it must be said that the permit is necessary for the exportation of the goods outside the State. It is very unfortunate, however, because of the statement made by the Chief Minister of Haryana and/or Press Note issued by the Haryana Government, the petitioner or the consignor has been

caught on the wrong foot, though prima facie it does not appear that the consignor was wrong and in fact he acted in the bona fide belief that the order has been withdrawn. It is the Haryana Government who is to be blamed for the petitioner's difficulties.

5. Be that as it may, under the law it is necessary to have a permission for the exportation of goods and if no person is authorised by the said Government, for issuing permit it is for the petitioner to apply either to the Central Government or to the State Government for the permit.

6. The next question, Mr. Deb contended, is on the basis of the show cause notice as issued under Sections 6-A and 6-B of the Essential Commodities Act, 1967. Sections 6-A and 6-B of the said Act make the following provisions:—

"6-A. Where any foodgrains, edible oilseeds or edible oils are seized in pursuance of an order made under Section 3 in relation thereto, they may be produced, without any unreasonable delay, before the Collector of the District or the Presidency-town in which such foodgrains, edible oilseeds or edible oils are seized and whether or not a prosecution is instituted for the contravention of such order, the Collector, if satisfied that there has been a contravention of such order, may order confiscation of the foodgrains, edible oilseeds or edible oils:

Provided that without prejudice to any action which may be taken under any other provision of this Act, no foodgrains or edible oilseeds seized in pursuance of an order made under Section 3 in relation thereto from a producer shall, if the seized foodgrains or edible oilseeds have been produced by him, be confiscated under this section.

6-B. No order confiscating any foodgrains, edible oilseeds or edible oils shall be made under Section 6-A unless the owner of such articles or the person from whom they are seized—

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the articles;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) is given a reasonable opportunity of being heard in the matter."

Under Section 6-B of the Essential Commodities Act the authorised Officer in the present case is the Collector who is empowered to confiscate the maize exported if he is satisfied that the same has been done in contravention of any order under the Essential Commodities Act or orders made thereunder. In my opinion, Sec. 6-B of the Essential Commodities Act makes

it clear that no confiscation should be made unless the competent authority hears a representation from the person affected. After hearing the matter and after that if the respondent Collector is satisfied that there was such a contravention, then the confiscation can be ordered. Before the stage of hearing, the authorities concerned must have an open mind in regard to the matter. If the authorities do not have the open mind before hearing, the provision for hearing under the statute becomes an idle formality. In this case unfortunately, it appears to me, that even at the stage of issuing notice for hearing under Section 6-B of the Essential Commodities Act, the Collector of Howrah was himself satisfied that a contravention has been made. In my opinion, this cannot be done. The satisfaction can come only after hearing the petitioner and not before that. The respondent in the impugned notice has stated as follows:—

"NOTICE.

To M/s. Manilal Bhagat Saran, 7, Baikuntha Sen Lane, Calcutta.

Under Section 6-B of the Essential Commodities Act, 1955 (Act X of 1955).

Whereas information has been received that you have abetted the export of/exported 229 bags of Maize from Haryana to West Bengal in Wagon No. SE 47066 from Karnal Railway Station on 17-10-67 without any permit in violation of Rule 3 of the Northern Inter-Zonal Maize (Movement Control) Order 1967 which is an offence under S. 7 of the Essential Commodities Act, 1955.

Whereas I am empowered under Section 6-A of the Essential Commodities Act for ordering the confiscation of the foodgrains (Maize) which has been exported in contravention of the above order.

Whereas I am satisfied on perusal of the documents produced before me and hearing that a contravention has been made by you of the Provisions of Rule 3 of the Northern Inter-Zonal Maize (Movement Control) Order 1967.

You are therefore given this notice to make your representation in writing by 18-12-67 against the ground for confiscation of the Maize exported by you.

Sd/- Illegible

27-11-67.

Collector."

From a perusal of the said annexure, it appears to me, that the respondent Collector has come to a finding that the petitioners have abetted the export of/exported 229 bags of Maize from Haryana to West Bengal without any permit and secondly he was satisfied that a contravention has been made under the provision of Rule 3 of the Northern Inter-Zonal Maize (Movement Control) Order 1967 and thereafter he has given notice to show cause against the ground of confiscation of maize export-

ed. If the Collector of Howrah has already made up his mind that there is exportation of maize without a permit, the Collector has no other option but to confiscate the maize. Before the hearing given in the representation against the allegation under Sections 6-A or 6-B it is incumbent on the part of the Collector to keep an open mind and give the opportunity to the petitioner for making representation that there has been no contravention under Rule 3 of the Northern inter-Zonal Maize (Movement Control) Order 1967, but reading the terms of the notice it is clear that the Collector was already satisfied that there is such a contravention.

7. Mr. Banerjee contended that as it has been stated that the Collector of Howrah heard the representation against the ground for confiscation it cannot be said that the Collector did not have an open mind which was necessary. Reading the show cause notice, I however, cannot accept Mr. Banerjee's contention. In my opinion, the notice read as a whole makes it clear that the Collector was satisfied that there was a contravention and show cause notice only given for the confiscation, should not be allowed to stand. In my opinion, such notice cannot be sustained and must be quashed.

8. The Rule is therefore made absolute to the extent that the notice under Section 6-B of the Essential Commodities Act, 1955 is set aside.

9. There will be no order as to costs.

10. Let operation of this order remain stayed for six weeks from today as prayed for by Mr. Mukherjee.

Rule made absolute.

AIR 1972 CALCUTTA 408 (V 59 C 85)
BANERJEE, J.

Saugar Electricity Supply, Petitioner v.
M. P. Electric Board, Respondents.

Matter No. 295 of 1967, D/- 9-5-1972.

Index Note:— (A) Electricity (Supply) Act (1948), Sch. 7, Item C (a) (iii) — Life of diesel electric set — In computing its actual number of hours the set had run, cannot be taken into account.

(Para 4)

ORDER:— In this rule the petitioner challenges the order by which the respondent demanded a sum of Rs. 26,164/- per annum as rent of 500 KW Mirlees Diesel Set. It is not necessary for me to refer the facts of the case in detail but it will suffice to say that while the rent payable was fixed at Rs. 26,164/- per annum on the basis of the facts that fixing the remaining life of the set, the department

stated that the set is to be taken as life of 12 years. The petitioner stated that the mode of fixing the rental on that basis was patently wrong and contrary to the Seventh Schedule of the Act. The case of the petitioner, as made out in the petition, is that the set was purchased in 1950 for a sum of £13000 and admittedly there is no dispute that the costs of the set was originally Rs. 2,95,000/-. On the basis of the said amount, it is stated by the petitioner, that the rent as fixed by the respondent is wholly illegal. It is further stated that the rent so fixed was in violation of the Seventh Schedule of the Electricity (Supply) Act, 1948. For the purpose of the Seventh Schedule we may set out the Seventh Schedule which provides as follows:

"C. Assets purchased new—

(a) Plant and machinery in generating stations, including plant foundations—

- (i) Hydro-electric .. Thirty-five
- (ii) Steam-electric .. Twenty-five
- (iii) diesel-electric .. Fifteen.

(b) Cooling towers and circulating water systems .. Thirty.

(c) Hydraulic works forming part of a hydro-electric system including—

(i) dams, spillways, weirs, canals, reinforced concrete flumes and syphons .. One hundred.

(ii) reinforced, concrete pipe-line and surge tanks, steel pipelines, sluice gates, steel surge tanks, hydraulic control valves and other hydraulic works .. Forty."

It is admitted that this is a Diesel electric set and the life under the Schedule of the table is 15 years from the date of purchase. It is also relevant for me to set out D to the Seventh Schedule which provides as follows:—

D. Assets purchased secondhand and assets not otherwise provided for in this Table.

Such reasonable period as the State Government determines in each case having regard to the nature, age and condition of the asset at the time of its acquisition by the owner."

2. Mr. Subrata Kumar Roy Choudhury on behalf of the petitioner contended that admittedly the set was purchased in 1952 or 1953. He took 1953 as the date when set was purchased. Applying the principle therefore the set was purchased in 1953 and it is more than 12 years old. Therefore it is argued by Mr. Roy Choudhury that applying the Seventh Schedule the fixation of Rs. 26,164/- per annum as rent is invalid.

3. On behalf of the respondent however, Mr. Das contended that the set did not run for most of the time. In the Seventh Schedule it is computed on the

normal average annual running hours of a continuously operating power station of an electric utility undertaking. It is argued that the life of 15 years is based on 3000 working hours per year and therefore it is argued that the total working of 45000 hours is a life of a machine as the particular machine did only run for 8,820 hours, the fixation of the rent was made accordingly. This case of the respondent is to be found in paragraphs 27 and 28 of the affidavit-in-opposition.

4. In my opinion, the section, as it stands today, cannot be construed as argued by Mr. Das. It is not stated therein that the working hour is to be taken into consideration for the purpose of computing 15 years run of the machine. It must be stated that the machine itself ran about 12 years admittedly and therefore to compute rent on that basis of working hours during the period cannot be correct on provision of the statute as it stands. Mr. Das further contended that this is a second hand machine. Even if, that is so, there must be an order by the State Government under 'D' of the Seventh Schedule but no such determination has been made. In the circumstances, therefore, the order is set aside and the matter goes back to the competent authority either to fix the rents on the basis of the Seventh Schedule C or D as the case may be and thereafter proceed in accordance with law. Petition allowed.

AIR 1972 CALCUTTA 409 (V 39 C 86)
AMIYA KUMAR MOOKERJEE, J.

Dwijapada Halder, Petitioner v. Prafulla Chandra Halder, Opposite Party.

Civil Revn. No. 1118 of 1970, D/- 30-8-1972.

(A) W. B. Land Reforms Act (10 of 1956), Ss. 5 (5) and 8 (1) — Non-notified co-sharer could apply for pre-emption under Section 8 (1) within 3 years from date of notice of transfer under Section 5 (5). AIR 1948 Cal 48 (SB), Followed. (Para 4)

(B) W. B. Land Reforms Act (10 of 1956), S. 8 — Section does not provide for rejection of application for pre-emption for non-deposit of consideration amount while applying. (X-Ref:— Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 26F (2).) (X-Ref:— W. B. Non-Agricultural Tenancy Act (20 of 1949), S. 24 (2).)

Unlike Section 8 of the W. Bengal Land Reforms Act, Section 26-F (2) of Bengal Tenancy Act and Section 24 (2) of W. B. Non-Agricultural Tenancy Act provide that application for pre-emption shall be rejected if applicant fails to deposit the consideration money at the time of apply-

ing. Notwithstanding such provisions, applications thereunder cannot be rejected provided the amount is paid subsequently but within period of limitation under general law. AIR 1948 Cal 144 and (1955) 59 Cal WN 939, Followed. AIR 1936 Cal 576, Dissented from.

(Paras 5 & 8)

(C) W. B. Land Reforms Act (10 of 1956), Ss. 8 (1) and 9 (1) — Where consideration money is in dispute pre-emptor may without suffering rejection of his application deposit deficiency if any determined by the Revenue Officer within time allowed by him.

Where pre-emptor deposited only the value of the land but not value of some structure mentioned in the Kobala in question on the ground that it did not exist, rejection of his application for non-deposit of full value without enquiring into the truth of the allegation and determining further consideration money payable, if any, held, invalid. (Para 12)

Cases Referred: Chronological Paras

(1955) 59 Cal WN 939, Prabartak

Jute Mills Ltd. v. Anila Devi 7

AIR 1948 Cal 48 = 52 Cal WN

64 (SB); Asmatali Sharip v. Muja-

harali Sardar 4

AIR 1948 Cal 144, Nural Hossain

Mallick v. Mihlal Sheikh 6

AIR 1936 Cal 576 = ILR (1937) I

Cal 112 = 40 Cal WN 1023,

Sachindra Nath Chakraborty v.

Trailakyanath Chakraborty 6

Bankim Chandra Ray and Bikash

Chandra Mondal, for Petitioner; Asish

Kumar Sanyal, for Opposite Party.

ORDER:— This Rule is directed against an appellate order passed in an appeal under Section 9 (6) of the West Bengal Land Reforms Act, 1955. A short and interesting point arises for consideration in the present Rule is, whether an application for pre-emption under Sec. 8 (1) of the West Bengal Land Reforms Act (hereinafter referred to as the Act) is liable to be rejected when a co-sharer of a holding made a short deposit of the consideration money at the time of filing such application.

2. The petitioner filed an application under Section 8 (1) of the Act and deposited Rs. 750/- being the value of the land as stated in the kobala, but he did not deposit Rs. 250/- being the value of the structure mentioned in the Conveyance because, according to him, there was no structure on the land, as such the value of the structure stated in the kobala was a fictitious one. The Revenue Officer dismissed the petitioner's application for pre-emption on two grounds viz., that the required consideration money was not deposited by the petitioner and the lands were not agricultural lands. On appeal, the appellate tribunal found that the lands

were agricultural lands but dismissed the petitioner's appeal, upon the view, that the petitioner failed to comply with the statutory obligation cast upon him in the matter of depositing the consideration money together with compensation thereon. The petitioner being aggrieved against the said appellate order, moved this Court on an application under Article 227 of the Constitution and obtained the present Rule.

3. Mr. Roy, appearing in support of the Rule contended, that the learned Munsif failed to consider that the petitioner specifically raised a dispute as regards the quantum of consideration money paid by the opposite party. The Revenue Officer under Section 9 (1) of the Act after determining the said dispute should have directed the petitioner to deposit such further amount within a specified time. If the petitioner failed to deposit such amount within such time, in that case only, the petitioner's application under Section 8 (1) of the Act should have been dismissed. The Revenue Officer has got no power or jurisdiction to dismiss the petitioner's application on account of short deposit of the consideration money.

4. Admittedly the present petitioner is a non-notified co-sharer. Article 137 of the New Limitation Act corresponding to Article 181 of the Old Act apply to an application by a co-sharer who has not been served with a notice of transfer under Section 5 (5) of the Act and his application would be in time, if made within three years from the date of the transfer (*Vide, Asmatoli Sharip v. Mufaharali Sardar*, 52 Cal WN 64 = (AIR 1948 Cal 48 (SB)). Therefore, the application for pre-emption in the instant case is within time.

5. Under Section 26-F (2) of the Bengal Tenancy Act, unless the applicant at the time of making an application for pre-emption deposits in the Court the amount of consideration money his application shall be dismissed. Similar provisions are to be found in sub-section (2) of Section 24 of the West Bengal Non-Agricultural Tenancy Act. But such provisions are absent in Section 8 of the Act.

6. A single Bench decision of this Court held in *Sachindra Nath Chakraborty v. Trailakyanath Chakraborty*, 40 Cal WN 1023 = AIR 1936 Cal 576 = ILR (1937) 1 Cal 112, that the Court has no power to extend the time for making a deposit by a co-applicant beyond the period of time mentioned in clause (a) of sub-section (4) of S. 26-F of the Bengal Tenancy Act. A Division Bench of this Court in *Nural Hossain Mallick v. Mihilal Sheikh*, AIR 1948 Cal 144, dissented from the above single Bench decision and held, that an application for pre-emption under Section 26-F of the Bengal Tenancy Act will not be dismissed if the circumstances

are such that the deposit may be deemed to have been made at the time of making the application.

7. Another Division Bench of this Court in *Prabartak Jute Mills Ltd. v. Anila Devi*, (1955) 59 Cal WN 939, held, that even in cases where notice under Sec. 23 of the West Bengal Non-Agricultural Tenancy Act had been served, though deposit is essential, the time stated in Section 24 of the West Bengal Non-Agricultural Tenancy Act, is not so essential as to compel the Court to dismiss the application if such deposit was not made at the time of filing the petition. The date of deposit might be treated as the date when the petition is presented and/or the application for pre-emption is made and an order for pre-emption can be made provided such deposit was made, within the time prescribed by general law of limitation.

8. Where there are mandatory provisions in the statute that an application for pre-emption shall be rejected if the applicant fails to deposit the consideration money at the time of making such application, even then in view of the above decisions of this Court as referred to above, such applications could not be rejected if the consideration money is paid subsequently within the period of limitation.

9. In the instant case, the balance of consideration money had not been paid by the petitioner. The Revenue Officer did not direct the petitioner to deposit any such amount. Section 9 (1) of the Act deals with the procedure to be followed where an application under Section 8 of the Act is filed. Notices are required to be served by the Revenue Officer to the transferee and also on the land which forms the subject-matter of the application. The transferee or any person interested may prove the consideration money paid for the transfer and other sums viz. rent, revenue, cess, tax etc. paid in respect of the land. The Revenue Officer may, after such enquiry as he considers necessary, direct the applicant to deposit such further sum, if any, within the time specified by him, and all such sums being deposited shall make an order that the amount of the consideration money together with such other sums as are proved, have been paid by the transferee. The Revenue Officer, thereafter, shall make a further order that the portion or share of the holding to be transferred to the applicant.

10. A fact is said to be proved when, after considering the matter before it, the court either believes it to exist, or considers its existence so probably that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

11. In the instant case, the petitioner believed that as there was no structure on the land, the value of the structure as shown in the kobala was fictitious,

So upon the assumption of non-existence of the structure, he deposited the value of the land but did not deposit Rs. 250/- the value of the structure. Under these circumstances, obviously the onus lies upon the transferee to prove that the consideration money so deposited by the pre-emptor was insufficient as it did not include the value of the structure standing on the land. The Revenue Officer after making an enquiry if he is satisfied that there is a structure on the land and the value of the structure as shown in the kobala is not fictitious, in that case, he should direct the applicant to deposit such further amount as he might deem fit and proper within a specified time and when such further deposit having been made, the Revenue Officer shall order for transfer of the portion of the share of the holding to the applicant.

12. So, in my opinion, the Revenue Officer or the Appellate Tribunal has got no jurisdiction to reject the petitioner's application under Section 8 (1) of the Act simply because the applicant made a short deposit of the consideration money. Where the consideration money is disputed, it would be sufficient compliance of Section 8 (1) of the Act, if the applicant deposits the balance of consideration money when the Revenue Officer makes a final order either granting or refusing pre-emption after the amount of consideration money payable by the pre-emptor, has been adjudicated under Section 9 (1) of the Act.

13. In the result, this Rule is made absolute, the impugned orders of the Appellate Tribunal as well as the Revenue Officer are set aside and the case is remitted back to the Revenue Officer to determine afresh the petitioner's application under Section 8 (1) of the Act after giving the petitioner opportunity to deposit such further amount as the Revenue Officer might deem fit and proper after making a proper enquiry, within a specified time and dispose of the petitioner's application in accordance with law. If the petitioner fails to make the deposit such further amount within the time as directed by the Revenue Officer, in that case, his application under Section 8 (1) of the Act will stand rejected.

14. There will be no order as to costs.

15. Let the records go down to the Revenue Officer as expeditiously as possible.

Petition allowed.

AIR 1972 CALCUTTA 411 (V 59 C 87)
SANKAR PROSAD MITRA AND ARUN
KUMAR JANAH, JJ.

Tirthapada Nag and others, Petitioners v. Ram Babu Gupta and another, Opposite Parties.

Civil Rule No. 4366 of 1967, D/- 22-3-1972.

West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 (1) (f) (as amended by Act 62 of 1950) — Section 9 (1) (f) does not violate Art. 19 (1) (f) or Art. 14 of Constitution. (X-Ref:— Constitution of India, Art. 19 (1) (f) and Art. 14).

The object of amending Section 9 (1) (f) was to provide inducements to the landlords for building new houses and since the amended provisions cumulatively are more advantageous to the landlords than the old provisions the amended Section 9 (1) (f) does not violate Article 19 (1) (f) of the Constitution on the ground that it imposes unreasonable restrictions on landlords; nor can it be said to violate Article 14 on the ground of discrimination between constructions made before, 31-12-1949 and those made after that date. AIR 1952 Cal 273 and AIR 1958 SC 538 and AIR 1953 Bom 174 and AIR 1952 All 703 (FB), Rel. on; AIR 1954 SC 170 and AIR 1962 SC 821, Dist.

(Paras 21, 23, 26, 28, 29)

Cases Referred: Chronological Paras
AIR 1962 SC 821 = 1962 Supp (2)

SCR 411, Jayvantsinghji Ranmal-singhji v. State of Gujarat 14, 15

AIR 1958 SC 538 = 1959 SCR 279,
Ram Krishna Dalmia v. S. R. Tendol-
kar 22

AIR 1954 SC 170 = 1954 SCR 558,
State of West Bengal v. Mrs. Bela
Banerjee 14

AIR 1953 Bom 174 = 54 Bom LR
950, A. S. Ruben v. Narayan Moresh-
war 24

AIR 1952 All 703 = 1952 All LJ
208 (FB), Raman Das v. State of
U. P. 27

AIR 1952 Cal 273 = 55 Cal WN
719, Iswari Prosad Goenka v. N. R.
Sen 15

R. K. Banerjee, Saktinath Mukherjee and Abhijit Banerjee, for Petitioners; G. N. Roy and S. Nandy, for Opposite Parties; Gouri Mitter (Advocate General), Somen Bose and B. C. Basak, for the State.

MITRA, J.:— This Rule is against an order of the Second Additional District Judge at Howrah in Miscellaneous Appeal No. 262 of 1966. The order was made on the 18th September, 1967.

2. On the 30th March, 1950 the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 came into force. Section 9 (1) (f) of the Act reads thus:—

"In any of the following cases, the Controller shall on application by any landlord or tenant, fix the standard rent as set forth hereunder:—

Where any premises have been wholly or substantially constructed after the 31st day of December, 1949, by fixing the standard rent payable for one year at a rate not less than four per centum and not more than six per centum of the reasonable costs of construction added to the reasonable price of the land included in the premises as on the date of commencement of such construction taking into account the prevailing rate of rent in the locality for similar accommodation with similar advantages and amenities and the comparative advantages or disadvantages of accommodation in the premises:

Provided that where the premises whose standard rent is to be fixed form a part of the construction the standard rent shall be fixed at a rate which is fairly proportionate to the total standard rent of the entire construction."

3. On November 30, 1950 the above provisions were amended by the Amendment Act 62 of 1950. The new Section 9 (1) (f) stood as follows:—

"In any of the following cases, the Controller shall on application by any landlord or tenant, fix the standard rent as set forth hereunder:—

Where any premises have been wholly or are substantially constructed after the 31st day of December, 1949, by fixing the standard rent payable for one year at a rate equal to six per centum of the actual cost of construction as determined by the Controller added to the market price as on the 31st day of December, 1946, of the land included in the premises or to the market price of the said land as on the date of the completion of the construction whichever is less:

Provided that where the premises whose standard rent is to be fixed form a part of the construction the standard rent shall be fixed at a rate which is fairly proportionate to the total standard rent of the entire construction."

4. On the 9th June, 1954 the tenants (Opposite Parties Nos. 1 and 2 before us) of a shop room at premises No. 1 Satya Narayan Temple Road, Salkia, Howrah, instituted Rent Control Case No. 69 of 1954 in the Court of the Rent Controller of Howrah for fixation of standard rent payable by them under Section 9 (1) (f) of the 1950 Act. On the date of this application these two tenants were paying rent at the rate of Rs. 60/- per month for the shop room.

5. The Rent Controller of Howrah on the 18th February, 1963 fixed the standard rent at Rs. 29/- per month. The landlords (Petitioners Nos. 1 to 3 before

us) preferred an appeal to the Additional District Judge. This was Miscellaneous Appeal No. 50 of 1963.

6. The Additional District Judge, Howrah, on the 27th July, 1963 determined the costs of construction at Rs. 19,031/-. But he disagreed with the Controller's assessment of the value of the land. He sent the case back to the Controller on remand.

7. The Rent Controller by his order No. 113 dated the 12th October, 1966 valued the land at Rs. 4,200/-. The total value, therefore, came to Rupees 23,231/- (Rs. 19,031 for construction plus Rs. 4,200/- for the land). The rent of the entire premises was fixed at Rs. 116-15 per month. And the rent of the shop room was fixed at Rs. 40/- per month. The landlords again preferred an appeal. This was Miscellaneous Appeal No. 261 of 1966.

8. The Second Additional District Judge of Howrah disposed of the last-mentioned appeal on the 18th September, 1967. He affirmed the order of the Rent Controller with a modification that the rate of rent, that is Rs. 40/- per month would be effective from the 1st of Baishakh 1361 B. S. instead of the 1st May, 1964.

9. The present Rule was obtained on the 18th December, 1967.

10. Mr. R. K. Banerjee, learned counsel for the petitioners contends before us that the amended provisions of Sec. 9 (1) (f) are ultra vires the Constitution. Learned counsel submits that rent is monetary compensation which the tenant pays to the landlord for his occupation. Rent is also one of the indices of the value of the property. An artificial fixation of rent, therefore, affects the valuation of the land and the structures thereon. Such artificial fixation is irrational. From these points of view the rent that the tenant pays must be just and reasonable. Mr. Banerjee says that fixation of percentage by the legislature he is not challenging, because, the legislature has the right to enact the percentage of total value of the property which should be payable as rent. But the fixation of the value of land on hypothetical basis dating it back to the 31st of December, 1946 is destructive of the principle of monetary compensation and ascertainment of proper value of land and structure. Mr. Banerjee further submits that all the rent restriction Ordinances and Acts up to 1956 were of temporary duration. It is, therefore, improper for the legislature to fix rents on such artificial considerations with respect to past or future dates; Mr. Banerjee has also referred us to Section 8 of the West Bengal Premises Tenancy Act, 1956 which is a permanent Act. Section 8 (1) (d) of the Act contains provisions similar to those in

Section 9 (1) (f) of the previous Act and in these permanent provisions instead of market price as on the 31st December, 1946, the market price on the date "of commencement of construction" has been introduced. In other words, the legislature has tried to revert to the original provisions of Section 9 (1) (f) of the 1950 Act.

11. Mr. Banerjee has also argued that although the 1950 Act was a temporary Act, standard rent fixed under that Act was practically unalterable in view of the provisions of Section 9 of the 1956 Act. This section lays down that rent payable for any premises can be increased only when there has been an increase in the tenant's share of the municipal rates and taxes or when any construction has been made at the instance of the tenant. The position, therefore, is that when rents are determined under the amended provisions of Section 9 (1) (f) of the 1950 Act, the landlord is for all practical purposes irreparably prejudiced.

12. Mr. Banerjee points out that the legislature in the 1956 Act, by reverting more or less to the original Section 9 (1) (f) of the 1950 Act shows that it has realised that rents fixed under the amended provisions of Section 9 (1) (f) were not fair.

13. For all the reasons aforesaid, counsel for the petitioners has urged that the amended provisions of Section 9 (1) (f) of the 1950 Act offend against Article 19 (1) (f) of the Constitution, as they seek to impose unreasonable restrictions on the right to acquire or hold property. Mr. Banerjee has contended further that these amended provisions violate Article 14 of the Constitution as well. By these provisions a discrimination has been made between owners of land who had made constructions before the 31st December, 1949 and those who have made constructions after the 31st December, 1949. The same class of land has been treated differently.

14. Mr. Banerjee has relied upon two decisions of the Supreme Court in support of his proposition that it is not permissible to affect retrospectively the valuation of the property. These are the decisions in *State of West Bengal v. Mrs. Bela Banerjee*, AIR 1954 SC 170 and *Jayvantsinghji Ranmalsinghji v. State of Gujarat*, AIR 1962 SC 821. In *Bela Banerjee's* case the Supreme Court was considering the provisions of Section 8 of the West Bengal Land Development and Planning Act, 1948. This was a permanent Act and Section 8 prescribed that lands might be acquired under it at the market value on the 31st December, 1946. The Supreme Court has said that fixation of this ceiling of compensation without reference to the value of the land at the time of the acqui-

sition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of Article 31 (2). We have to point out that apart from the fact that this was a case under Article 31 (2), the Supreme Court itself has said further that fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it; but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary. The Supreme Court has expressed the view that any principle for determining compensation which denies to the owner any increment in value cannot result in the ascertainment of the true equivalent of the land appropriated. The result, therefore, is that it all depends on the circumstances in which an anterior date of valuation is fixed by the legislature and there may be cases in which fixation with reference to an anterior date may not be violative of any of the provisions of the Constitution.

15. In *Jayvantsinghji's* case, AIR 1962 SC 821 cited above the Supreme Court had to construe, inter alia, the provisions of Sections 3, 4 and 6 of the Bombay Land Tenure Abolition Laws (Amendment) Act, 1958. In paragraph 14 of the Judgment the Supreme Court has observed that the right of the petitioners to the purchase price under Section 32-H of the Tenancy Act, 1948 from those of their tenants who were non-permanent on April 1, 1957 was a right of property in respect of which the petitioner has a guarantee under Article 19 (1) (f). The provisions in Sections 3, 4 and 6 of the impugned Act of 1958, according to the Supreme Court, in so far as they laid down that in certain circumstances a tenant would be deemed to be a permanent tenant from the date of the Taluqdari Abolition Act, 1949, adversely affected the right of the petitioner with retrospective effect. This is again a case in which certain provisions were considered to be unconstitutional on the peculiar circumstances that arose and cannot be treated as a guiding authority in all cases. In our case the amended provisions of Section 9 (1) (f) of the 1950 Act were considered by a Special Bench of this Court in *Iswari Prosad Goenka v. N. R. Sen*, 55 Cal WN 719 = (AIR 1952 Cal 273), Harries, C. J. who presided over this Bench observed at pp. 723 to 724 as follows:—

"It was urged that owing to the increase in the cost of building materials and the cost of maintenance, the rents permitted by these Rent Control Acts are

wholly unreasonable, and therefore the Court would be bound to hold that the Rent Control Act of 1950 as amended, is in its entirety ultra vires the Constitution.

There can be no doubt that the cost of building materials has greatly increased and that the Rent Control Act of 1950 has very drastically curtailed the rights of the landlord to demand what rent he pleases from a tenant. It may be that the margin of profit allowed to the landlord by the Rent Act of 1950 is small, but that would not of necessity, make the Act ultra vires as being an unreasonable restriction on the landlord's rights. What has to be considered is whether these restrictions on the landlord's rights are justified, having regard to the circumstances which would inevitably arise if landlords were free to charge what rent they wished. It appears to me that in the interests of law and order and good Government, restrictions on the landlord's rights were absolutely necessary, for otherwise thousands of tenants would have been ejected and persons would have been compelled to pay far more than they could afford for most inferior accommodation. In considering whether the restrictions imposed on the landlords are reasonable regard must be had to the position of the tenants. Would it be in the interest of good Government and in the public interest generally for thousands of people to be rendered homeless and for thousands of others to be compelled to pay exorbitant rents and to be literally at the mercy of their landlords? It appears to me that in the circumstances existing in this country and particularly in this State, the control of the rents during the War and particularly after partition, was essential and had any Government failed to take action in this matter serious consequences might well have arisen which might have shaken the very foundation of this State and indeed of the whole of India. In my view it cannot possibly be said that in the circumstances existing when these Acts were passed, the restrictions imposed by the Acts generally were unreasonable more than were necessary in the interests of the general public."

16. The above observations of Harries, C. J., constitute an effective answer to Mr. Banerjee's arguments based on Article 19 (1) (f) of the Constitution. But we may go deeper into this matter. We have looked into the statement of objects and reasons which was laid before the legislature in support of the amended provisions of Section 9 (1) (f) of the 1950 Act. The relevant portion of this statement runs thus:—

"It is also proposed to amend Section 9 (1) (f) of the Act assuring a return of six per cent on capital investment with a view to increasing construction of new

houses for letting purposes, the need for which has become more imperative than ever on account of large scale influx of refugees from East Bengal."

17. The learned Advocate-General has also placed before us the speech which was delivered on the floor of legislature by the Minister concerned. In this speech the Minister says:—

"...Two questions have emerged since the Act was passed, which have necessitated further amendment of this Act of 1950. In the first place it is seen that in Calcutta we are not going to have very many new houses and representations have been made that unless better terms, than those that have been provided for in the Act of 1950 are offered, owners of lands will not feel encouraged to build new houses. It is therefore just to give encouragement to the owners of land to build new houses which this province needs so much at the present moment when there is such an influx of refugees and other people to Calcutta and the urban areas. Government have thought it fit and proper to assure the owners of land that if they build new houses they can expect better return. That is the reason for the proposed amendment of Section 9 of the Act....."

18. The learned Advocate-General has also placed before us extracts from notes and orders of the land and Land Revenue Department's file relevant for our purposes. In these extracts we find the following observations made by the officers who were dealing with the file:—

"In this connection it may be noted that the question of amending clause (f) of sub-section (1) of Section 9 of the Act has also been taken up for consideration as desired by Hon'ble Chief Minister with a view to creating conditions and facilities for construction of more new houses."

19. From the above statements it appears that at the relevant time owing to large influx of refugees from East Bengal and rush of population into the City of Calcutta and its neighbouring areas it was felt that more houses should be constructed in this city and in the suburbs, but the authorities found that it was necessary to provide for incentives to give encouragements to land-holders to build new houses. That is why they amended the provisions of Section 9 (1) (f) in order that the owners of land might have better terms to induce them to undertake new constructions. It is in this context that we have to analyse the old provisions of Section 9 (1) (f) and compare them with the new provisions. We set out below a comparative chart consisting of the old and the new provisions:—

Old

New

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. At a rate not less than four percentum and more than six percentum. 2. Percentum of reasonable costs of construction. 3. Add to reasonable costs of construction reasonable price of the land included in the premises as on the date of the commencement of such construction taking into account the prevailing rate of rent in the locality for similar accommodation with similar advantages and amenities and the comparative advantages or disadvantages of accommodation in the premises. | <ol style="list-style-type: none"> 1. Fixed rate of six per cent with no discretion to the Controller. 2. Percentum of the actual costs of construction. 3. Add to the actual costs of construction the market price of the land as on the 31st day of December, 1946 or on the date of completion of the construction whichever is less. |
|---|--|

20. Mr. Banerjee for the petitioner concedes that so far as costs of construction are concerned, the amended provisions are improvements on the original provisions. But he urges that the same argument does not apply to the price of land. On the contrary, with respect to the price of land, in the amended provisions, the landlord has been adversely affected.

21. We are unable to accept this contention of Mr. Banerjee. Firstly the legislature thought that by the amended provisions it was providing inducements to landlords for building new houses. Secondly, we have to consider the cumulative effect of the old provisions and that of the new provisions. It seems to us that the old provisions, cumulatively speaking, were less advantageous to the landlords. In the old provisions there were three uncertain factors, namely, (1) the percentage of standard rent could vary from four to six per cent, (2) it was for the Controller to determine the reasonable costs of construction and (3) it was also for the Controller to determine the reasonable price of land having regard to the locality in which it was situate. All these factors were uncertain and the legislature by the amended provisions tried, as far as possible, to make them certain. In this view of the matter we are unable to say that the amended provisions impose unreasonable restrictions on landlords and as such they violate Article 19 (1) (f) of the Constitution. That the legislature thought it necessary to change these provisions again in the 1956 Act does not seem to us to be relevant to the issue under consideration. Firstly the 1956 Act is a permanent Act whereas the 1950 Act was to remain in operation temporarily. Secondly, when it came to be enacted as a permanent legislation, the authorities might have thought that the market value as on the 31st December, 1946 was not proper. Thirdly, it may be that the purpose for which Section 9 (1) (f) was amended had failed. But these are not the tests for determining the validity or the vires of the Act having regard to the immediate object sought to be achieved.

22. We now proceed to discuss whether the amended provisions violate Article 14 of the Constitution. The Supreme Court has repeatedly laid down that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of reasonable classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration (vide *Ram Krishna Dalmia v. S. R. Tendolkar*, AIR 1958 SC 538).

23. In the instant case owing to large influx of population necessitating new constructions, the legislature has made a classification. It has placed constructions after the 31st of December, 1949 in one group and constructions before that date in another group. But there is clearly a nexus between the basis of classification and the object sought to be achieved. We have already said, whether or not the legislature has succeeded in achieving this object is a different matter altogether.

24. Incidentally, we may refer to a judgment of the Bombay High Court and one of the Allahabad High Court which have some relevance to the points urged before us in the present case. In *A. S. Ruben v. Narayan Moreswar*, AIR 1953 Bom 174, Explanation (a) to Section 13 (1) (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 was challenged. Section 13 (1) (g) entitled a landlord to recover possession from his tenant if he required the premises reasonably and bona fide for occupation by himself or for any person for whose benefit the premises were held. Sub-clause (2) of Section 13 gave a further protection to the tenant. It said that even though a landlord might establish his requirements, the tenant would still be protected if the Court

came to the conclusion, on a consideration of a balance of convenience, that the ejectment would result in greater hardship to the tenant than to the landlord. Explanation (a) to Section 18 (1) (g) was as follows:—

"Explanation (a): A person shall not be deemed to be a landlord unless he has acquired his interest in the premises at a date prior to the beginning of the tenancy, or the 1st day of January, 1947, whichever is later or, if the interest had devolved on him by inheritance or succession, his predecessor-in-title had acquired the interest at a date prior to the beginning of the tenancy, or the first day of January, 1947, whichever is later."

25. The Bombay High Court has said that this explanation is not hit by Article 14 of the Constitution. Article 14, states the Bombay High Court, does not prohibit the legislature from classifying in certain cases. But if it does classify, and if it does lay down that a particular class is exempt from a particular law, that classification must be on a reasonable basis. The Bombay High Court proceeds to add that the Government had found that in recent years there had been many purchases of houses — properties and as the owners might apply for ejectment of their tenants, it was necessary to enact Explanation (a). And the legislature was fully justified in extending protection to the tenants by framing this particular explanation. As the discrimination was justified and there was a reasonable basis for the discrimination, the selection of the date itself, says the Bombay High Court, must be left to the good sense and intelligence of the legislature, and in this particular case there was 'prima facie' good sense and intelligence in selecting January 1, 1947. The Bombay High Court has also held that as the explanation does not offend against Article 14 of the Constitution, no question arises with regard to Article 19 (1) (f); the explanation is in the interest of the general public and is not ultra vires.

26. In our case a similar situation has arisen. No doubt the legislature has chosen an anterior date for purposes of valuation of the land. But it seems that the anxiety of the legislature was to ensure more constructions. That is why a return of six per cent of the actual cost of constructions was provided for in the amended Section 9 (1) (f) of the West Bengal Premises Rent Control Act, 1950 and so far as the price of land is concerned, there is no evidence on record to show that a lesser value than what was prescribed in the original provisions was intended by the legislature. In any event, the cumulative effect of what the landlord would get taking into consideration his actual costs of construction and the value of the land on which the construction stands appears to be better than what the original provisions

had contemplated. For these reasons we cannot say that the new provisions of Section 9 (1) (f) offend against Article 14 of the Constitution, and since these were provisions meant to serve the general interest of the public, they do not also offend against Article 19 (1) (f) of the Constitution.

27. The case of the Allahabad High Court is AIR 1952 All 703 (FB) (Raman Das v. State of Uttar Pradesh). This is a Full Bench judgment of the Allahabad High Court. Certain provisions of the Uttar Pradesh Temporary Control of Rent and Eviction Act, 1947 came to be considered in this judgment. For our purposes it would be relevant to set out paragraph 10 of the judgment at page 706. The paragraph runs thus:—

"The last point urged is that there is discrimination between the owners of houses built after July 1, 1946, and the owners of houses constructed before that date. The history behind this Act explains the reason for this difference. The Act was passed early in 1947 at a time when there was acute shortage of accommodation. It was thought that an Act of this kind controlling the activities of landlords might discourage persons from building houses and as it was necessary in the public interest that as many houses should be built as possible an incentive was given to those who had lands and were willing to spend money that any houses built by them would be at their complete disposal and no restrictions would be imposed on the same. The Act as originally drafted, therefore did not apply to houses built after July 1, 1946. In 1948, however, it was found that this privilege was being abused and fancy rents were being asked for such premises and by an amendment a proviso was added giving the owners a right of occupation of premises built by them after July 1, 1946, but otherwise allowing the District Magistrate to have control over allotment of these premises. We do not think that there was no just basis, therefore, for this discrimination between houses built before July 1, 1946, and those built after July 1, 1946. We do not think, therefore, that the proviso in any way affects the validity of the Act."

28. In the instant case the reasons for amending Section 9 (1) (f) have been fully discussed in the earlier part of this judgment. The legislature was seeking to give incentive to construction of new buildings and the discrimination that it has made between constructions before the 31st December, 1949 and after the 31st December, 1949 appears to be justified by the situation, namely, shortage of accommodation due to influx of population which the legislature was seeking to meet.

29. In the premises aforesaid we are of opinion that the amended provisions

of Section 9 (1) (f) of the West Bengal Premises Rent Control Act, 1950 do not violate either Article 19 (1) (f) or Article 14 of the Constitution.

30. The Rule is, therefore, discharged. There will be no order as to costs.

31. Let the records be sent back as early as possible.

JANAH, J.:— 32. I agree.
Rule discharged.

AIR 1972 CALCUTTA 417 (V 59 C 88)

P. B. MUKHARJI, C. J. AND B. C. MITRA, J.

Probodh Chandra Sett, Appellant v. Income-tax Officer, 'C' Ward and others, Respondents.

Appeal No. 50 of 1971, D/- 16-3-1972.

Index Note (A) — Income-tax Act (1961), S. 297 (2) (a) — Assessee filed return under Income-tax Act (1922). — Assessment order passed under Section 143 (3) of Act (1961) — Order held valid.

(Para 12)

Brief Note (A) — A wrong reference to the power under which the order is made does not per se vitiate the order if there is some other power under which that order could lawfully be made. The validity of the impugned order has to be tested by reference to the basic question whether the authority had any power at all to make that order. A wrong description of the order would not vitiate it if the power to make the order really existed.

(Para 12)

Index Note (B) — Constitution of India, Art. 226 — Alternative remedy open — Writ jurisdiction cannot be invoked.

(Para 15)

Brief Note (B) — Assessee filed return under Income-tax Act (1922). However the assessment order was passed under Section 297 (2) (a) of Act (1961). Instead of approaching Income-tax Appellate Tribunal for getting the order corrected the assessee applied under Article 226 of the Constitution. Held that the writ jurisdiction could not be invoked when there is an alternative remedy open.

(Para 15)

Cases Referred: Chronological Paras

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| 1971 Tax LR 738 = 82 ITR 243
(Punl. & Har.), Commr. of I-T.,
Patiala v. Hargopal Bhalla | 12 |
| AIR 1964 SC 1095 = 51 ITR 823,
Shivram Poddar v. I-T. Officer | 18 |
| AIR 1961 SC 200 = 41 ITR 12, L.
Hazari Mal Kuthiala v. I-T. Offi-
cer, Special Circle, Ambala Cantt. | 13 |
| AIR 1961 SC 609 = (1961) 2 SCR
765, C. A. Abraham v. I-T. Officer | 18 |

T. P. Mukherjee with Sailendra Nath Datta, for Appellant; Dipankar Gupta with Ajoy Mitra, for Respondents.

P. B. MUKHARJI, C. J.:— The appellant made an application under Article 226 of the Constitution raising a question of interpretation of Section 297 (2) (a) of the Income-tax Act of 1961.

2. For the assessment year 1961-62 the appellant filed his return voluntarily on December 1, 1961. On February 1, 1963, a notice under Section 23 (2) of the Indian Income-tax Act, 1922 was issued and served on the appellant. On March 17, 1966, a further notice under Section 23 (2) of the Indian Income-tax Act, 1922 was issued calling upon the appellant to attend on March 22, 1966 for completion of the assessment. On March 23, 1966 the appellant informed the Income-tax Officer that as the aforesaid notice was served on the appellant after 1 P.M. it was not possible for him to comply with it. Thereafter on December 31, 1966, a notice under Section 221 of the Income-tax Act, 1961 was issued by the respondent Income-tax Officer on the appellant to show cause why a penalty should not be imposed upon him for not paying the tax assessed. On January 11, 1967 another notice under Section 154/155 of the 1961 Act was issued by the respondent Income-tax Officer for rectification of the purported assessment made under Section 144 of that Act. On January 21, 1967, two applications were presented by the appellant to the Income-tax Officer. In the first application, the petitioner contended that the assessment was ultra vires as it was made under the 1961 Act and not under the 1922 Act and therefore no question of penalty could arise. In the second petition, objection was taken by the appellant to the competency of the notice for reduction of the order of assessment already made. On February 16, 1967, a notice of demand and the corresponding challan and assessment order under Section 144 of 1961 Act relating to the assessment year 1961-62 were served on the assessee and on the same date the assessee made an application to the respondent Income-tax Officer requesting him to cancel the assessment and make a fresh assessment as he was not given reasonable opportunity to comply with the notice dated March 17, 1966. The appellant's aforesaid application was accepted and the respondent Income-tax Officer cancelled the assessment and made a fresh assessment for the year under Section 143 (3)/146 of 1961 Act on September 6, 1967.

3. The appellant thereafter took an appeal from the aforesaid order of assessment before the Appellate Assistant Commissioner. In the grounds of appeal, objections were taken to the inclusion of certain amount in the total income and there was an omnibus ground at the end viz. the assessment was otherwise bad in law

and in the facts and circumstances of the case. But before the Appellate Assistant Commissioner no argument was advanced that the assessment was bad because it was made under the provisions of 1961 Act and the Appellate Assistant Commissioner gave the appellant certain reliefs by way of deductions which were given effect to by the respondent Income-tax Officer under Section 250 of 1961 Act in the order of assessment. No further appeals were taken by the petitioner to the Tribunal.

4. On June 28, 1968, a challan was issued for realisation of the tax on the basis of the modified assessment and on July 18, 1969 the respondent Income-tax Officer issued a notice under Section 221 of 1961 Act on the appellant to show cause why a penalty should not be imposed for failure to pay the tax assessed and demanded within the time allowed by the Act.

5. Thereupon the Rule was obtained by the appellant on August 20, 1968 calling upon the respondents to show cause why the aforesaid order of assessment, the demand for tax, the notice for showing cause why penalty should not be imposed as well as the appellate order of the Appellate Assistant Commissioner should not be quashed.

6. That sets out the bare facts of this case. The learned Judge who heard the Rule discharged it. He came to the following finding of facts:

7. The respondent Income-tax Officer had abundant authority to make the assessment under the corresponding provisions of 1922 Act which are more or less in pari materia with the assessment sections of 1961 Act. Therefore, according to the learned Judge, the order of assessment and the consequential orders and notices thereto cannot be considered void ab initio and without jurisdiction. The proper thing for the authorities would have been to rectify the order and make it in consonance with the provisions of the repealed Act of 1922.

8. But the learned Judge says that unfortunately the fact that under the provisions of Section 297 (2) (a) the assessment should have been made under the provisions of the old Act was not brought to the attention of either the respondent Income-tax Officer or the respondent Appellate Assistant Commissioner. There, of course, the learned Judge was wrong. The attention of the Income-tax Officer in fact was drawn to the appellant's letter dated January 21, 1967 where it is stated:

"It now appears to me from your notice under Sections 154/155 of the Act of 1961 that the assessment order in question was passed under Section 144 of the new Act. As the return was filed under the old Act the assessment in question should have been made under the old Act and as such the assessment under Section 144 is ab initio void."

To the same effect it was repeated by the appellant in his letter dated January 21, 1967. Therefore, it is not quite correct to say that the Income-tax Officer's attention was not brought to the fact that the new Act not being applicable the old Act is applicable.

9. But the question did not rest there. The appellant took no point under this score. He appealed to the Appellate Assistant Commissioner. In his several grounds of appeal, he makes no special ground of this point and he does not state that his whole contention is that the old Act applied and the new Act did not apply. Mr. Mukherjee, who appeared for the appellant showed us his several grounds where it was stated that the assessment is otherwise bad in law and in fact. We do not, however, feel that that ground covers this point and we feel that it was incumbent upon the assessee appellant to put it forward as a ground in his ground of appeal before the Income-tax Officer and the Appellate Assistant Commissioner. Before the Appellate Assistant Commissioner, as we have already stated, the appellant did not argue the point at all that the old Act applied.

10. Now proceeding with the findings of the learned trial Judge, he says:

"Now possibly it is too late for anybody to make any rectification of the impugned orders and notices. For this state of affairs the petitioner has nobody but himself to blame. He should have filed an appeal to the Tribunal from the order of the Appellate Assistant Commissioner and pointed out that the order of assessment was erroneous as it was not made under the provisions of the 1922 Act and the Tribunal could have passed the necessary orders enabling the respondent Income-tax Officer to rectify the order of assessment. As I am satisfied that there was no initial lack of jurisdiction in the respondent Income-tax Officer in making the assessment, this Rule must be discharged."

I do not think that the learned Judge could have passed any other order. The returns in this case were filed on December 1, 1961 and the notice under Section 23 (2) of the Indian Income-tax Act, 1922 was issued on February 1, 1963.

11. Two points really arise in this appeal. First is, can the appellant having chosen his course of remedy change it in the mid-stream? Secondly, is the order of the learned trial Judge at all prejudicial to the assessee?

12. Regarding the point that the order should have been made under the old Indian Income-tax Act, 1922 it is quite clear that wrong reference to the power under which the order is made does not per se vitiate the order if there is some other power under which that order could lawfully be made. The validity of the

impugned order has to be tested by reference to the basic question whether the Income-tax Officer had any power at all to make an order of that nature. If the power is otherwise established, the fact that the source of the power has been incorrectly described would not make the order invalid. The provisions of Section 23 (3) of the 1922 Act are in pari materia with the provisions of Section 143 (3) of the 1961 Act and deal with the same subject-matter, that is, assessment. There is a slight difference in the language but the purport of the provisions in both the Acts is the same. Therefore, an order of the Income-tax Officer passed under Section 143 (3) of the Act of 1961 could, therefore, be legitimately held to have been passed in exercise of the powers vested in the Income-tax Officer under Section 23 (3) of the 1922 Act. That was the decision of the Punjab and Haryana High Court in *Commr. of Income-tax, Patiala v. Hargopal Bhalla and Sons*, 82 ITR 243 = (1971 Tax LR 738 (Punj. & Har.)).

13. In *L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt.*, 41 ITR 12 = (AIR 1961 SC 200) the Supreme Court tended to give the same decision. There it was held that the Commissioner of Income-tax, purporting to act under Section 5 (5) and (7-A) of the Indian Income-tax Act, made an order on November 4, 1953, that the assessment of the assessee firm would be done by the Income-tax Officer Special Circle, Ambala, and not by the Income-tax Officer, Patiala, who was the competent authority under Section 64 of the Act to assess the firm. In 1955 the Income-tax Officer, Special Circle, Ambala issued a notice under Section 34 of the Patiala Income-tax Act to reopen the firm's assessment for the accounting year 1945-46. The firm contended that the Officer at Ambala had no jurisdiction as the order of the Commissioner was ultra vires, since it was not issued under the Patiala Act. It was held by the Supreme Court that the exercise of a power would be referable to a jurisdiction which conferred validity upon it and not to a jurisdiction under which it would be nugatory, and the order of the Commissioner was not invalid merely because it was not made under the Patiala Act.

14. The appellant contended that he has been prejudiced by the application of the new Act. The contention is that the penalty and prosecution are harsher in the new Act than under the old Act and there were alternative remedies under the old Act. Reference was made in support of this argument to Section 28, sub-section (4) of the old Act and Section 275-A to Section 280 of the new Act of 1961. It was also pointed out that under the new Act of 1961 Section 139 (1), Proviso (iii)

there is also a penal rate of interest. Secondly, it was argued that the substantive procedure was also different and it was not a matter of adjective procedure. In support of that proposition Section 67 of the new Act of 1961 was shown and argued that no such procedure under the old Act of 1922 was available. The argument on this point seems to me to be entirely misplaced. What we are dealing with in this appeal is not the question of penalty or prosecution. If and when the penalty and prosecution take place, the appellant has ample remedies and doors of this Court are open to take proceedings. But that is not the subject-matter of the present application.

15. Now regarding the point whether the appellant having chosen one particular remedy can in the mid-stream start a Writ Petition under Article 226 of the Constitution. The appellant was aware of the point at all material times. The appellant in fact took the point in two of his letters to the Income-tax Officer but the appellant did not press for it and allowed the Income-tax Officer to go into the merits. Then the appellant chose the remedy and followed that path by way of an appeal to the Appellate Assistant Commissioner. There he does not argue the point at all and allowed the Appellate Assistant Commissioner to come to a decision on the merits and in fact he reduced the assessment. Now the appellant thinks of a change of course. He could have appealed to the Appellate Tribunal and got his relief if his point was sound and the corrections made in the order of assessment. He did not do so. On the contrary he turned round and sought a Writ under Article 226 of the Constitution of India. As the appellant has already resorted to an alternative, and equally efficacious, legal remedy, it should be required to pursue that remedy and should not be allowed to invoke the special jurisdiction of the High Court under Article 226 of the Constitution. Specially it is so here where the matter on merits hardly deserves interference under the Writ in the discretionary jurisdiction. The appellant's fear of the penalty and prosecution being different under the new Act being made applicable to him is premature and if it comes then the appellant's remedy would be open under Article 226 of the Constitution.

16. In that view of the problem, I do not think that I should interfere with the decision of the learned Judge. I therefore, dismiss the appeal. There will be no order as to costs.

B. C. MITRA, J.:— 17. I agree with the order made by my Lord but I would like to add a few words of my own. The appellant preferred an appeal against the order of the Income-tax Officer and in

the grounds of appeal, he stated that the Income-tax Officer had committed an error in holding the loans, amounting to Rupees 40,000/- as income from other sources. This point was agitated on behalf of the appellant before the Appellate Assistant Commissioner and in the Order made by the latter, it appears, he held that the appellant had discharged the onus that lay upon him in proving the genuineness of the loan of Rs. 5,000/-, taken from Kamal Kumar Dey. He also held that regarding the balance loan of Rs. 35,000/-, stated to have been taken in 1961-62 and Rs. 50,000 taken in 1962-63 assessment years, the representative of the appellant gave up his argument that the amount represented borrowings. Finally the Appellate Assistant Commissioner held that the total income of the appellant for 1961-62 and 1962-63 should be reduced by Rs. 10,762/- and Rs. 50,200/- respectively. It is quite clear to us that the appellant's grievances with regard to loans were removed by the Order of the Appellate Assistant Commissioner.

18. Another point to which I should like to refer is that the appellant had alternative remedy available to him. The existence of an alternative remedy is no bar to the issue of Writs by this Court under Article 226 of the Constitution of India. But where such alternative remedy exists, the Writ Court in exercise of its discretion should not grant relief to a petitioner unless the petitioner satisfies the Court that there are sufficient and/or adequate grounds as to why the alternative remedy will not be sufficient to meet his grievances. That is the view which has been taken by the Supreme Court in two decisions viz. in the case of C. A. Abraham v. Income-tax Officer, AIR 1961 SC 609 and in the case of Shivram Poddar v. Income-tax Officer, 51 ITR 823 = (AIR 1964 SC 1095). In this case the appellant has made out no grounds in the Writ Petition as to why the alternative remedy available to him by way of a further appeal to the Tribunal would not have been adequate or sufficient for his purpose.

19. The only other matter to which I would like to refer is the provision in Section 297 of the Income-tax Act, 1961. That section deals with repeals and savings and provides for different circumstances where the Indian Income-tax Act, 1922 and Income-tax Act, 1961 are to be applied in assessment and also in penalty proceedings. Admittedly in this case, no penalty has yet been imposed upon the appellant. If and when such penalty is imposed upon the appellant for omission on his part to pay the assessment already made, the question as to under which Act, viz. the Indian Income-tax Act, 1922 or the Income-tax Act, 1961, penalty would be recovered, would have to be consider-

ed. It seems to us that a discussion on this question at this stage is premature.

20. For these reasons, I agree with the order made by my Lord.

21. Appeal is, therefore, dismissed. Order accordingly.

AIR 1972, CALCUTTA 420 (V 59 C 89)
SALIL KUMAR HAZRA, J.

Corporation of Calcutta, Plaintiff v. Hindusthan Construction Co. Ltd., Defendant.

Suit No. 1618 of 1960, D/- 1-3-1972.

(A) Bengal Finance (Sales Tax) Act (6 of 1941), S. 2 — Construction contracts — Material supplied by contractor cannot be assessed for payment of sales tax. AIR 1958 SC 560 and AIR 1957 Cal 283, Relied on. (Para 8)

(B) Contract Act (1872), S. 72 — Payment made by mistake of law — It is recoverable. AIR 1946 Cal 245, Followed. (Para 9)

(C) Contract Act (1872), S. 72 — Payment made under mistake of fact or law — Party is entitled to get back money in absence of circumstances like estoppel, waiver, limitation or the like — Equitable consideration is not a bar to such a relief. AIR 1959 SC 135 and (1959) 10 STC 57 (All.), Relied on. (Para 12)

In this case defendant paid sales tax believing that sales tax was payable even in respect of construction contracts. Under the terms of the contract if sales tax was payable it was to be paid by the plaintiff. Both the parties, however, were acting under a common misapprehension that sales tax was payable. Acting under such a notion plaintiff paid certain amount to defendant when the latter asked the plaintiff to reimburse the amount paid. Hence no question of estoppel arises because plaintiff made no representation which was acted upon by the defendant to his own detriment. No question of waiver also can arise because immediately after the mistake became known demand was made by plaintiff for refund of sales tax. (Para 13)

(D) Contract Act (1872), S. 72 — Word 'mistake' would comprise both mistake of law and fact — Section is not in conflict with Ss. 21 and 22. AIR 1955 Cal 626 treated as not good law in view of AIR 1959 SC 135. (X-Ref.: Ss. 21 and 22). (Para 15)

(E) Civil P. C. (1908), S. 34 — Ad interim interest — Suit under S. 72 of Contract Act for refund of money paid by mistake — Both the parties labouring under

the same mistake — Held it would not be sound exercise of discretion to allow plaintiff ad interim interest during pendency of suit. (Para 21)

Cases Referred: Chronological Paras

AIR 1971 SC 422 = (1971) 2 SCJ 609, Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd.	23, 30
(1968) 22 STC 524 (SC), Gill & Co. Pvt. Ltd. v. Commercial Tax Officer, Hyderabad	7, 17
AIR 1963 Cal 198, Steuart and Co. Ltd. v. Mackertich	7, 13
AIR 1963 Mad 231 = (1963) 1 Mad LJ 183, P. S. Machado v. Venkatarama Gopala	5
AIR 1963 Raj 93 = 1962 Raj LW 618, Thakur Umed Singh v. Amlokchand	28
AIR 1962 SC 1471 = (1962) 2 SCA 490, Hem Nolini v. Mrs. Isolyne Saroj Bashini	7, 13
AIR 1960 Raj 63 = 1960 Raj LW 63 (FB), Ashoka Bus Transport Corporation, Bhilwara v. Appellate Tribunal of State Transport Authority	23
AIR 1959 SC 135 = 1959 SCR 1350, Sales Tax Officer, Banaras v. Kanhaiya Lal Mukund Lal Saraf	7, 10, 11, 12, 14, 15, 16
(1959) 10 STC 57 (All.), Sales Tax Commr. U. P. v. Sada Sukh Vyopar Mondal	7, 12, 17
AIR 1958 SC 560 = 1959 SCR 379, State of Madras v. Gannon Dunkerley and Co.	2, 5, 7, 8, 19
AIR 1958 SC 682 = 1959 SCR 445, Mithan Lal v. State of Delhi	5
AIR 1957 Cal 283 = (1957) 8 STC 478, Dukhineswar Sarkar and Bros. Ltd. v. Commercial Tax Officer	2, 5, 7, 8
AIR 1955 Cal 626 = 97 Cal LJ 9, Anath Bandhu Deb v. Dominion of India	5, 15, 16
AIR 1952 Raj 159 = ILR (1952) 2 Raj 319, Ghessa Lal v. Mootia	28
AIR 1951 Nag 372 = 1951 Nag LJ 359, Nagorao Govindrao Ayachit v. Governor-General in Council	5, 14
AIR 1949 PC 297 = 76 Ind App 244 = 54 Cal WN 1, Shiba Prosad Singh v. Srish Chandra Nandi	5, 7, 9, 10, 16
AIR 1948 Nag 110 = ILR (1947) Nag 510, Nainsukhdas v. Goyerdhandas	7, 13
AIR 1946 Bom 1 = 47 Bom LR 719, Anandram Mangtaram v. Bholaram Tanumal	23, 30
AIR 1946 Cal 245 = 80 Cal LJ 170, Jagadish Prosad Pannalal v. Produce Exchange Corporation Ltd.	5, 9

AIR 1943 Nag 240 = 1943 Nag LJ 220, Yadaorao Ganpatrao Kadu v. Ramrao Balasaheb Dhote	23
AIR 1932 Bom 319 = 34 Bom LR 129, Parashram v. Secretary of State	23, 24
AIR 1927 PC 151 = 54 Ind App 276, John Agabog v. James Golder Robinson	7, 13
AIR 1919 Cal 144 = 23 Cal WN 336, Sarajubala Debi Chowdhurani v. Saradanath Bhattacharjee	23
AIR 1917 Bom 119 = ILR 42 Bom 16, Solomon Jacob v. National Bank of India Ltd., Aden	5
AIR 1916 Nag 61 = 12 Nag LR 100 Govind v. Chandrabhaga	7, 13

Sankar Ghose with P. K. Roy, for Plaintiff; B. K. Ghose with Ajit Sen, for Defendant.

JUDGMENT :— The plaintiff Corporation of Calcutta is claiming in this suit repayment or refund of Rs. 40,871/- from the defendant, as money paid to the defendant by mistake of fact and law.

2. The defendant carries on business as engineer and contractor. In January/March, 1952, the plaintiff Corporation of Calcutta invited tenders for completion of Dry Water Flow Channel for 'Dr. Dey's Kulti Outfall Scheme', for construction of channels. The defendant submitted tenders. Three contracts were entered into between the plaintiff and the defendant. The first contract was executed on April 29, 1952, the second contract was executed on April 29, 1952 and the third contract was executed on November 1, 1952. The contracts were made as per specifications and tenders of the defendant. Tenders were sent along with forwarding letters of the defendant. Each of the forwarding letters of the defendant to the plaintiff provided as follows:—

"We have not provided for sales tax in our quotation. Any sales tax payable on account of this work will be to your account."

It was expressly and/or impliedly agreed by and between the parties that in case any sales tax was payable in respect of the said contracts by the defendant to the State of West Bengal, the plaintiff will reimburse the defendant for the same. In terms of the said agreement between the parties the works of construction of dry water flow channel was carried on by the defendant and completed in the year 1953. The defendant, from time to time, submitted bills to the plaintiff, for sales tax which the defendant claimed to have paid to the State of West Bengal, in respect of the said contracts. The defendant stated that the total amount so paid by the defendant was Rs. 54,498.42 p. The particulars of the same will appear as hereunder:

Number of the Bill	Date of the bill	Particulars of the contract	AMOUNT
H. C. O./OB/69	15.3.54	Manufacture of bricks at Kantatola	Rs. 22,229.75 paise
K. W. B./S. F. B.		Remodelling Topsia- Kulti Road, Zone IV	
H. C. O./OB/S	23.3.56	D. W. F. Channel 1-3 miles	Rs. 3,570.94 "
H. C. O./OB/1	23.3.56	-do- do- 4th mile	Rs. 15,483.81 "
H. C. O./OB/2	23.3.56	-do- do- 5th mile	Rs. 4,524.71 "
H. C. O./OB/3	23.3.56	-do- do- 6th mile	Rs. 4,531.73 "
H. C. O./OB/4	23.3.56		Rs. 4,157.48 "
			Rs. 54,498.42 paise

The defendant wrote to the plaintiff on January 10, 1957, demanding from the plaintiff an advance of Rs. 50,000/- against the sum of Rs. 54,498.42 paise, which the defendant stated that they have already paid as sales tax to the State of West Bengal. On September 27, 1957, the plaintiff advanced a total sum of Rs. 40,871/- to the defendant for sales tax, relying and/or acting on the representation of the defendant. In or about April 1958, the plaintiff discovered that the said payment of Rupees 40,871/- was made by mistake of fact and law. On September 25, 1958, the plaintiff wrote to the defendant asking for refund of the amount received by the defendant from the plaintiff on account of sales tax. The plaintiff enclosed with the said letter, a copy of the report and opinion of the law officer of the plaintiff, to the effect that the contracts entered into between the parties were construction contracts and bricks manufactured on Corporation land and supplied at a cost fixed under the contracts by the contractors and the Corporation for exclusive use of the work to be done, as such there was no liability to pay sales tax on such contract in view of the decision of the Supreme Court in AIR 1958 SC 560, and also the judgment of the Calcutta High Court in AIR 1957 Cal 283. According to the plaintiff the payment of Rs. 40,871/- was made by mistake and the mistake was discovered in or about April, 1958 after the decision of the Supreme Court reported in 1958 SC page 560 (Gannon Dunkerley's case), holding, that no sales tax is payable on construction contracts as stated above, became known to the plaintiff. As the said amount was not refunded by the defendant, this suit was instituted on 15th November, 1960. On February 10, 1961, the defendant filed its written statement. In the written statement the defendant denied that the payment of sales tax was made by the plaintiff by mistake of fact and law. The defendant stated the contract in respect of manufacture of bricks at Kantatola is not a construction contract within the meaning of the Supreme Court decision as alleged. The defendant denied that the plaintiff is entitled to claim refund. The

written statement was amended on September 5, 1963. In the amended written statement the defence, inter alia, was that the defendant in good faith paid the sum of Rs. 54,498.42 p. as sales tax at the request and/or with the knowledge and/or consent of the plaintiff, who induced the defendant to believe that it was obligatory to pay sales tax as aforesaid and the plaintiff would reimburse the defendant for such payment. The plaintiff not only induced the defendant to pay sales tax as aforesaid but also paid the sum of Rs. 40,871/- as and by way of indemnification and/or reimbursement. Further the plaintiff was estopped from denying the validity of the payment of the sales tax and/or its liability to reimburse or indemnify the defendant for the same. The following issues were raised before me:

ISSUES:

1. Was the sum of Rs. 40,871/- advanced by the plaintiff to the defendant by mistake of fact and/or law on the representation of the defendant that the sales tax was payable in respect of the contracts as stated in the plaint?

1 (a). Was there any agreement that the defendant would pay sales tax to the State of West Bengal on account of the plaintiff in relation to the contract in suit?

2 (a). Was the mistake of fact or law discovered in view of the decisions of the Supreme Court holding that no sales tax was payable on construction contracts?

2 (b). Were the contracts between the parties and in any event the contracts for manufacture of bricks at Kantatola 'Construction contracts' within the meaning of the Supreme Court decision?

3. Has the consideration for payment of Rs. 40,871/- wholly failed or become illegal or void as alleged in paragraph 12 of the plaint?

4. Is the plaintiff estopped from denying the validity of the payment of sales tax made by the defendant and/or its liability to reimburse and/or to indemnify as pleaded in paragraph 11 (c) of the Written Statement?

5. Is the suit bad for non-joinder of parties as the State of West Bengal has not been made a party in this suit?

6. Is the suit barred by the law of limitation?

7. To what relief, if any, is the plaintiff entitled?

The real question in this suit is whether the sum of Rs. 40,871/- is refundable by the plaintiff as claimed in the plaint. The letters and documents between the parties are admitted and are included in Ext. A, the admitted brief of documents. The contracts between the parties entered into are also admitted. It seems to me that there is no proper scope of oral evidence in this case but since oral evidence has been given I am setting out hereunder the nature of oral evidence adduced by the parties to the suit. Two witnesses were examined on behalf of the plaintiff Corporation of Calcutta. The first witness is Bireswar Roy Chowdhury who was working as a sub-overseer in Dr. Dey's Kulti Outfall Scheme and the second witness is Ajit Kumar Bose, who is now assistant law officer of the Corporation of Calcutta. On behalf of the defendant only one witness was examined, Claud D'Souza who was serving in the defendant company in the accounts department and dealt with the sales tax matter of the defendant company. Bireswar Roy Chowdhury, Sub-Overseer in Dr. Dey's Kulti Outfall Scheme proved its three contracts which are admitted by the defendant Company. He said that the defendant Hindusthan Construction Company was carrying on the works. He also stated that at the Corporation ground some bricks were manufactured by the defendant and the D.W.F. Channel was pitched with bricks. Some works on the roads were carried on. The soiling and edging of roads were carried on. The construction work was from first to 3rd mile of Dr. Dey's Kulti Outfall Scheme and also for 5th mile and 6th mile. The Hindusthan Construction Company Ltd. supplied the labour. Bricks were manufactured at Kantatolla brick-field belonging to the Corporation. The defendant had a work site not in the brick-field itself, but on the side of that brick-field they had a temporary construction where they had three work sites and the works of the channel were carried on by them from this earth. The defendant did excavation of earth for carrying out the works. From this earth they manufactured bricks, and with these bricks they carried on the works of the D.W.F. Channel. The bricks were manufactured out of Corporation earth for use in constructing those channels.

3. The second witness on behalf of the Corporation, Ajit Kumar Bose stated before me that, he actually assisted the Law Officer in drafting the report. The report arose out of sales tax claimed by the defendant payable in respect of the contract entered into between the Hindusthan Construction Company and the Corporation. The defendant Company claim-

ed sales tax from the Corporation in respect of the contract entered into by them and there were three contracts. The witness came to know after the decision passed by the Supreme Court that the Corporation is not liable to pay sales tax in accordance with the contract. The decision was with regard to the case of Gannon Dunkerley & Co. and in the report of the Chief Law Officer this decision has been referred. As a result of the Supreme Court decision the position was that the Corporation is not liable to pay sales tax, on the contrary, it can recover sales tax paid to the defendant company by the Corporation of Calcutta by mistake. The contract being one contract for construction of road and the channel to be constructed pursuant to the outfall scheme framed by Dr. Dey, the Corporation was not liable to pay sales tax in respect of the three contracts. There was no sale of goods in these contracts. The contract being one or indivisible contract, sales tax was not payable. The bricks were utilised for preparation of the channel and for construction of the road. The bricks were manufactured out of earth obtained from the Corporation land. The payment of sales tax was made on September 27, 1957, before the decision of the Supreme Court in 1958. Prior to the decision of the Supreme Court the Corporation did not know or realise that sales tax was not payable. Payment was made by mistake to the defendant Company. He also stated that payment was made on September, 1957. The suit was filed on November 15, 1960. The High Court reopened after long vacation on November 14, 1960. On that date the Court was closed on account of the death of Mr. Hem Chandra Naskar who was a Minister of the Government of West Bengal. The Court re-opened on November 15, 1960 and on the re-opening day the suit was filed. The Court remained closed for long vacation from September 20, 1960 up to November 13, 1960.

4. The only witness for the defendant Company Claud D'Souza admitted that the work that the defendant did was in connection with the construction of Dry Water Flow Channel. He also admitted that for the said works three contracts were entered into between the plaintiff and the defendant. Whatever sales tax the defendant claimed to have paid as sales tax was in respect of the works done in respect of the three contracts and under no other contract. He also admitted that the Corporation had asked the defendant to construct these channels and drains for the entire work and for that the entire work had been done by the defendant. In connection with that work, some bricks had to be used by the defendant and the bricks had been used for the completion of the construction work.

5. Mr. B. K. Ghose learned counsel for the defendant submitted as follows:—

It was a term of the contract that the plaintiff would re-imburse the defendant in case any sales tax was payable in respect of the contracts. The defendant demanded advance payment of Rs. 50,000/- by the letter dated January 10, 1957 and the plaintiff advanced on September 27, 1957, a total sum of Rs. 40,871/-. The judgment of Sinha, J. was delivered on January 18, 1957 and was reported in AIR 1957 Cal 283 (May Issue). Therefore, in May 1967 when the payment was made the plaintiff should have discovered the mistake of fact or law. Ignorance of law is no excuse. Money had been paid ignoring the law. In course of argument Mr. B. K. Ghose further submitted that there was a separate contract for manufacture of bricks at Kantatolla. The tender for manufacture of bricks on Corporation land at Kantatolla mentioned in the letter dated January 11, 1951 was accepted and there was a separate contract for the same. The defendant paid sales tax as agent of the plaintiff. The plaintiff is estopped from realising Rs. 40,871/- from the defendant. Section 72 of the Indian Contract Act does not apply. As the defendant parted with the money, therefore its money was realised from the plaintiff. The plaintiff is disentitled to recover what was paid by mistake, because the defendant has been misled by the plaintiff's conduct. On equitable consideration, the plaintiff is not entitled to refund. He relied on the following cases:

(1) AIR 1963 Mad 231 (P. S. Machado v. Venkatarama Gopala Ayer).

(2) AIR 1946 Cal 245 (Jagadish Prosad Pannalal v. Produce Exchange Corporation Ltd.).

(3) AIR 1955 Cal 626 (Anath Bandhu Deb v. Dominion of India).

(4) 76 Ind App 244 = (AIR 1949 PC 297) (Shiba Prasad Singh v. Sris Chandra Nandi).

(5) AIR 1951 Nag 372 (Nagorao Govindrao Ayachit v. Governor-General in Council).

(6) ILR 42 Bombay 16 = (AIR 1917 Bombay 119) (Soloman Jacob v. National Bank of India Ltd., Aden).

(7) AIR 1958 SC 560 (The State of Madras v. Gannon Dunkerley & Co.).

(8) AIR 1958 SC 682 (Mithan Lal v. State of Delhi).

(9) AIR 1957 Cal 283 (Dukhineswar Sarkar & Bros. Ltd. v. Commercial Tax Officer).

6. Mr. Sankar Kumar Ghose the learned counsel appearing for the plaintiff submitted as follows:—

7. There are three contracts which are the subject-matter of the suit in respect of which the defendant alleged to have paid sales tax to the State of West Bengal. The plaintiff advanced Rs. 40,000

thinking that sales tax was payable on the three contracts. These are all work contracts or construction contracts and sales tax is not payable on such contracts. This point has been finally decided in the judgment of the Supreme Court in AIR 1958 SC 560. Previous to this judgment there was a judgment of the Calcutta High Court by Sinha J. in AIR 1957 Cal 283, to the same effect. But before the judgment of the Supreme Court there were different views of different High Courts and the matter was finally decided by the Supreme Court as stated above. Sales tax was not paid by the defendant as an agent of the plaintiff but as dealer under the Bengal Finance (Sales Tax) Act, 1941. The plaintiff paid sales tax in view of the agreement between the parties upon demand made by the defendant for payment of sales tax thinking that sales tax was payable in respect of works under the contracts, but the plaintiff realised after the decision of the Supreme Court that in the instant case sales tax was not payable. The amount paid as such sales tax by the plaintiff was paid by mistake of fact and law, and Section 72 of the Indian Contract Act is attracted. There was no question of any waiver, estoppel or limitation. Equitable consideration is no bar to the relief claimed by the plaintiff for refund as Section 72 of the Indian Contract Act applies in this case. Mr. Sankar Ghose in support of his submissions very ably relied on and referred to the relevant passages in the several judgments in the following reported cases: 76 Ind App 244 = 54 Cal WN 1 = AIR 1949 PC 297; (Sri Shiba Prasad Singh v. Sris Chandra Nandi), AIR 1959 SC 135; Sales Tax Officer Banaras v. Kanhaiyalal, (1959) 10 STC 57 (All); Sales Tax Commr., U. P. v. Sada Sukh Vyopar Mondal, AIR 1916 Nag 61; Govind v. Mt. Chandrabhaga, AIR 1948 Nag 110; Nainsukh Das v. Goverdhandas, AIR 1927 PC 151; John Agabog v. James Golder Robinson, AIR 1962 SC 1471; Hem Nolini v. Isolyne Saroj Bashini, AIR 1963 Cal 198; Steuart and Co. Ltd. v. Mackertich, (1968) 22 STC 524 (SC); Gill & Co. Pvt. Ltd. v. Commercial Tax Officer, Hyderabad.

Upon due consideration of the evidence adduced and the arguments made on behalf of the respective parties, my findings are as follows:—

The execution of the contracts between the parties are admitted. The contracts between the parties are included in Exts. B, C & D. The defendant claims to have paid the sum of Rs. 53,036.88 as sales tax on contracts for construction of D. W. F. channels as will appear from the letter of the defendant dated July 15, 1959. The payment of sales tax was made by the defendant on November 3, 1952, October 6, 1953, October 28, 1954 and November 3, 1955. There

is nothing to show, before me, that a separate contract for manufacture of bricks at Kantatolla was made. The defendant did not prove any such contract. Only three contracts are admitted and proved before me and these three contracts are included in Exts. B, C & D. The contract included in Ext. B is dated April 29, 1952. In this contract it is mentioned that tender dated March 15, 1952 was accepted. Another contract is dated April 29, 1952 which is Ext. D. In this contract it is mentioned that tender dated March 18, 1952 was accepted. The third contract is dated November 1, 1952 which is Ext. C. In this contract it is mentioned that tender dated January 25, 1952 was accepted. Therefore, the tender mentioned in the letter dated January 11, 1951 for manufacture of bricks at Kantatolla was not separately accepted and there was no separate contract for manufacture of bricks at Kantatolla. Use of bricks was part of the works to be done under the contracts. This will appear from the Schedule of rates and tender form which contain the description of the works including the works for excavation, lining and ancillary works. Manufacturing of bricks at Kantatolla was required for all the three contracts. The works included brick soling, brick edge lining and so forth. Claude D'Souza, witness called by the defendant admitted that in connection with the works, certain bricks had to be used by the defendant. The bricks that were used by the defendant were manufactured at Kantatolla on Corporation land and on sand supplied by the Corporation. All works were done under these three contracts. The contracts were for construction of channel and drains (D'Souza Qq 53 to 70). Therefore, in view of the fact admitted before me, there is no doubt that the contracts were contracts for construction, and manufacture of bricks was made for the use of construction work and the using of bricks was part of construction contracts. There was no occasion for sale of bricks separately but the bricks manufactured at Kantatolla were used for construction work and became parts of the entire indivisible works done by the defendant.

8. The principles of law laid down in AIR 1958 SC 560 and in AIR 1957 Cal 283, are clearly attracted and no sales tax was payable on the three contracts. These are all construction contracts. When the assessment orders were passed by the assessing authorities, and when payment of sales tax was made by the defendant in terms of the assessment orders, the law on the point was not clear; and the view prevailed on interpretation of West Bengal Sales Tax Act, that construction contracts were assessable under the Sales Tax Act and the materials used for carrying out the contract of construction in case of struc-

tural contract were also assessable for payment of sales tax. However, after the decision of the Supreme Court in AIR 1958 SC 560, affirming the decision of the Calcutta High Court in AIR 1957 Cal 283, it is clear that sales tax could not be assessed on construction contracts. Materials used for construction contract cannot be separately assessed for payment of sales tax. Therefore, when payment was made by the Corporation of Calcutta on September 27, 1957 to the defendant the payment was made by mistake of law and fact. The same mistake was made by the defendant when payment was made by the defendant to the State of West Bengal. Both parties were labouring under the same mistake inasmuch as on construction contract the sales tax was not payable.

9. The next question which arises is whether in the instant case Section 72 of the Indian Contract Act will be applicable. The leading case on this point is the case of Sri Sri Sibaprosad Singh v. Maharaja Srish Chandra Nandy, decided by the Privy Council in the year 1949 and reported in 78 Ind App 244 = AIR 1949 PC 297 = 54 Cal WN 1. With regard to the argument made by Mr. B. K. Ghose that payment was made by mistake of law and as such it is not recoverable, this decision of the Privy Council is a complete answer. Previous to the Privy Council decision, there were conflicting views of the learned Judges in India. Harries, C. J., took the view following the English principles of law that money paid under mistake of fact is recoverable; but generally speaking, money paid under mistake of law is not recoverable. In the opinion of Harries, C. J., under the Indian Contract Act though the same deals with the effect of mistake of fact and law upon a contract there is no express provision relating to the effect of payment made under such mistake. The view of Harries, C. J., was that the law relating to the matter is the same in this country as it is in England. Lort-Williams J., in 39 Cal WN 174 (Katherine Stiffles v. Carr Mackertich) also took the same view that when money is paid voluntarily with full knowledge of all facts, it cannot be recovered on the ground that payment was made under a mistake of law. Sen J. in a case reported in AIR 1946 Cal 245, disagreed with the above view of Lort-Williams J. Sen J., took a contrary view in interpretation of Sec. 72 of the Indian Contract Act and held that English Common Law Rule that payment made under mistake of law is not recoverable can have no application in India, where there is a statute governing this question. The Privy Council in Sibaprosad's case, 78 IA 244 = (AIR 1949 PC 297), agreed with the view of Sen J., Therefore, prima facie, under the facts of this case the law laid down in Section 72 of the Indian Contract Act is attracted.

10. The only other points which remain to be considered, are whether there are other circumstances which disentitle the plaintiff to recover the sum which was paid by mistake of law and fact. It is to be noted that in the Privy Council judgment in *Sibaprosad's case*, AIR 1949 PC 297, their Lordships of the Privy Council added that, "Their Lordships' judgment does not imply that other sum paid under a mistake is recoverable, no matter what their circumstances may be. There may, in a particular case, be circumstances which disentitle a plaintiff by an estoppel or otherwise". The Privy Council used very careful and guarded expression as to the circumstances which disentitle a plaintiff to get refund. The Privy Council used the words "By estoppel or otherwise." What is the meaning of the words 'or otherwise'? The law as laid down in *Sibaprosad's case* was approved and explained by the Supreme Court of India in *Kanhiyalal Mukundlal's case*, AIR 1959 SC 135. It was held by the learned Judges of the Supreme Court at p. 143 of the report that "on a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to the question of estoppel, waiver, limitation or the like." In other words, the Supreme Court used the expressions "waiver, limitation or the like", in place of the words "or otherwise" which occurred in the judgment of the Privy Council (76 Ind App 244 at p. 259 = AIR 1949 PC 297)."

11. In the judgment of the Supreme Court, AIR 1959 SC 135, it has also been held at p. 142 that in case where S. 72 of the Indian Contract Act applies if payment was made voluntarily, that would not disentitle the plaintiff from receiving this amount. Equitable consideration is again no bar for such relief. Their Lordships of the Supreme Court held at page 143, that no question of estoppel can ever arise when both the parties are labouring under a mistake of law and one of the parties is no more to blame than the other. An estoppel arises only when the plaintiff by his act or conduct makes a representation to the defendant of a certain state of facts which is acted upon by the defendant to his detriment; it is only then that the plaintiff is estopped from setting up a different state of facts.

12. The decision of the Supreme Court in AIR 1959 SC 135, has been explained by the Allahabad High Court in the case in (1959) 10 STC 57 (All). It

was held by the Allahabad High Court in *Sadasuk's case* that a person, who had paid money to another by mistake, be it a fact or law, is entitled to get back the money under Section 72 of the Indian Contract Act, 1872. His title to get back the money may, however, be lost on account of certain circumstances like estoppel, waiver, limitation or the like; but no equitable consideration can take away his title to the refund of the money.

13. Now, the only question is whether under the facts and circumstances of the instant case, the plaintiff is disentitled to get refund by reason of estoppel, waiver, limitation or the like. It has been proved before me, that payment of sales tax was made by mistake which is common to both the parties. The letters dated July 15, 1959 and October 3, 1958 by the defendant to the plaintiff clearly show that both the parties were labouring under the same mistake. There is no question of estoppel in this case because estoppel must be of fact and not of law. The decision in AIR 1916 Nag 61, relied upon by Mr. Sankar Ghose is an authority for the well established principle that representation in order to work as an estoppel, may not generally be a material statement of fact. The same principle was also enunciated in AIR 1948 Nag 110 at p. 116 para 54. "In order to operate as an estoppel the representation must be of fact and not a matter of law." In the instant case, there is no question of estoppel because sales tax was not paid on any representation made by the plaintiff; but the defendant paid sales tax to the State of West Bengal as the defendant was assessed as 'dealer'. The taxing authorities passed the assessment order and required that the defendant should pay as dealer. There was no representation by the plaintiff to make payment of sales tax. Therefore, there is no question of estoppel in this case (see observation of Lord Phillimore in AIR 1927 PC 151 at p. 156, *John Agabog Vertannes v. James Golder Robinson*)—also AIR 1963 Cal 198. When both the parties are acting under a common misapprehension there could be no estoppel until the position was cleared up. The defendant in the instant case paid sales tax before realisation of money as sales tax from the plaintiff. After the decision of Supreme Court reported in AIR 1958 SC 560, it was made clear beyond all doubts, that sales tax was not payable on such contracts. Before the decision of the Supreme Court the law on this point was not clear and the parties were labouring under the view that sales tax was payable. The plaintiff paid to the defendant after its demand for payment of sales tax. This is a case where both parties were labouring under the same mistake and again for this reason there is no case of estoppel. Estoppel arises when the plaintiff by his act or conduct makes a representation to the

defendant that certain state of facts exists which is acted upon by the defendant to his detriment, it is only then that the plaintiff is estopped from setting up a different state of facts (see AIR 1962 SC 1471 at p. 1472). But in the instant case it is the defendant who demanded from the plaintiff that the defendant had already paid sales tax and the same should be paid by plaintiff. It was not a case that the plaintiff was making representation to the defendant that sales tax should be paid and the defendant acted upon any such representation. There was no such representation by the plaintiff at all. Further there was no question of estoppel because the plaintiff was labouring under a mistake of law and fact that such money was due and payable as sales tax. There is no question of waiver in this case, because, immediately after the mistake became known to the plaintiff demand was made by the plaintiff for refund of sales tax. There is no question of limitation in this case, because the suit was instituted within three years from the date of payment by the plaintiff to the defendant. The payment was admittedly made on September 27, 1957. The High Court reopened after the long vacation on November 15, 1960. The Court was closed on November 14, 1960 due to the death of Shri Hem Chandra Naskar, who was then a minister of State of West Bengal. As November 14, 1960 was declared a holiday, the suit was filed on November 15, 1960, the date when the Court reopened after the long vacation.

14. I will now deal with the cases relied upon by Mr. B. K. Ghose. The cases cited by Mr. B. K. Ghose do not help him and only two cases need be referred to in this connection. The judgment of R. Kaushelendra Rao J., reported in AIR 1951 Nag 372 at p. 374, relied upon by Mr. B. K. Ghose, before me, was disapproved by the Supreme Court in AIR 1959 SC 135 at p. 145. It was held by the Supreme Court that the question of equitable consideration cannot be imported when Section 72 of the Indian Contract Act applies.

15. The other case relied upon by Mr. B. K. Ghose is AIR 1955 Cal 626. In this case it was held by P. B. Mukharji J. (as he then was) that, "ignorance of law is not mistake of law. It cannot be the intention of Section 72, that wherever and whenever and however a mistake of law occurs, a claim may be made under Section 72. Deliberate disregard of law is not mistake of law. It is not open to the plaintiff to say that he did not know the effect of Section 175 (3), Government of India Act, 1935. When money was paid voluntarily with full knowledge of all the facts it cannot be recovered on the ground that payment was made under a mistake of law." In the case before P. B. Mukharji J. (as he then was) the Learned Judge

did not grant relief either under Sec. 70 or under Section 72 of the Indian Contract Act. This case was decided in the year 1955. In my view the subsequent decision of the Supreme Court in the year 1958 reported in AIR 1959 SC 135, enunciated the law on this point differently. It was held by the Supreme Court that the term "mistake" used in Section 72 of the Contract Act has been used without any qualification or limitation whatever and comprised within its scope a mistake of law as well as a mistake of fact. There is no warrant for ascribing a limited meaning to the word 'mistake' as used therein. There is no conflict between the provisions of Section 72 on the one hand and Ss. 21 and 22 of the Contract Act on the other. The principle is that if one party under mistake whether of fact or law pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitled the party paying money to recover back from the party receiving the same."

16. Both P. B. Mukharji, J. (as he then was) and the learned Judges of the Supreme Court, relied on and referred to the judgment of the Privy Council in Siba Prosad's case, 76 Ind App 244 = (AIR 1949 PC 297), but interpreted the principles of law in Section 72 of the Indian Contract Act differently. Unfortunately, the decision in AIR 1955 Cal 626, was not referred to in the judgment of the Supreme Court in AIR 1959 SC 135. However, I am bound to follow the law laid down by the Supreme Court.

17. From the documents disclosed by the defendant, it appears that the defendant was a 'dealer' under the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941) and as such dealer the defendant paid sales tax for the gross turnover during the accounting year. The defendant did not pay sales tax as agent of the plaintiff. There cannot be any liability of the plaintiff Corporation of Calcutta to pay sales tax to the State of West Bengal because the plaintiff Corporation is not a dealer within the meaning of Bengal Finance (Sales Tax) Act. All that the Corporation did was to enter into agreements with the defendant that if any sales tax was payable for the work then the Corporation will pay the same to the defendant. The decision in (1959) 10 STC 57 (All.) at p. 65, is a clear authority for the proposition that the dealer is not the agent of the customer. The defendant did not collect tax from the plaintiff as agent of the State. A point has been taken by Mr. B. K. Ghose that the State of West Bengal should have been made a party. It is clear that the plaintiff is asking for refund of sales tax from the defendant on the

ground that the money was paid by the defendant by mistake. There is no question of any repayment from the State of West Bengal because the plaintiff had not paid to the State of West Bengal. As such the State of West Bengal is not a necessary party in this suit for refund under Section 72 of the Indian Contract Act. The defendant claims that it had paid sales tax relating to the construction contracts and the taxing authorities had realised the same. If that is so, the defendant can take steps to quash the assessment order or such other steps for refund against the State, stating that such tax was paid by mistake. The decision of the Supreme Court reported in (1968) 22 STC 524 (Gill & Company Private Limited v. Commercial Tax Officer, Hyderabad III) is an authority for the proposition that such refund would ordinarily be made by the State. In the premises, I hold that the plaintiff is entitled to refund of payment of Rs. 40,871/- from the defendant.

18. I will answer the Issues raised in this case as hereunder:

Issue No. 1:— Yes.

Issue No. 1 (a):—No. There was no agreement that the defendant would pay sales tax on account of the plaintiff in relation to the contracts in suit. The defendant paid sales tax as dealer and not as agent of the plaintiff.

Issue No. 2 (a):— Yes. The mistake was discovered after the decision of the Supreme Court holding that no sales tax was payable on construction contract.

Issue No. 2 (b):— Yes. The contracts between the parties were construction contracts within the meaning of the decision of the Supreme Court.

Issue No. 3:— Yes.

Issue No. 4:— No. There is no question of estoppel against the plaintiff. There is no question of any liability of the plaintiff to reimburse or indemnify the defendant as the contracts were construction contracts and sales tax was not payable.

Issue No. 5:— No. The State of West Bengal is not a necessary party in this suit.

Issue No. 6:— No. The suit is not barred by the law of limitation.

Issue No. 7:— The plaintiff is entitled to refund of the money paid or advanced, namely, Rs. 40,871/-.

19. At the end of the argument in this case, Mr. Sankar Ghose, the learned counsel appearing for the plaintiff submitted that I should grant to the plaintiff ad interim interest from the date of the institution of the suit till the date of the decree. Whether in the circumstances of a particular case ad interim interest should be granted or not is a matter of discretion and this discretion has to be exercised judicially on the facts and circumstances of each case. This is clear from Section 34

of the Code of Civil Procedure. I do not think I may be justified in granting ad interim interest in respect of the sum of Rs. 40,871/- paid by the Corporation to the defendant by mistake of fact and law. In the instant case both the parties were labouring under a mistake in thinking that sales tax was payable. The defendant was assessed as a dealer and the defendant's case is that it paid sales tax after such assessment. The assessing authority also did so in view of the law of sales tax as known and understood by them at the point of time when assessment order was passed. The Supreme Court finally decided in 1958 in Gannon Dunkerley and Co.'s case, AIR 1958 SC 560 that in case of construction contract no sales tax was payable. Before the decision of the Supreme Court the defendant demanded that in view of the contract between the parties the plaintiff must pay sales tax to the defendant which the defendant has paid to the assessing authority and the plaintiff paid the same. After such payment the plaintiff claimed for refund.

20. The suit was contested by the defendant on several points. One of the points urged by the defendant is that because there was manufacture of bricks by the defendant for the construction work, sales tax was payable. This issue is now decided in this suit against the defendant. After the institution of the suit long time has elapsed. Even when the suit appeared in my list and was called on for hearing the plaintiff's solicitor was not ready to go on with the suit and asked for time. The brief of documents was prepared after I had granted time to the plaintiff's solicitor to prepare the same and this was done, when I insisted that the old matters must be heard and no further adjournment would be given. After the suit was instituted the defendant was contesting the suit on the ground, inter alia, that the amount paid by the plaintiff was not refundable.

21. It is true that the plaintiff has succeeded on the point that Section 72 of the Indian Contract Act applies in this case and the plaintiff is entitled to get refund of the sum of Rs. 40,871/- paid by mistake; but that does not mean that the plaintiff should get ad interim interest during the pendency of the suit. Under Section 72, a person to whom money has been paid by mistake must repay it. The section does not say that repayment should be made with interest. There is no question of any interest before filing the suit in this case. The plaintiff cannot get ad interim interest as a matter of course. I cannot disregard the fact that the defendant had parted with its money before receiving payment from the plaintiff labouring under the same mistake. The question of realisation of money paid by the defendant from the State of West Bengal

would arise at a later stage, if and when, the defendant would take proper proceedings for recovery of the amount against the Sales Tax Authorities. It may be that the defendant may not get any interest from the State. The defendant could not get the benefit of the money which was paid by plaintiff; because, the defendant has also parted with similar amount by making payment to the taxing authorities. Therefore, I do not think that I will be justified in allowing the plaintiff any ad interim interest during the pendency of this suit.

22. The defendant could not get the benefit of the money because the defendant had to pay sales tax. It may be, that the defendant parted with the money before realisation of the same from the plaintiff, but since the defendant had paid more than Rs. 40,871/-, but did not in effect have the use and benefit of the money to wit, Rs. 40,871/- realised from the plaintiff, I do not think I will be justified in allowing any ad interim interest to the plaintiff during the pendency of the suit in respect of the said sum of Rs. 40,871/-.

23. Mr. Sankar Ghose cited before me, a number of authorities to establish his client's case that I should grant ad interim interest from the date of institution of the suit to the date of the decree. Authorities cited by him are:

AIR 1932 Bom 319 (Parashram v. Secretary of State).

49 Bom LR 296 (Abdul Hussain Mohasinali Bohri v. Fazalbhai Taherali Bohri).

AIR 1919 Cal 144 (Sarajubala Debi Chowdhurani v. Saradanath Bhattacharjee).

AIR 1943 Nag 240 (Yadaorao Ganpat-rao Kadu v. Ramrao Balasaheb Dhote).

AIR 1960 Raj 63 (Ashoka Bus Transport Corporation Bhilwara v. Appellate Tribunal of State Transport Authority).

AIR 1946 Bom 1 at p. 7 (Anandram Mangtaram v. Bholaram Tanumal).

AIR 1971 SC 422 (Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd.).

24. Under different facts and circumstances which arose in the several cases cited by Mr. Sankar Ghose, the Court in the exercise of its discretion allowed ad interim interest which will appear from the above cases. In my view, the cases cited are no authority for the proposition that under the facts and circumstances of the instant case which I am now trying I am compelled to order payment of ad interim interest, although in my view under the facts of this case the plaintiff should not get ad interim interest. After all the question of payment of ad interim interest is a question of discretion and has to be determined in the light of the facts and circumstances of each parti-

cular case. However, since Mr. Shankar Kumar Ghose has cited, so many authorities, I will discuss some of them as hereunder. In AIR 1932 Bom 319 at p. 325 it was argued by the plaintiff's advocate that although interest has not been specifically claimed in the plaint under Section 34 of the Code of Civil Procedure read with Order 7, Rule 7 of the Code of Civil Procedure it is within the discretion of the Court to award it. The Special Government Pleader said that the matter was not free from difficulty but the learned Judges awarded interest at 6 per cent per annum from the date of the institution of the suit till realisation in exercise of their discretion. Therefore, this case reaffirms that the Court has discretion to grant ad interim interest and under the facts and circumstances of the case the Court did grant it.

25. The next case relied upon by Mr. Ghose is 49 Bom LR 296. This was a suit on a promissory note. No pendente lite interest was allowed by the trial Court because the promissory note did not make any specific mention about interest. There were two promissory notes. The first promissory note did not contain any provision regarding interest and though the second promissory note did contain such a term the plaintiff had not sent the statements of accounts to the defendants as required by Sec. 3 of the Central Provinces and Berar Money Lenders Act. The Court did not allow any interest pendente lite or interest after the date of the decree but has not given any reason for refusing to award it.

26. The learned Judges of the High Court held that the Court below was in error in holding that the plaintiff is not entitled to any interest at all on the promissory note dated June 27, 1935 merely because that promissory note did not make any specific mention about interest. It has ignored the provision of Section 80 of the Negotiable Instruments Act which required that in a case like this interest shall be calculated at the rate of 6 per cent per annum. The promissory note in this case was in fact a fresh contract or a novation of the old contract. The suit being one for the enforcement of such a contract the latter part of the definition of "money-lender" contained in Section 2 (b) of the Act was not attracted, and the plaintiff was, therefore, entitled to interest from the date of the execution of the promissory note till the date of the suit.

27. No reason has been given for disallowing interest pendente lite or interest subsequent to the date of the decree. No doubt, the granting of such interest is in the discretion of the Court but that discretion had to be exercised judicially. Ordinarily, the Court does not disallow interest to a plaintiff in such cases unless

he by his conduct renders himself disentitled to the grant of such interest. The only suggestion made by the learned counsel for the defendants is that the plaintiff delayed the filing of the suit and also that instead of suing straightway in the Court at Khamgaon within whose jurisdiction the defendants reside, he wrongly instituted the suit at Nagpur. In my view, interest pendente lite was allowed in this case under entirely different circumstances and this case is again an authority for the proposition that granting of interest pendente lite is in the discretion of the Court. I do not think that the facts of the instant case has any relevance to the facts of the case cited by Mr. Ghose.

28. The next case cited is AIR 1963 Raj 93 at p. 95 (Thakur Umed Singh v. Amolakchand). This is an appeal arising out of a suit for recovery of price of goods sold and delivered. The Court below disallowed interest but did not give any reason for such disallowance. The learned Judges followed AIR 1952 Raj 159 = ILR (1952) 2 Raj 319 (Chessa Lal v. Mootia) and held that a creditor would be entitled to pendente lite and future interest unless there were reasons why he should be deprived of it. Where the courts below disallow such interest they must indicate the reasons for the conclusion to which they have come, so that the appellate Court may be assured that the discretion which undoubtedly vests in the Courts below in this regard has been exercised judicially and on correct principles.

29. I do not think that this case also helps Mr. Sankar Ghose that I must grant ad interim interest.

30. AIR 1946 Bom 1 at p. 7 reaffirms that under Section 34, it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for payment of money. AIR 1971 SC 422 at p. 429 in my view, does not help the plaintiff in this respect. I do not agree with the submissions of Mr. Ghose that whenever there was a decree for payment of money, ad interim interest has to be granted. It will depend upon the facts of each case and, in my view, this is not a case where I shall grant ad interim interest. However, I shall grant interest on decree. I do not think I shall discuss the large number of authorities on the same point which was pressed by Mr. Ghose as it is not necessary. In the premises, there will be a decree for Rs. 40,871/-, interest on decree at the rate of 6% per annum and costs.

31. There will be no order as to payment of reserved costs. The operation of the decree be stayed for four weeks.

Order accordingly.

AIR 1972 CALCUTTA 430 (V 59 C 90)
SANKAR PRASAD MITRA AND SALIL
KUMAR DATTA, JJ.

M/s. Kokarmal Gurudayal, Petitioner
v. Sagarmal Bengani, Opposite Party.

Civil Revn. Case No. 4025 of 1970,
D/- 23-2-1972.

(A) W. B. Premises Tenancy Act (12 of 1956), (As Amended by Act 4 of 1968), S. 17-B (1) — Time limit within which tenant has to apply for reliefs under Section 17-B (1) — Commencement of — (X-Ref:— Maxims).

Held that the commencement of President's Act 4 of 1968 is August 26, 1967 as mentioned in Sec. 1 (2) thereof and an application under Section 17-B (1) could be made within a period of sixty days only from the August 26, 1967. No other date, has any relevance to the applicability of this section. The maxim "lex non cogit ad impossibilia" does not apply to S. 17-B (1).

(Para 43)

The history of this legislation leads to the inevitable conclusion that the legislative authorities were consciously re-enacting the relevant provisions of 1967 Ordinance in the subsequent Acts and Ordinances just to keep alive the rights that were given to a tenant under the 1967 Ordinance.

(Para 43)

The substitution of some date other than the date suggested in Section 1 (2) is not permissible. The purpose of the Act is to give relief against forfeiture to tenants with retrospective effect and it is that purpose which runs through all the other sections of the statute.

(Para 26)

The doctrine of "generalia specialibus non derogant" cannot be applied to the statute in question. AIR 1969 Cal 67 and (1969) 73 Cal WN 736, Overruled. Case Law discussed.

(Para 26)

(B) W. B. Premises Tenancy Act (XII of 1956), Ss. 39, 17-B — Application under S. 17-B — "Within a period of 60 days" in S. 17-B (1) — Reference is to period of limitation — S. 5, Limitation Act, applies by virtue of S. 39 of Tenancy Act — (X-Ref:— Limitation Act (1963), Ss. 5 and 29 (2)).

Section 17-B (1) prescribes a period of sixty days from the 26th August, 1967, after which an application under the section cannot be maintained. A provision of this nature cannot but be a period of limitation.

(Para 54)

Section 39 of the Tenancy Act has expressly made all the provisions of the Limitation Act, 1908 applicable to the Tenancy Act subject to periods of limitation mentioned in the Tenancy Act itself. This clear invocation to all the provisions of the Limitation Act of 1908, attracts the provisions of Section 5 of that Act to the appropriate provisions of the Tenancy Act in-

cluding Section 17-B (1). The intention of the legislature has always been that Section 5 could be availed of in suitable cases. Observations to the contrary in A.F.O.D. No. 689 of 1963, D/- 19-3-1969 (Cal.) held obiter, Suit No. 829 of 1966, D/- 13-8-1969 (Cal.) and AIR 1971 Cal 313, Dissent from. Case Law Ref. (Para 62)

(C) Limitation Act (1963), S. 5 — Sufficient cause — Ignorance of law arising from not taking any legal advice on petitioner's rights under S. 17-B, W. B. Premises Tenancy Act (1956), held not sufficient cause within S. 5, Limitation Act. (Para 74)

Inaction of this nature cannot be condoned by a Court of Law by exercising its powers under S. 5 of the Limitation Act. (Para 38)

There may be extenuating circumstances justifying the application of Section 5 of the Limitation Act when a party is ignorant of his rights, but such circumstances are, indeed, rare. For instance, in the instant case if the petitioner had stated that it was under the impression that there was no period of limitation for an application under Section 17-B (1) owing to the impossibility of applying the relevant provisions, the petitioner's case under Section 5 might have deserved careful consideration. Case Law ref. (Para 78)

Cases Referred: Chronological Paras

AIR 1971 Cal 313, Rajputana Trading Co. Pvt. Ltd. v. Malaya Trading Agency	64
(1971) 75 Cal WN 342 = 1971 Ren CJ 703, Mrs. Gouri Bose v. Sukumar Ghose	63
AIR 1969 Cal 67 = 73 Cal WN 10, Benu Roy v. Manindra Nath Chatterjee	19
(1969) 73 Cal WN 736, Md. Yusuf v. Golam Jilani	23, 81
(1969) A.F.O.D. No. 689 of 1963, D/- 19-3-1969 (Cal), National Traders v. Dr. Lalit Mohan Roy	50, 52
(1969) Suit No. 829 of 1966, D/- 13-8-1969 (Cal.), Jatindra Nath Samanta v. Rash Behari Dutta and Co.	64
AIR 1966 SC 1342 = (1966) 3 SCR 379, Commr. of Inc. Tax, Patiala v. Shahzada Nand and Sons	24
AIR 1966 SC 1953 = (1965) 3 SCR 708, Sree Bank Ltd. v. Sarkar Dutta Roy and Co.	27
AIR 1966 Cal 488 = 69 Cal WN 921, Ram Prosad v. Bijoy Kumar	61
AIR 1962 SC 361 = (1962) 2 SCR 762, Ramlal v. Rewa Coal Fields Ltd.	66
AIR 1957 Cal 257 = 61 Cal WN 263 (SB), Tarak Chandra v. Ratanlal Ghosal	41
AIR 1956 Pepsu 40, Mukandi Ram v. Executive Engineer, Sangrur Circle	53
AIR 1954 All 150 = 1952 All LJ 30, Radhey Lal v. Lareti	29

AIR 1954 Bom 537 = ILR (1954) Bom 1389, Sitaram v. M. N. Nag-rashna	74
AIR 1951 All 227 = 1951 All LJ 722, Sahabuddin v. Mohan Lal	28
AIR 1950 PC 80, Shankarlal v. Hiralal	51
(1948) 1 KB 695 = (1948) 1 All ER 283, Harding v. Price	69
AIR 1942 Cal 544 = 46 Cal WN 943, Commrs. of Pabna Municipality v. Nirode Sundari	57
AIR 1940 Cal 305 = 44 Cal WN 362, District Board, Chittagong v. Emdadali Hoque	53
AIR 1929 Cal 325 = 33 Cal WN 227, Sati Prosad v. Gobinda Chandra	55, 56
AIR 1926 Nag 236 = 91 Ind Cas 563, Madhorao v. Balaji	59
AIR 1925 Cal 684 (1) = 29 Cal WN 472, Krishna Mohan Ghosh v. Surapati Banerjee	77
(1923) 1 Ch 431 (CA), Slack v. Leeds Industrial Co-op. Society	51
(1911) 2 KB 556 = 80 LJKB 981, Gregory v. Torquay Corpn.	71
(1897) ILR 21 Bom 552, Dadabhai Jamsetji v. Maneksha Sorabji	77
(1888) ILR 12 Bom 320, Sitaram v. Nimba	76
(1888) 13 AC 61 = 57 LJ Ch 661, Seaton v. Seaton	69
(1882) 9 QBD 672 = 52 LJQB 44, Quilter v. Mapleson	30
(1873) 6 HL 223 = 22 WR 193, Earl Beauchamp v. Winn	68
(1850) 117 ER 391 = 19 LJM 209, Queen v. Leicestershire JJ.	39
(1845) 115 ER 455 = 14 LJQB 217, Green v. Wood	36
(1834) 4 Nev and M 893 = 110 ER 1445, Burn v. Carvalho	19, 20, 22, 23
(1584) 3 Co Rep 7a, In re: Heydon's Case	25

A. C. Bhabra, Maunulal Tambi and Rajat Kumar Ghosh, for Petitioner; P. P. Ginwalla, S. Goho and Janwarilal Pugalia, for Respondent.

SANKAR PRASAD MITRA, J. —

This Rule is directed against an order of the Sixth Subordinate Judge, Alipore, being Order No. 56 of the 10th November, 1970, in Title Suit No. 3 of 1964 (Sagarmal Bengani v. M/s. Pokarmal Gurudayal) rejecting the defendant's application under Section 17-B (1) of the West Bengal Premises Tenancy Act, 1956 and another application under Section 5 of the Limitation Act. The facts briefly are as follows:

On January 21, 1964, Sagarmal Bengani filed Title Suit No. 3 of 1964 before the Subordinate Judge, Sixth Court, Alipore against Messrs. Pokarmal Gurudayal for ejectment of the defendant from a godown at premises No. P-3, Brojodayal Saha Road, Cossipore, on the ground of default in payment of rent since April, 1963. On

the 27th March, 1965, the Court passed an order under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956, striking out the tenant's defence against delivery of possession. On May 5, 1965, the tenant applied for relief against forfeiture under Section 114 of the Transfer of Property Act. On May 20, 1965, the application for relief against forfeiture was rejected. On June 26, 1965, the suit was dismissed; but the landlord preferred an appeal to which we would revert a little later.

2. On the August 24, 1965, West Bengal Ordinance No. VI of 1965 was promulgated. Section 17-A (1) of this Ordinance was as follows:—

"Where any decree or order for the recovery of possession of any premises has been made in a suit or proceeding in which the defence against delivery of possession was struck out by an order under sub-section (3) of Section 17, but the possession of such premises has not been recovered from the tenant by the execution of such decree or order, the tenant may make an application to the Court which made such decree or order within a period of sixty days from the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1965, for setting aside such decree or order."

3. This Ordinance was promulgated by the Governor of West Bengal on August 21, 1965 and was published in the Calcutta Gazette Extraordinary on the August 24, 1965. The provisions of this Ordinance were also enacted by the West Bengal Legislature by the Act 29 of 1965. Section 17-A of that Act ran thus:—

"17-A. Power of Court to set aside decree or order for ejectment in certain cases.

(1) Where any decree or order for the recovery of possession of any premises has been made in a suit or proceeding in which the defence against delivery of possession was struck out by an order under sub-section (3) of Section 17, but the possession of such premises has not been recovered from the tenant by the execution of such decree or order, the tenant may make an application to the Court which made such decree or order within a period of sixty days from the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1965, for setting aside such decree or order....."

4. We are not directly concerned in this Rule either with the Ordinance of 1965 or with the Act of 1965; but we have quoted the above provisions merely to show that the legislature has consistently used the same form of expression in all the subsequent enactments we shall refer to later.

5. The landlord, in the instant case, preferred an appeal against the dismissal of the suit. The appeal was mark-

ed as Title Appeal No. 1091 of 1965. This Title Appeal was disposed of on November 17, 1965. The Additional District Judge, Seventh Court, Alipore, reversed the judgment of the Trial Court and passed an ejectment decree in favour of the landlord. In 1966, the tenant filed a second appeal being Second Appeal No. 1053 of 1966 in this Court against the judgment and decree of the Appellate Court. On April 20, 1966, a Division Bench of this Court in Civil Rule No. 529 (8) of 1966 directed the tenant to deposit Rs. 11,400.00 on or before the 1st May, 1966, or to continue to deposit Rs. 450.00 every month. According to the tenant, this order has up till now been complied with.

6. On August 26, 1967, the Governor of West Bengal promulgated West Bengal Ordinance VI of 1967. By this Ordinance Sections 17-B and 17-C were inserted into the West Bengal Premises Tenancy Act, 1956. In this application we are concerned with Section 17-C, the relevant portions whereof are as follows:—

"Section 17-C (1). Power of Court to set aside decree in cases where defence against delivery of possession struck out. Where a decree for the recovery of possession of any premises was passed before the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1967, in a suit in which the defence against delivery of possession was struck out by an order under sub-section (3) of Section 17, but the possession of such premises has not been recovered from the tenant by the execution of such decree, the tenant may, within a period of sixty days from the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1967, make an application to the Court which passed such decree to set aside such decree."

7. This Ordinance was published in an Extraordinary issue of the Calcutta Gazette on August 28, 1967 which was, therefore, the date of its commencement. On November 29, 1967, the West Bengal Legislature had a session. Naturally, Ordinance No. VI of 1967, was to cease on January 9, 1968. That is why, on the 8th January 1968, the West Bengal Premises Tenancy (Amendment) Second Ordinance, 1968 (West Bengal Ordinance No. II of 1968) was promulgated as the Legislature was not in session. It is interesting to observe the language of the relevant portions of Section 17-C of this Ordinance. These are as follows:—

"17-C (1). Where a decree for the recovery of possession of any premises was passed before the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1967,—(West Bengal Ordinance VI of 1967), in a suit in which the defence against delivery of possession was struck out by an order under sub-section

tion (3) of Section 17, but the possession of such premises has not been recovered from the tenant by the execution of such decree, the tenant may, within a period of sixty days from the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1967, make an application to the Court which passed such decree to set aside such decree."

8. We intend to emphasize that in this Ordinance of 1968 the same right which was given to the tenant by the Ordinance of 1967 was being repeated. The Legislature was fully conscious of the fact that the period of sixty days from the commencement of the Ordinance of 1967 had expired long before the promulgation of the Ordinance of 1968 but had not thought it fit to make any changes in the appropriate provisions of Section 17-C of the 1968 Ordinance.

9. On March 26, 1968, the West Bengal Premises Tenancy (Amendment) Act, 1968 was enacted. We quote below the relevant provisions of Section 17-B of this Act:

"17-B. (1) Power of Court to set aside decree in cases where defence against delivery of possession struck out. Where a decree for the recovery of possession of any premises was passed before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, in a suit in which the defence against delivery of possession was struck out by an order under sub-section (3) of Section 17, but the possession of such premises has not been recovered from the tenant by the execution of such decree, the tenant may, within a period of sixty days of such commencement, make an application to the Court which passed such decree to set aside such decree."

10. In Section 1 (2) of this Act it is specifically provided that the Act "shall be deemed to have come into force on the 26th day of August, 1967". This was the date of commencement of Ordinance No. VI of 1967.

11. It is clear, therefore that, again and again, the legislature is trying to keep alive the right conferred on a tenant by the 1967 Ordinance and was not giving him a higher or an extended right. Incidentally, Section 6 of the Amendment Act of 1968 runs thus:—

"6 (1). The West Bengal Premises Tenancy (Amendment) Second Ordinance, 1968 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken (including any order made, proceeding commenced, obligation or liability incurred), or deemed to have been done or taken, under the principal Act as amended by the said Ordinance shall continue to be in force and shall be deemed to have been done, taken, made, commenced or incurred, as

the case may be, under the principal Act as amended by this Act."

12. There were similar provisions in Section 7 of the Second Ordinance of 1968 with respect to Ordinance No. VI of 1967. The Amendment Act of 1968 was a President's Act. It was President's Act No. 4 of 1968. That is why, after the termination of President's Rule the West Bengal Legislature under the provisions of Article 357 (2) of the Constitution had to pass the West Bengal Premises Tenancy (Amendment) Act, 1969 which the President assented to on the 31st October, 1969. Section 17-B (1) of this Act reads thus:

"17-B (1). Power of Court to set aside decree in cases where defence against delivery of possession struck out: Where a decree for the recovery of possession of any premises was passed before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, in a suit in which the defence against delivery of possession was struck out by an Order under sub-section (3) of Section 17, but the possession of such premises has not been recovered from the tenant by the execution of such decree, the tenant may, within a period of sixty days of such commencement, make an application to the Court which passed such decree to set aside such decree....."

13. Once again, the Legislature is sticking to the date of commencement of Ordinance No. VI of 1967, namely, the 26th August, 1967. And owing to the provisions of Article 357 (2) itself there is no provision in the 1969 Act for "Repeal and Saving."

14. These are the statutory provisions we have to consider and construe in the present Rule. Coming back to the facts of the case it is alleged in paragraph 13 of the petition that on the 25th February, 1969, the petitioner's second appeal appeared in the list for hearing before P. N. Mookerjee and S. K. Chakraborty, JJ. and was adjourned till the reopening of the Court after the Easter vacation.

15. In paragraph 14 of the petition it is stated that the petitioner thereafter engaged Mr. Arun Kumar Dutt (Senior) as the petitioner's senior advocate in the second appeal. On the 9th April, 1969, a conference was held with the said senior advocate. At this conference the petitioner's partner Gurdial Berlia was present. Mr. A. K. Dutt was of opinion that it was necessary for the petitioner to file in the trial Court an application under Section 17-B (1) of the West Bengal Premises Tenancy (Amendment) Act, 1968 for setting aside the order of March 27, 1965, by which the petitioner's defence against recovery of possession was directed to be struck out and for other necessary reliefs. Mr. A. K. Dutt, says the petitioner, was also of the view that the petitioner ought

to, in the special facts and circumstances of the case, make an application to the trial Court for the aforesaid relief including a prayer for condonation of delay.

16. Two days thereafter on April 11, 1969, the petitioner made an application to the trial Court under Section 17-B (1) of the said Act and also an application under Section 5 of the Limitation Act. On May 7, 1969 the second appeal was dismissed. On November 10, 1970, the trial Court rejected the application under Section 17-B (1) and under Section 5. On December 21, 1970, the present rule was issued.

17. The first question to be decided in this Rule is the time within which a tenant had to apply for reliefs under Section 17-B (1). According to Mr. Bhabra, learned counsel for the petitioner, there is no time limit at all for making this application provided that it is made before a tenant is evicted by execution proceedings. Learned counsel says that the period of sixty days from the date of commencement of the Amendment Act, 1968, that is, August 26, 1967, within which an application had to be made under Section 17-B (1), was a provision impossible of being carried into effect and the Court should take no notice of it. As the time limit is not a matter of jurisdiction, the Court, submits Mr. Bhabra, can give relief under Section 17-B (1) when the other conditions prescribed by the section are satisfied.

18. Our attention has been drawn to two decisions of this Court on Section 17-B. In both the decisions it has been held that for certain purposes the date of commencement of President's Act No. 4 of 1968 is not the 26th August, 1967 as provided in sub-section (2) of Section 1; but the 26th March, 1968, when the President gave his assent to the Act. The two learned Judges who delivered these two judgments reached the same conclusion; but their Lordships' reasonings were not the same. Both Mr. Bhabra for the petitioner and Mr. Ginwalla appearing for the opposite party before us, have submitted to us that, these two decisions cannot be accepted as correct. Mr. Bhabra's contention is that there is no time limit for making an application under Section 17-B (1). Mr. Ginwalla's contention is that the time limit is sixty days from the date of commencement which is, as prescribed in sub-section (2) of Section 1 of the President's Act 4 of 1968, the 26th August, 1967.

19. The first decision of this Court we have been referred to, is the decision of Bijayesh Mukherji, J. in *Benu Roy v. Manindra Nath Chatterjee*, 73 Cal WN 10. The learned Judge has principally relied on a passage in Maxwell on the Interpretation of Statutes 10th Edition, at page 409. In this passage it is stated: "..... where a particular day is named for its commencement (that is the commence-

ment of an Act), but the Royal assent is not given until a later day, the Act would come into operation only on the later day." This passage rests on footnote (p) which bears *Burn v. Carvalho*, (1834) 4 Nev and M 893 S. 9, Newspaper Libel Act, 1881 (c. 60) required printers to make certain returns before July 31, 1881, yet it was not passed till the following August 27."

20. Mr. Bhabra showed to us that this passage had been omitted in the 12th Edition of Maxwell's book. The reason for this omission, says Mr. Bhabra, is that it cannot be sustained by the authority of (1834) 4 Nev and M 893. This case decided that as the language of Section 30 of the Civil Procedure Act, 1833 was "prospective only" it could not apply to any proceeding which took place before the Act was passed. The Court also made a comparison between the language of Section 30 and that of Section 21, which was sufficiently comprehensive to include all actions brought by executors and administrators whether before or after the passing of the Act: vide *Craies on "Statute Law"*, 7th Edition, page 385, footnote 18.

21. It is clear therefore, that the judgment of Bijayesh Mukherji, J. pronounced primarily on the above passage in the 10th Edition of Maxwell's Interpretation of Statutes cannot be upheld by us. Moreover, Mukherji, J.'s attention, it appears, was not specifically drawn to the fact that the date of commencement of the Act is necessary for the purpose of determining which of the decrees were passed before that date. In other words, the significance of the word 'such' before the word 'commencement' and before the word 'decree' in Section 17-B (1) was not emphasized before Mukherji, J. The vulnerable decrees were decrees made before the commencement of the Act, that is, the August 26, 1967. And the application had to be made within sixty days of the August 26, 1967.

22. The result of the judgment of Bijayesh Mukherji, J. appears to be that the date of commencement for the decree is the August 26, 1967; but its date of commencement for an application under Section 17-B (1) is the March 26, 1968. Such a construction, if we may say so with great respect, causes violence to the language used in Section 17-B (1). It causes violence to "such commencement" and "such decree". Then again, in the English Case of (1834) 4 Nev and M 893, Section 44 of the Act enacted that "this Statute shall commence and take effect on the first day of June 1883". In other words, the date of commencement of this Statute was prospective. In our case the date of commencement is retrospective. For all these reasons, we are unable to follow the judgment of Bijayesh Mukherji, J.

23. The next judgment is the judgment of Alak Gupta, J. in *Md. Yusuf v. Golam Jilani*, (1969) 73 Cal WN 736. Gupta, J. points out that the reasoning of Bijayesh Mukherji, J., based on the case of (1834) 4 Nev and M 893, cannot be supported. But his Lordship also is of the view that for purpose of Sec. 17-B the date of commencement of President's Act 4 of 1968 is the March 26, 1968. His Lordship has given his reasons in paragraphs 6 and 8 of the judgment. These paragraphs have been summarised in the head note as follows:—

"Whenever in the same Statute there is a particular enactment, such as that in the West Bengal Premises Tenancy (Amendment) Act, President's Act 4 of 1968, published and made known to the public, for the first time, on March 26, 1968, and introducing in the parent Act Section 17-A, the language of which is clearly prospective, and there is also a general enactment, such as Section 1 (2) prescribing that the aforesaid (Amendment) Act shall be deemed to have come into force on August 26, 1967, and the general enactment, taken in its most comprehensive sense, would overrule the special enactment, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the Statute to which it may properly apply. So considered, the commencement of the 1968 (Amendment) Act for the purpose of Section 17-A must be taken to be March 26, 1968, when the said Act was published, the aforesaid section being thus saved from being entirely nugatory."

Alak Gupta, J. therefore, has applied the doctrine of *generalia specialibus non derogant* to the relevant provisions of the West Bengal Premises Tenancy (Amendment) Act, 1968 and has held, inter alia, that an application under Section 17-A may be made within a period of thirty days of the 26th March, 1968.

24. The doctrine of *generalia specialibus non derogant* has been fully explained in the case of the Commr. of Income Tax, *Patiala v. Shahzada Nand & Sons*, AIR 1966 SC 1342 at p 1347. The Supreme Court says that the maxim means that when there is a conflict between a general and a special provision, the latter shall prevail. The Supreme Court quotes in this connection *Craies on Statute Laws*, 5th Edition, at page 205. The passage runs thus:—

"The Rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

25. The Supreme Court points out that this Rule of construction is not of universal application. It is subject to the condition that there is nothing in the general provision, express or implied, indicating an intention to the contrary; see Maxwell on "Interpretation of Statutes," 11th Edition, at pp. 168 to 169. The Supreme Court then proceeds to say that when the words of the section are clear, but its scope is sought to be curtailed by construction, the approach suggested by Lord Coke in re: Heydon's case, (1584) 3 Co. Rep 7a, yields better results. The Supreme Court has said:

"To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act: to consider, according to Lord Coke: (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason for the remedy."

26. We are of the view that this doctrine of *generalia specialibus non derogant* cannot be applied to the statute we have been called upon to construe. There is no general provision and special provision on the same subject. In Section 1 (2) it is apparent that the legislature wanted to make the statute retrospective. Therefore, the word 'commencement' used in the sections that follow Section 1 (2) of President's Act 4 of 1968 must have the meaning that can be derived for it from Section 1 (2). It seems to us that substitution of some date other than the date suggested in Section 1 (2) is not permissible. The purpose of the Act is to give relief against forfeiture to tenants with retrospective effect and it is that purpose which runs through all the other sections of the statute.

27. Let us, in this connection, refer to a few cases. In *Sree Bank Ltd. v. Sarkar Dutt Roy & Co.*, AIR 1966 SC 1953, at page 1965 (paragraph 38) Raghubar Dayal, J., observes:—

"It is not necessary for the retrospective operation of the provision of an Act that it must be stated that its provisions would be deemed to have always existed. That is one mode and may be an effective mode of providing that the provisions would have retrospective effect. Retrospective effect of an enactment can also be gathered from its language and the object and intent of the legislature in enacting it."

28. In *Sahabuddin v. Mohan Lal*, AIR 1951 All 227 at p 228 (paragraph 2), it is stated:

"Reliance was placed on certain provisions of the United Provinces (Temporary) Control of Rent & Eviction Act... and it was urged that the decree was no longer executable. This Act received the

assent of the Governor-General on 28-2-1947 and was published in the U. P. Gazette... on 1-3-1947. Sub-section (3) of Section 1, however, provides that the Act must be deemed to have come into force on 1-10-1946. The result, therefore, is that though the Act was passed in the year 1947 it was given retrospective effect from 1-10-1946. The compromise decree being dated 8-11-1946, it must be deemed to have been passed after the Act came into force."

29. This judgment was followed in *Radhey Lal v. Lareti*, AIR 1954 All 150 at p 151 (para. 9). Both the judgments of Allahabad High Court were on statutes that wanted to give relief to tenants retrospectively.

30. Then again, Jessel, M. R. in *Quilter v. Mapleson*, (1882) 9 QBD 672 at p 674, has observed:

"The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively, unless it is clear that such was the intention of the legislature....."

31. We have cited the decisions in the foregoing paragraphs to indicate the various circumstances in which a statute is given retrospective operation. In our case the express provision in Section 1 (2) of President's Act 4 of 1968 is that the statute is retrospective. In other words, it explicitly intends to give relief to a tenant retrospectively. In these premises, we find it difficult to follow the judgment of Alak Gupta, J., in (1969) 73 Cal WN 736.

32. As we have said counsel for both the parties before us are agreed that they cannot rely either on the judgment of Bijayesh Mukherji, J. or on the judgment of Alak Gupta, J. to support the proposition that President's Act 4 of 1968 came into operation on the 26th March, 1968.

33. In view of this admitted position Mr. Bhabra for the petitioner has argued that if the Act did not come into operation on the 26th March, 1968, then the provisions of Section 17-B became impossible of being given effect to. In these circumstances, the only conclusion is, according to Mr. Bhabra, that for an application under Section 17-B there is no period of limitation at all. Mr. Bhabra relies on the maxims of (a) *Lex non inditit aliquid impossibilia* (the law intends not anything impossible) and (b) *Lex non cogit ad impossibilia* (the law does not compel the impossible). These maxims have been explained in Black on "Interpretation of Laws", 2nd Edition at pages 119 to 120. A statute is never to be understood as requiring an impossibility, if such a result can be avoided by any fair and reasonable construction. The law itself

and the administration of it, must yield to that to which everything must bend — to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim as it does in its general aphorisms, all intention of compelling them to impossibilities; and the administration of law must adopt that general exception in the consideration of all particular cases. The law is not so unreasonable as to require the performance of impossibilities as a condition to the assertion of acknowledged rights..... 'Impossibility' is defined in law as that which, in the constitution and course of nature or of the law, no man can do or perform. An Act is said to be 'physically' impossible when it is contrary to the course of nature; and such an impossibility may be either absolute, when it is impossible in any and every case, as involving a reversal of the order of nature, or it may be relative, when it arises from the circumstances of the particular case, as for example, for A to make a payment to B, the latter being dead. This is sometimes called 'impossibility in fact'. To this class belongs also what is called 'practical' impossibility, where the Act can indeed be done, but only at an excessive or unreasonable expenditure of time, labour, or money. Again, an Act is said to be 'legally' impossible, when a recognised law or rule of law makes it impossible, as for a minor to make a valid will; and this class of Acts must not be confounded with those which are possible, but forbidden by law, as to commit a crime. Lastly, an Act is sometimes said to be 'logically' impossible when it is contrary to the nature of the transaction or involves a contradiction of terms; for instance, when A gifts property to B expressly for the latter's own benefit, but on condition that he shall transfer it to C.

34. Counsel for the petitioner has strongly relied on the above principles and has urged that the presumption against impossibility should be invoked for a proper construction of Section 17-B. And the provision therein that the application under the section has to be made within sixty days of the August 26, 1967, (when the Act itself was assented to on the March 26, 1968) should be construed to be a logical impossibility.

35. Learned counsel also relied on Allen in 'Law in the Making', 7th Edition, at page 462, where the same principles have been briefly discussed. Allen says: "A Statutory rule may be perfectly reasonable and practicable in its general application, but in a particular instance, owing to inevitable circumstances, it may be impossible for an individual to comply with it. The maxim *Lex non cogit ad impossibilia* then applies. A Statute will not be construed as imposing on an individual a duty which it was not reasonably possible for him to perform."

36. Mr. Bhabra also relied on the observation of Lord Denman, C. J. in *Green v. Wood*, (1845) 115 ER 455 at page 458, which reads:

"We are bound to give to the words of the legislature all possible meaning which is consistent with the clear language used. But, if we find language used which is incapable of a meaning, we cannot supply one....."

37. Our attention was also drawn to Maxwell's *Interpretation of Statutes*, 12th Edition, at page 326, which says: "Enactments which impose duties upon conditions are, when these are not construed as conditions precedent to the exercise of a jurisdiction, subject to the maxim that *Lex non cogit ad impossibilia*. They are understood as dispensing with the performance of what is prescribed when performance of it is impossible."

38. The case of *Harding v. Price*, (1948) 1 KB 695, was then cited. The facts were that a trailer attached to a lorry collided with and damaged a stationary car while passing it. It was found as a fact that the driver of the lorry because of the noise the trailer was making did not know of the accident. He therefore did not stop or report the accident to the police as required by Section 22 of the Road Traffic Act, 1930. The Court has held that if a statute contained an absolute prohibition against the doing of an act, as a general rule *mens rea* was not a constituent of the offence; but there was for this purpose a difference between a statutory provision prohibiting an act and one imposing a duty to do something on the happening of an event. The driver could not report something of which he had no knowledge, and therefore he was not guilty of the offence.

39. The next case which Mr. Bhabra cited was the case of the *Queen v. The Justices of Leicestershire*, (1850) 117 ER 391. After an order in bastardy had been made, the putative father, intending to appeal, entered into a recognizance, according to stat. 8 & 9 Vict. c 10, s 3, and, on the same day, sent notice of his having done so by post to the woman. When the appeal came on to be tried, it was proved that the woman had died before the notice to her was posted; and the Sessions being of opinion that a condition imposed by stat. 8 & 9 Vict. c 10, s 3, as preliminary to an appeal had not been complied with, refused to hear the appeal. It was held, on demurrer to the return to a mandamus to enter continuance and hear the appeal, that performance of the condition imposed by law having by the act of God become impossible, its performance was excused; and a peremptory mandamus was awarded.

40. In the instant case these authorities are not apposite. We have al-

ready indicated that the history of the legislation, we are dealing with, does not suggest that the legislature was prescribing an impossibility. In fact, the legislature never intended to confer any right other than the right given by Ordinance No. VI of 1967. By this Ordinance the legislature introduced various sections into the principal Act including Section 17-C which has now become Section 17-B. The legislature's intention was to produce a situation in which the West Bengal Tenancy Act would contain these new provision as if the 1967 Ordinance was an Act.

41. A Special Bench of this Court in *Tarak Chandra v. Ratanlal Ghosal*, 61 Cal WN 263 = (AIR 1957 Cal 257 (SB)), has elaborately discussed what happens when a temporary Act is repealed. It was laid down that the general rule was that unless it contained some special provisions to the contrary, a temporary Act ceased to have any further effect after it had expired. The Special Bench said that no proceedings could be taken under it any longer. And proceedings already taken and pending also terminated automatically as soon as the temporary Act expired. The Special Bench was considering the West Bengal Premises Rent Control Act, 1950 which was limited in duration up to the 31st March, 1956. Before the judgment was delivered the West Bengal Legislature introduced new provisions for "Repeal and Savings" by the West Bengal Premises Tenancy (Amendment) Act, 1956. The expressions used in the new provisions were subjected to severe criticism and Chakravarti, C. J. at Page 292, after coming to the conclusion that the new provisions had saved pending proceedings, observed:

"I am sensible that the construction I am adopting does not lie on the surface of the section and indeed involves some strain on its language. But the language is not wholly incapable of bearing the construction....."

42. It seems to us that this is the reason why the provisions, *inter alia*, of Section 17-B in the same form as they were in the West Bengal Ordinance No. VI of 1967 have been introduced again and again in the enactments that followed in addition to the saving provisions we have referred to. The legislative authorities were anxious that the right given to a tenant under Ordinance No. VI of 1967 and the proceedings commenced thereunder should not die with the expiry of the Ordinance. And they never intended to give to the tenant a higher or a larger or greater right.

43. The date of commencement of the West Bengal Ordinance No. VI of 1967 is the 26th August, 1967. The application under Section 17-C (which became Section 17-B in the later Statutes) had to

be made within a period of 60 days from the commencement of this Ordinance. On November 29, 1967, the West Bengal Legislature had a session; but the Ordinance of 1967 was not converted into an Act. On January 9, 1968, the Ordinance of 1967 was to expire. That is why, a day earlier on January 8, 1968, another Ordinance was promulgated and it was called "The West Bengal Premises Tenancy (Amendment) Second Ordinance, 1968. (West Bengal Ordinance No. II of 1968); but this Ordinance did not make any changes as to the provisions for making an application under the relevant section. The Ordinance of 1968 was followed by President's Act No. 4 of 1968 which was known as the West Bengal Premises Tenancy (Amendment) Act, 1968. Section 17-B of this Act is a repetition of the provisions of Section 17-C of Ordinance No. VI of 1967. Moreover, sub-section (2) of Sec. 1 of this Act makes it abundantly clear that the Act "shall be deemed to have come into force on the 26th day of August, 1967" which is the date of commencement of Ordinance No. VI of 1967. Lastly, we have the West Bengal Premises Tenancy (Amendment) Act of 1969 which is an Act to re-enact the provisions of President's Act 4 of 1968; but the 1969 Act also does not introduce any changes either in Section 1 (2) or in Section 17-B. The history of this legislation, therefore, leads us to the inevitable conclusion that the legislative authorities were consciously re-enacting the relevant provisions of 1967 Ordinance in the subsequent Acts and Ordinances just to keep alive the rights that were given to a tenant under the 1967 Ordinance. We are, therefore, of opinion that the commencement of President's Act 4 of 1968 accordingly is August 26, 1967 as mentioned in Section 1 (2) thereof and that an application under Section 17-B (1) could be made within a period of sixty days only from the August 26, 1967. No other date, in our view, has any relevance to the applicability of this section. We do not also agree that the maxim "Lex non cogit ad impossibilia" applies to S. 17-B (1).

44. The next question that arises for our consideration is whether the reference to sixty days in Section 17-B (1) is a period of limitation. If it is a period of limitation, then the provisions in Section 5 of the Limitation Act or provisions analogous thereto may be invoked to save an application made beyond that period. Mr. Ginwalla for the opposite party contends that this is not a period of limitation. His point is that limitation merely bars the remedy and not the right. Section 17-B, according to him, does not confer an unlimited right which is barred by limitation. The only right, says learned counsel, which Section 17-B confers, is a limited right exercisable within a certain period. In Section 17-B (1) Mr. Ginwalla

points out, the expression "within a period of sixty days from such commencement" is sandwiched between the words "may" and "make". In all the Acts and Ordinances to which our attention has been drawn in this Rule the same juxtaposition of words, occurs.

45. Mr. Ginwalla drew our attention to the differences between the language used in Section 17-A and Section 17-B on the one hand and Section 17 (2B) on the other. The language in Sections 17-A and 17-B are almost the same. But Section 17 (2B) opens with the words "no application for extension of time for the deposit or payment of any amount under clause (a) of sub-section (2A) shall be entertained unless it is made before the expiry of the time specified therefor in sub-section (1) or sub-section (2),.....". According to Mr. Ginwalla this expression prescribes a period of limitation; but when a period is sandwiched between an auxiliary verb and a verb (like "may" and "make") it is not a period of limitation. The adverbial clause "within a period of sixty days of such commencement" only limits the action of the verb. From this point of view Section 17-B (1) merely confers a limited right and as soon the period passes away, says Mr. Ginwalla, the right disappears or is exhausted.

46. Now, Section 39 of the West Bengal Premises Tenancy Act, 1956, is as follows:—

"Subject to the provisions in this Act relating to limitation, all the provisions of the Indian Limitation Act, 1908, shall apply to suits, appeals and proceedings under this Act."

47. One of the sections of the Indian Limitation Act, 1908 is Section 5 which runs thus:

"Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

"Explanation— The fact that the appellant or applicant was misled by an order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section."

48. Mr. Ginwalla's argument before us is that Section 17-B (1) does not prescribe any period of limitation; it merely gives a right which subsists for a limited period which may be aptly called a 'limited right.' Assuming, says Mr. Ginwalla, this is a period of limitation. Sec-

tion 5 of the Limitation Act has no application to it because the Tenancy Act itself prescribes the period for the making of an application under Section 17-B. Mr. Ginwalla has drawn our attention to Section 29 (2) of the Limitation Act, 1963 which says, *inter alia*, that when any special or local law prescribes a period of limitation different from the period prescribed in the Limitation Act the provisions of Sections 4 to 24 shall apply in so far as, and to the extent to which, these provisions are not expressly excluded by such special or local law. Mr. Ginwalla submitted that if the intention of the framers of the Tenancy Act was to attract to its provisions, Section 5 of the Limitation Act, they would not have introduced Section 39 into their own Act. The provisions of Section 39, according to Mr. Ginwalla, expressly excludes the operation of Sections 4 to 24 of the Limitation Act.

49. We shall deal with this argument of Mr. Ginwalla at the appropriate time. But at the moment we only intend, incidentally, to point out that Section 39 of the Tenancy Act speaks of the provisions not of the Limitation Act of 1963 but of the Limitation Act of 1908. And in the latter Act Section 5 was not included in Section 29 (2).

50. Our attention was also drawn to an unreported judgment of A. N. Ray, J. and Bagchi, J. in *National Traders v. Dr. Lalit Mohan Roy*, (A. F. O. D. No. 689 of 1963) decided on 19-3-1969 (Cal). In this judgment it has been stated that Section 5 of the Limitation Act does not apply to an application under Section 17 (2-A) of the West Bengal Premises Tenancy Act, 1956. Ray, J. has *inter alia*, observed: "Section 5 of the Limitation Act relates to an extension of time in matters dealt with by the Limitation Act. These provisions (that is the provisions of the Tenancy Act) do not come within the purview of the Limitation Act." These observations appear to be obiter dicta. At page 31 of the judgment of Bagchi, J. we find that the Learned Judge has stated:

"To understand the meaning of the expression 'the Court' in the provisions of the sections and sub-sections we have discussed, we have analysed and considered all such sections and sub-sections and we have come to this conclusion that the expression 'the Court' in the sections and sub-sections, we have analysed and considered, relates to the Court, not of appeal, but of first instance."

51. The position, therefore, is that Ray and Bagchi, JJ. were of opinion that an application under Section 17 (2-A) was not maintainable before the Appeal Court but had to be made before the Trial Court. After arriving at this conclusion the Learned Judges proceeded to make observations on the applicability of the

Limitation Act. It is clear, therefore, that anything said in this judgment about limitation is obiter dictum. We may, in this connection, refer to the Privy Council's judgment in *Shankarlal v. Hira Lal*, AIR 1950 PC 80. The Privy Council has said that if the Court holds that the suit is not maintainable by reason of failure to comply with notice under Section 80 of the Civil Procedure Code, findings given on merits are obiter and do not support the plea of *res judicata* either in favour of or against a party. Allen in his "Law in the Making" at page 261 has quoted the observations of Lord Sterndale, M. R. in *Slack v. Leeds Industrial Co-operative Society*, (1923) 1 Ch 431 (CA). These observations are as follows:—

"Dicta are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such dicta, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under fuller consideration. Some dicta, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open, no doubt, to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class."

52. According to Mr. Bhabra, the Division Bench's observations on limitation in *National Traders* case, A. F. O. D. No. 689 of 1963, D/- 19-3-1969 (Cal), are dicta of the former kind as it does not appear from the judgment that all relevant matters were placed before the learned Judges concerned. There is, for instance, no reference to any arguments advanced on the basis of Section 39 of the West Bengal Premises Tenancy Act, 1956. In our view whether the dicta are of the former or the latter kind they are not binding on us and we are free to decide to the contrary if we are convinced that Section 5 of the Limitation Act applies to Section 17-B of the West Bengal Premises Tenancy Act, 1956.

53. What, after all, is the Law of Limitation? A Law of Limitation limits the time after which a suit, or other proceedings cannot be maintained in any Court of Justice. In other words, a Law of Limitation limits or prescribes a time at the end of which persons liable to sue shall become exempt from answering therein: vide U. N. Mitra's *Law of Limitation and Prescription*, 6th Edition at page 1.

54. Now, Section 17-B (1) of the West Bengal Premises Tenancy Act, 1956

prescribes a period of sixty days from the 26th August, 1967, after which an application under the section cannot be maintained. It seems to us that a provision of this nature cannot but be a period of limitation. The distinction which Mr. Ginnwalla drew between the languages used in Sections 17 (2A) and 17 (2B) on the one hand and the language of Section 17-B (1) on the other appears to be more verbal than substantive. These are merely ways of describing the same thing differently. In this context we have to appreciate the provisions of Section 39 of the West Bengal Premises Tenancy Act, 1956. This section applies the whole of the Indian Limitation Act, 1908 to the Tenancy Act subject to the provisions in the Tenancy Act relating to limitation. The provisions in the Indian Limitation Act are, broadly speaking, of two types. There are provisions prescribing periods within which suits or proceedings are to be instituted. Secondly, there are also provisions regarding the computation of such periods including those relating to enlargements of such periods in appropriate cases.

55. We have already referred to Section 29 (2) of the Limitation Act, 1963 on which Mr. Ginnwalla had relied. The effect of these provisions is that Sec. 5 of the Limitation Act would apply to a special or local law unless expressly excluded by such law. Before Section 5 was brought within the purview of Section 29 (2), the expression "expressly excluded" was construed in several decisions. For instance, in *Sati Prosad v. Gobinda Chandra*, AIR 1929 Cal 325 at p 327, Cuming, J. (sitting with Mallik, J.) has observed: "By the expression 'expressly' I think it is meant that express reference is made to the specific section in the Act; and that unless such reference is made to the section and by that reference they are expressly excluded, then they would apply." Two other Calcutta cases support the same view. In *District Board Chittagong v. Emdadal Hoque*, AIR 1940 Cal 305, Henderson, J. had to consider whether the provisions of Section 146 of the Bengal Local Self-Government Act, 1885 excluded the application of Section 15 (2) of the Limitation Act. The wording of the relevant portion of Section 146 was as follows:—

"Every such action shall be commenced within three months next after the accrual of the cause of action and not afterwards."

56. It was argued before the learned Judge that the words "and not afterwards" amounted to express exclusion. Henderson, J. has followed the Division Bench's decision in AIR 1929 Cal 325 (*supra*) and has held that these words do not constitute express exclusion and Section 15 (2) of the Limitation Act applied

to Section 146 of the Bengal Local Self-Government Act.

57. Biswas, J. took the same view with reference to the relevant provisions of the Bengal Municipal Act in *Comms. of Pabna Municipality v. Nirode Sundari*, AIR 1942 Cal 544.

58. The High Court at Pepsu in *Mukandi Ram v. Executive Engineer, Sangrur Circle*, AIR 1956 Pepsu 40 has also taken the same view. In para 8 of the judgment at p. 43 it has been observed with reference to Section 29 of the Limitation Act that the exclusion must be by express words, that is by express reference to the section and not exclusion as a result of logical process of reasoning.

59. It may be noted that Sec. 39 of the Tenancy Act has stated that all the provisions of the Indian Limitation Act, 1908 shall apply to suits, appeals and proceedings under the Tenancy Act subject to the provisions in the Tenancy Act relating to limitation. Section 29 (2) of the Indian Limitation Act, 1908 ran thus:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first Schedule the provisions of Section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(a) the provisions contained in Sec. 4, Sections 9 to 18, and Section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply."

60. Now, clause (b) of Section 29 (2) of the Limitation Act, 1908, expressly provided that apart from the provisions mentioned in clause (a) "the remaining provisions of this Act shall not apply." The expression "the remaining provisions of this Act shall not apply" in Section 29 (2) (b) of the Limitation Act, 1908, has been construed to mean that the remaining provisions of the Act shall not apply of their own force unless they are expressly made applicable by the special or local Act: vide *Madhorao v. Balaji*, AIR 1926 Nag 236.

61. Under the provisions of Section 8 (1) of the General Clauses Act, 1897, reference to the Limitation Act, 1908 in the Tenancy Act is to be read as reference to the Limitation Act, 1963; vide *Ram Prosad v. Bijoy Kumar*, 69 Cal WN 921 = (AIR 1966 Cal 488). Section 29 (2) of the Limitation Act, 1963, provides:

"Where any special or local law prescribes for any suit, appeal or application,

a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such periods were the periods prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 inclusive shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law."

62. Far from express exclusion of above sections, in our case, Section 39 of the Tenancy Act has expressly made all the provisions of the Limitation Act, 1908 applicable to the Tenancy Act subject to periods of limitation mentioned in the Tenancy Act itself. This clear invocation to all the provisions of the Limitation Act of 1908, in our opinion, attracts the provisions of Section 5 of that Act to the appropriate provisions of the Tenancy Act including Section 17-B (1). The intention of the legislature, it seems to us, has always been that Section 5 could be availed of in suitable cases.

63. My learned brother has taken the same view with reference to other sub-sections of Section 17 in *Mrs. Gouri Bose v. Sukumar Ghose*, (1971) 75 Cal WN 342.

64. There is another judgment of S. C. Ghose, J. in *Rajputana Trading Co. Private Ltd. v. Malaya Trading Agency*, AIR 1971 Cal 313. Ghose, J. is of opinion that the provisions "relating to limitation" contained in Section 17 of the West Bengal Tenancy Act, 1956 are not contrary to or inconsistent with the provisions of Sec. 5 of the Limitation Act and Section 5 can, in proper cases, be applied to Section 17 of the Tenancy Act. But Ghose, J. felt bound by a judgment of R. M. Datta, J. in *Suit No. 829 of 1966* (Cal) (*Jatindra Nath Samanta v. M/s. Rash Behari Dutta & Co.*) and held that Section 5 was not attracted to an application for extension of time to deposit rent under Section 17 (2A) of the Tenancy Act, the view of R. M. Datta, J., as we have already indicated, we are unable to accept.

65. Let us now examine whether the petitioner has shown sufficient cause for condoning the delay in making its application under Section 17-B (1). We have already referred to the statements in paragraph 14 of the petition. The sum and substance of the paragraph is that the petitioner on April 9, 1969, was for the first time advised by Mr. A. K. Dutta, senior advocate, that an application under Section 17-B should be made and, on the April 11, 1969, the petitioner applied to the Trial Court under Section 17-B as also under Section 5 of the Limitation Act. In Paragraph 15 of the petition it is stated that the application under Section 17-B could not be made within time owing to

"bona fide misapprehension of the legal position and the facts and circumstances as aforesaid."

66. Our task in this application is to decide whether these statements constitute "sufficient cause" within the meaning of Section 5 of the Limitation Act. Mr. Bhabra for the petitioner, submits that Section 17-B is worded in an abstruse manner. It is not a case of the litigant's negligence but a case of default owing to cumbersome wording of the statute. Reliance is placed on the Supreme Court's observations in *Ramlal v. Rewa Coal Fields Ltd.*, AIR 1962 SC 361. In para 7 of its judgment at p. 363 the Supreme Court observes:

"In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the Law of Limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."

67. These principles are well-settled. And Mr. Bhabra's contention is that in the instant case there has been no negligence, no inaction, no abence of bona fides on the part of the petitioner. The language of the statute is not clear and that would be the justification, according to Mr. Bhabra, for condoning the delay in making the application. When a statute is doubtful, says Mr. Bhabra, the doctrine of *ignorantia juris neminem excusat* does not apply.

68. In support of his proposition learned counsel cited several authorities. In *Earl Beauchamp v. Winn*, (1873) 6 HL (English and Irish Appeals) 223 at p. 234, it has been held that the rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief. This case is not an authority on the principles enacted in Sec. 5 of the Limitation Act. It is a case of private rights arising out of a Deed of Grant and both parties were under a mistake. Equitable relief was sought against mutual

mistake and the Court said that where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief.

69. The next case of Mr. Bhabra is the case of *Seaton v. Seaton*, (1888) 13 AC 61. This is also a decision of the House of Lords. In this case the construction of certain provisions of the Infants' Settlement Act, 1855 had arisen and Lord FitzGerald at pages 77 to 78 has explained the maxim *ignorantia juris non excusat*. Lord FitzGerald has said that the true meaning of the maxim is that parties cannot excuse themselves from liability from all civil or criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that the parties must be taken to know all the legal consequences of their acts, and especially where difficult questions of law, or of the practice of the Court are involved.

70. Whether or not the doctrine of *ignorantia juris non excusat* applies depends therefore to a certain extent on how simple the law is. If, for instance, the law which is violated involves difficult questions of construction or of the practice of the Court ignorance of law may be excused. In our case we do not find the complications envisaged by the House of Lords. Here, there were only two possible arguments. One argument was that the application under S. 17-B had to be made within sixty days of the 26th August 1967. The other argument was that the application had to be made within sixty days of the 26th March, 1968; but the tenant, in the instant case, did not come with his application within any of these periods. And Mr. Bhabra's contention that there is no period of limitation appears to us to be untenable. Moreover, neither in Paragraph 14 nor in Paragraph 15 of the petition is it stated that the petitioner was under a misapprehension as to the date within which an application under Section 17-B (1) was to be made. On the contrary, the clear trend of these paragraphs is that the petitioner was all along wholly ignorant of the rights conferred on a tenant by Section 17-B.

71. Mr. Bhabra also referred us to an obiter dictum of Pickford, J. in *Gregory v. Torquay Corporation*, (1911) 2 KB 556 at p. 559. The dictum is: "If a statute conferred a new right of action and also prescribed a limited time within which that right of action might be enforced, it may be that it could not be properly called a statute of limitations."

72. In the instant case this dictum need not be considered by us. We are clearly of opinion, for reasons stated above, that the Legislature's intention was that all applications under Section 17-B (1) should be made within sixty days of the

26th August, 1967. But if the petitioner's case is that its delay in making the application should be condoned inasmuch as the petitioner was under the impression that the "period of sixty days from such commencement" was not a period of limitation, the petitioner should have made a specific statement to this effect while giving his reasons for not making the application within time. No such statement has been made either in Paragraph 14 or in Paragraph 15 of the petition.

73. The position, therefore, is that the petitioner's explanation for delay in making the application under Section 17-B (1) is "bona fide misapprehension of legal position" and this misapprehension, according to the petitioner, was removed by the opinion of Mr. A. K. Dutt which the petitioner obtained on April 9, 1969. This is not a case of mistake of law arising out of wrong legal advice but a case of ignorance of law arising from not taking any legal advice on the petitioner's rights under Section 17-B till the April 9, 1969. The question is whether this is a sufficient cause within the meaning of Section 5 of the Limitation Act.

74. The Bombay High Court in *Sitaram v. M. N. Nagrahna*, AIR 1954 Bom 537, has discussed to some extent the problem we have been called upon to resolve in this case. The Bombay High Court says that there is a distinction between ignorance of law and mistake of law. Ignorance of law is ignorance of the rights of a party which the law confers upon him. Mistake of law is mistake in establishing those rights by, for instance, going to one forum instead of another. The party knows his rights, he wants to assert them, and establish them, but through mistake in understanding the provisions of the law goes to a wrong forum instead of going to the forum which the law has set up for the determination of his rights. In cases where there is a mistake of law, the Courts have almost uniformly taken the view that the time taken up by asserting the right in a wrong Court or wrong forum should be excused and the Courts have largely been influenced by the principle underlying Section 14 of the Limitation Act; but ignorance of law has been held to be not only no excuse but also no sufficient cause for failing to assert a party's rights in the forum established by law. The Bombay High Court is of opinion that the words "sufficient cause" in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice when neither negligence nor inaction nor want of bona fides is imputable to the appellant. Therefore, if a party be guilty of negligence or bad faith, no relief can be given under Section 5 of the Limitation Act. He should not also be guilty of inaction. And when a party does not choose to bestir himself

because he is ignorant of his rights, he is clearly in law guilty of inaction.

75. Now, what are the facts of this case. The petitioner before us took part in all kinds of proceedings in the Trial Court, before the Additional District Judge, Seventh Court, Alipore as also in a second appeal to this Court. The petitioner even made an application for leave to appeal to the Supreme Court when its second appeal was dismissed; but there was total inaction on its part so far as an application under Section 17-B (1) was concerned owing to ignorance of its rights under that section. And inaction of this nature cannot be condoned by a Court of law by exercising its powers under Sec. 5 of the Limitation Act.

76. Mr. Bhabra, learned counsel for the petitioner, submits that it is true that mere ignorance of the law cannot be recognised as a sufficient reason for delay under Section 5 of the Limitation Act. But this rule of law, says Mr. Bhabra, has also its limitations. In *Sitaram v. Nimba*, (1888) ILR 12 Bom 320, A obtained a decree against B as the heir and legal representative of his deceased uncle C. The decree directed that the amount adjudged should be recovered from C's assets in the hands of B. In execution of this decree certain property was attached. B claimed this property as his own and sought to remove the attachment, but the Court passed an order confirming the attachment on November 20, 1880. In 1881 B filed a regular suit to set aside this order. The suit was dismissed in 1885, as barred by Section 244 of the Civil Procedure Code. Thereupon B filed an appeal from the order in execution made on the 20th November, 1880. This appeal was rejected as time-barred. The Bombay High Court has held that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff was not entitled to a deduction of the time that intervened between the date of the order appealed against and the date of filing the suit inasmuch as mere ignorance of law was not an excuse for the delay for that would be putting a premium on ignorance.

77. Mr. Bhabra contends that the above case is a case of "mere ignorance" and the principle laid down therein has no general application. He has cited the case of *Dadabhai Jamsetji v. Maneksha Sorabji*, (1897) ILR 21 Bom 552, which says that the presentation of an appeal to a wrong Court under a bona fide mistake may be "sufficient cause" within the meaning of Section 5 of the Limitation Act. Learned counsel has also referred to the case of *Krishna Mohan Ghosh v. Surapati Banerjee*, AIR 1925 Cal 684 (1). In this

case the appellant was an ignorant milkman without any previous experience of litigation and pleaded ignorance of his duty to substitute the legal representative of the deceased respondent though he was warned of the respondent's death. The Calcutta High Court has held that in the circumstances of the case, the delay was bona fide and that sufficient cause was shown within the meaning of Section 5. Apart from the fact that this was a case of bona fide mistake not arising out of any laches or negligence, it is to be observed that here there was no question of asserting any right but merely the duty of substituting the legal representative of a deceased respondent.

78. To sum up the position we may observe that there may be extenuating circumstances justifying the application of Section 5 of the Limitation Act when a party is ignorant of his rights; but such circumstances are, indeed, rare. For instance, in the present case if the petitioner had stated that it was under the impression that there was no period of limitation for an application under Section 17-B (1) owing to the impossibility of applying the relevant provisions, the petitioner's case under Section 5 might have deserved careful consideration; but as we have pointed out, the only ground appears to be that the lawyers who were conducting the petitioner's case before the trial Court, the first appeal Court and the second appeal Court never advised the petitioner as to its rights under Section 17-B until the petitioner came to Mr. A. K. Dutt. A plea of this nature, is, in our opinion, a plea of mere ignorance of law arising out of the petitioner's neglect or failure to seek proper legal advice. On this plea we would not be justified in excusing the petitioner's delay under Section 5 of the Limitation Act.

79. In the result, this Rule is discharged. The interim order is vacated. There will be no order as to costs.

SALIL KUMAR DATTA, J: 80. I agree.

Rule discharged.

AIR 1972 CALCUTTA 443 (V 59 C 91)
MURARI MOHAN DUTT, J.

Baidyanath Kundu, Petitioner v. Sm. Jyotshna Rani Karmakar, Opposite Party.

C. R. No. 938 of 1971, D/- 7-2-1972.

W. B. Premises Tenancy Act (12 of 1956), S. 17 (3) — Bona fide dispute as to existence of relationship of landlord and tenant — Duty of Court to settle before striking out defence against delivery of possession.

FP/GP/D520/72/MVJ

Where the defendant both in the written statement and in his petition of objection to application under Section 17 (3) denies the existence of relationship of landlord and tenant between the plaintiff and himself the Court is bound to decide that issue first before passing an order under sub-section (3). This is, so notwithstanding the fact that the defendant did not raise the dispute by way of an application under Section 17 (2). (1961) 65 Cal WN 149 and (1962) 66 Cal WN 302 and ILR (1967) 1 Cal 449, Relied on.

(Paras 11, 12)

Cases Referred: Chronological Paras
 ILR (1967) 1 Cal 449, Tirthapati Sen v. Paresh Nath Sen 12
 (1962) 66 Cal WN 302 = 1963 Cal LJ 209, Aloka Ghose v. Inspector General of Police, West Bengal 10
 (1961) 65 Cal WN 149 = 1961 Cal LJ 105, Biswanath Roy v. Annapurna Roy 8

M. N. Ghose and Miss Gita Lalwani, for Petitioner; Purna Ch. Basu, for Opposite Party.

ORDER.— This Rule is directed against order No. 58 dated February 2, 1971, passed by the learned Munsif, Second Court, Midnapur, in a proceeding under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956. By the said order the learned Munsif struck out the defence of the petitioner against delivery of possession.

2. The opposite party filed the suit for ejectment against the petitioner on the ground of default in payment of rent and also on the ground of reasonable requirement. It was alleged by the opposite party that the petitioner failed to pay rent since September 1966. Further, it was alleged by the opposite party that the deposit of rent made by the petitioner with the Rent Controller since November, 1967 and also the deposit made by the petitioner in Court after entering appearance in the suit, were all invalid deposits. The petitioner did not make any application under Section 17 (2) of the Act.

3. The defence of the petitioner was, that he paid rent to the husband of the opposite party upto October 1967, but no receipt was granted by him. Since November 1967, the petitioner had been depositing rent with the Rent Controller as the husband of the opposite party refused to accept rent remitted by him by postal money-order. The petitioner denied that he was a defaulter as alleged by the opposite party. The further defence of the petitioner was that there was no relationship of landlord and tenant between the opposite party and the petitioner. The case that was made out by the petitioner in his written statement was that the plaintiff's husband Bhupendra Nath Karmakar executed an agreement of tenancy describ-

ing him as the landlord of the suit premises and collected rent from the petitioner. The petitioner denied that the deposits made by him with the Rent Controller were invalid deposits.

4. The opposite party made an application under Section 17 (3) praying for striking out the defence of the petitioner against delivery of possession. The petitioner opposed the said application by filing a petition of objection thereto. In his petition of objection, the petitioner challenged the ownership of the opposite party in respect of the suit premises and denied the relationship of landlord and tenant between the opposite party and the petitioner. The petitioner also denied that he was a defaulter in payment of rent as alleged by the opposite party.

5. At the hearing of the application under Section 17 (3), the opposite party examined her husband Bhupendra Nath Karmakar. Bhupendra Nath Karmakar in his evidence admitted that the written agreement was signed by him on September 22, 1963. That agreement is an agreement of tenancy and Bhupendra Nath Karmakar was described as the landlord. The witness further stated that there was no other agreement except the said agreement which he signed.

6. The learned Munsif came to the findings that the petitioner was a defaulter in payment of rent and that the deposits made by the petitioner with the Rent Controller were invalid deposits. Upon these findings, the learned Munsif struck out the defence of the petitioner against delivery of possession. The learned Munsif was of the view that the plea of absence of relationship of landlord and tenant between the parties could not be agitated by the petitioner in the proceeding under Section 17 (3) inasmuch as the petitioner did not raise that defence by an application under Section 17 (2) of the Act.

7. The only point that was argued by Mr. Ghosh, the learned Advocate for the petitioner is, that the learned Munsif should have considered the defence of the petitioner that there was no relationship of landlord and tenant between the opposite party and the petitioner. It has been already stated that the petitioner has specifically taken that defence in his written statement. In the petition of objection to the application under Section 17 (3), the petitioner has also taken that defence by way of objection to the plaintiff's application under Section 17 (3). Mr. Ghosh drew my attention to Order No. 39, dated June 19, 1970, passed by the learned Munsif. By that order the learned Munsif overruled the contention made on behalf of the petitioner that before hearing the application under Section 17 (3), the learned Munsif should dispose of the dis-

pute as to the existence of relationship of landlord and tenant between the opposite party and the petitioner. The sole reason given by the learned Munsif for overruling the said contention was that the said dispute should have been raised by an application under Section 17 (2) within the prescribed period.

8. Section 17 uses the expression 'any dispute as to the amount of rent'. In a Bench decision in *Biswanath Roy v. Annapurna Roy*, (1961) 65 Cal WN 149, P. N. Mookerjee, J. held that any kind of dispute which affects the amount of rent payable by the tenant including a dispute as to the existence of relationship of landlord and tenant between the parties, will be a dispute under or within the contemplation of Section 17 (2). It has also been held in that decision that the dispute as to the existence of relationship of landlord and tenant between the parties does affect the question of rent, payable by a tenant to a particular landlord, and in that view of the matter, in a case, where such a dispute has been raised, unless and until the Court has decided and determined that dispute and made an appropriate order under Section 17 (2), no question of striking out of the defence against delivery of possession under Section 17 (3) can arise, provided, of course, that the said dispute is a bona fide one, as, otherwise the said sub-section (2) would not be attracted.

9. Strong reliance was placed on this decision by Mr. Basu, the learned Advocate for the opposite party. It was contended by Mr. Basu that in view of the said decision, the tenant has to raise the dispute as to the existence of relationship of landlord and tenant by an application under Section 17 (2) and not otherwise. I am unable to accept this contention of Mr. Basu. All that has been laid down in that decision is that before striking out the defence against delivery of possession the Court should dispose of the dispute as to the existence of relationship of landlord and tenant between the parties. It may be that the dispute can be raised by, or in connection with, an application under Section 17 (2) of the Act. But it cannot be said that it has been laid down in that decision that the dispute has to be raised only by an application under Section 17 (2).

10. In a later Bench decision in *Aloka Ghosh v. Inspector-General of Police, West Bengal*, (1962) 66 Cal WN 302, P. N. Mookerjee, J. expressed the view that the question as to the existence of relationship of landlord and tenant between the parties may be either decided at the stage of the Section 17 (3) application, only prima facie and for purposes of the proceeding under Section 17 (3), leaving it open for a final decision at the time of hearing of the suit, or the Court may take

up the issue upon that question along with the application under Section 17 (3) and decide the two together fully so that the decision on that issue will be final for purposes of the suit also.

11. In the instant case, the petitioner has denied the relationship of landlord and tenant and, as aforesaid, he has raised the defence both in the written statement as also in his petition of objection to the application under Section 17 (3). From the pleadings of the parties an issue arises as to the existence of relationship of landlord and tenant between the parties. The implied effect of this denial of relationship is, that according to the petitioner the provision of the Act does not apply to the facts and circumstances of the case and that the Court has no jurisdiction to pass a decree for eviction against the petitioner. In order to proceed further in the matter the Court must first of all decide whether there is relationship of landlord and tenant between the parties. In case the Court finds that there is no such relationship between the parties, the Court will not have any jurisdiction to pass a decree for ejection. Therefore, in my opinion, it is incumbent upon the Court to first of all decide the issue as to the existence of relationship of landlord and tenant. The Court cannot either strike out the defence against delivery of possession or decree the suit without deciding the said issue as to the existence of relationship of landlord and tenant.

12. The view which I take finds support from a Bench decision of this Court in *Tirthapati Sen v. Paresh Nath Sen*, ILR (1967) 1 Cal 449. In that decision it has been held by A. C. Sen, J. that there is nothing in the Act which prevents the Court from first deciding the issue in the suit as to whether the defendant is the tenant of the plaintiff and thereafter, deciding the plaintiff's application under Section 17 (3) or from deciding both together; that in either case the Court cannot strike out the defence against delivery of possession on the ground that the defendant did not apply under Section 17 (2) within the prescribed time, even if the said issue is decided in favour of the tenant, and that moreover, the time prescribed for raising the dispute by the defendant under Section 17 (2) has no application to the plea taken by the defendant that he is not the tenant by way of objection to an application by the plaintiff under Section 17 (3). Most respectfully I agree with the aforesaid Bench decision. The learned Munsif was not justified in not considering the contention of the petitioner regarding the dispute as to the existence of relationship of landlord and tenant even at the time of hearing of the application under Section 17 (3). Before passing an order under Section 17 (3) the Court has to determine whether there is any such relationship,

particularly in a case where such relationship has been denied. In my opinion, the learned Munsif acted illegally and with material irregularity in the exercise of his jurisdiction in not considering the contention of the petitioner and deciding the dispute before striking out the defence of the petitioner against delivery of possession.

13. In the result, the order of the learned Munsif is set aside. The case is sent back to the learned Munsif and he is directed to first of all decide the issue as to the existence of relationship of landlord and tenant between the opposite party and the petitioner and thereafter to dispose of the application of the opposite party under Section 17 (3). The Rule is made absolute. There will be no order as to costs in the Rule.

Case remanded.

AIR 1972 CALCUTTA 446 (V 59 C 92)

ANIL KUMAR SINHA, J.

Sheikh Hossain, Petitioner v. Mst. Naubahar Bibi, Opposite Party.

Civil Rule No. 456 of 1971, D/- 7-1-1972.

W. B. Premises Tenancy Act (12 of 1956), S. 17 (3) — Striking out defence against delivery of possession — Defendant denying that plaintiff was his landlord — Dispute about their relationship must be settled before defence is struck out though defendant has failed to raise the dispute under S. 17 (2). (X-Ref:— Evidence Act (1872), Ss. 17, 116). (Para 4)

The deposit of rent by the defendant under S. 17 (1) does not amount to an admission of the relationship of landlord and tenant within S. 17 of the Evidence Act nor is he estopped from challenging the title of the plaintiff in a proceeding under S. 17 (3). (1961) 65 Cal WN 149 and ILR (1967) Cal 449, Relied on.

(Paras 6, 7)

Cases Referred: Chronological Paras

ILR (1967) 1 Cal 449, Tirthapati Sen

v. Paresh Nath Sen

(1961) 65 Cal WN 149 = 1961 Cal

LJ 105, Bishwanath Roy v. Annapurna Roy

Dhruba Kumar Mukherjee and Bidyut Kiran Mukherjee, for Petitioner; Barun Kumar Roy Choudhury, for Opposite Party.

ORDER:— This Rule is directed against an order striking out the defence of the defendant petitioner under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the Act).

2. A suit has been filed by the plaintiff (alleging that she is the owner by

FP/GP/D535/72/MVJ)

purchase of premises No. 13 Gangadhar Babu Lane Calcutta) for ejectment of the defendant who is in occupation of one ground floor room of the above premises at a monthly rental of Rs. 50/- as a tenant on the ground of default of payment of rent since May 1966 and on the further ground that the room is reasonably required by the plaintiff for building and rebuilding purposes and also for her own use and occupation. The defendant petitioner appeared and since then he is contesting the suit by filing written statement. He has also deposited rents for May 1966, October 1966 and July, 1969 within one month from the date of service of summons with an application under S. 17 (1) of the Act, with permission of the Court, together with statutory interest for the arrears.

3. On 19-6-70 the plaintiff has filed an application under Section 17 (3) of the Act for striking out the defence of the present petitioner against delivery of possession on the allegation that he has not paid any amount whatsoever on account of arrears of rent and also that he has not deposited the current rent. In the written statement one of the objections taken is that there is no relationship of landlord and tenant between the plaintiff and the present petitioner which was also repeated in the objection filed by the present petitioner to oppose the application under Section 17 (3) of the Act. The trial Court found that the deposits already made with the permission of the Court were valid deposits but since he has neither deposited arrears of rent after May, 1966 nor has filed any application under Section 17 (2) raising any dispute as to arrears for the said months, although "it may be said that he has deposited, as stated by him in his written statement, all rents upto June, 1969 excepting May, 1966 to the credit of the plaintiff's predecessor-in-interest named Bilayet Hossain in the office of the Rent Controller," the trial Court refused to give any relief and struck out the written defence. This is how the petitioner felt aggrieved and obtained the present Rule.

4. Mr. Mukherjee says that it was the duty of the trial Court to decide the question raised by the petitioner both in his written statement and written objection against the application under Section 17 (3) of the Act relating to the absence of relationship of landlord and tenant between the plaintiff and the petitioner before any order could be passed under Section 17 (3) on the application. Reliance is placed on a decision of this Court reported in (1961) 65 Cal WN 149 (Biswanath Roy v. Annapurna Roy). Mr. Roy Choudhury appearing on behalf of the opposite party in repelling such contention, submits, in the first place, that having once admitted payment of rent in the name of the plaintiff under Section 17 (1) of the Act, the defendant petitioner was estopped from chal-

lenging the title of the plaintiff as his landlord. It is said that such deposit with an application under Section 17 (1) of the Act is a clear admission on the part of the tenant defendant that the plaintiff is his landlord.

5. In the second place his argument is that not having raised any dispute under Section 17 (2) of the Act, in any event, the defendant tenant is disentitled to raise any objection as to absence of relationship of landlord and tenant on an application made by the plaintiff under Section 17 (3) of the Act. In aid of his contention he relies on a Bench decision of this Court reported in ILR (1967) 1 Cal 449 (Tirthapati Sen v. Pares Nath Sen).

6. As regards the first contention I do not think that the question of estoppel or admission arises at all, for in spite of depositing the rent under Section 17 (1) of the Act, the defendant, under the Statute, is entitled to raise a dispute under Section 17 (2) of the Act within the time specified therein for determination of the amount of rent. It is now well-settled that the dispute will include amongst other things the question of absence of relationship of landlord and tenant. Such deposit of rent under Section 17 (1) again cannot operate as an admission within the meaning of Section 17 of the Indian Evidence Act for the amount supposed to be deposited in Court is not rent but "an amount calculated at the rate of rent at which it was last paid,.....". This apart, for very same reason, that in spite of such deposit he is entitled to raise a dispute, clearly shows, that these deposits under Section 17 (1) cannot be used as an admission on the part of the tenant that the plaintiff is necessarily his landlord.

7. As regards the second contention of Mr. Roy Choudhury, it is clear from the decision in Tirthapati Sen's case (supra) that even on an application under Section 17 (3), it is the duty, nevertheless, of the Court to decide the issue as to whether there is the relationship of landlord and tenant between the parties, if it is raised. Mr. Roy Choudhury however submits that even so, the issue was not pressed but from the judgment itself there is nothing to indicate, although there is the written objection of the defendant, that the defendant did not press this issue at the hearing of the application.

8. Accordingly, both the contentions of Mr. Roy Choudhury fails. This, apart, it appears that the trial Court did not enter into the question as to whether the deposits of rent upto 1969 with the Rent Controller were valid deposits, though made in the name of Bilayet Hossain. In fact, there is nothing also to indicate from the judgment upon what materials the Court concluded that the tenant defendant was in arrears since May, 1966. Consider-

ing all these, it must be held that the order passed by the trial Court suffers from serious infirmities and cannot therefore be sustained as valid.

9. Accordingly, I set aside the order complained of and make the Rule absolute. The matter will now go back to the trial Court for a fresh decision of Section 17 (3) application in accordance with law and in the light of the observations made above.

10. There will be no order for costs. Let the records go down to the Court below without delay.

Case remanded.

AIR 1972 CALCUTTA 447 (V 59 C 93)

ANIL KUMAR SINHA, J.

Rabindra Nath Sinha Roy, Petitioner v. The Divisional Commissioner, Burdwan Division, at Chinsura and others, Opposite Parties.

C. R. No. 580 of 1970, D/- 9-12-1971.

Index Note: (A) West Bengal Land Reforms Act (10 of 1956), S. 4 (2-A) (a) — Quarrying sand — Provision cannot apply where sands found on surface land during excavation of tank were allowed by owner to be removed by licensee for business purpose since there is no quarrying of sand in such case. (Para 7)

Kishore Mukherjee, Saktipada Mukherjee and Chitra Ranjan Mitra, for Petitioner; Aditya Narayan Roy, for Opposite Parties Nos. 1 to 3.

ORDER:— This Rule is directed against an order passed by the Divisional Commissioner in appeal modifying the order of the Additional District Magistrate, Estates Acquisition, Hooghly, imposing upon the petitioner fine for removing sands from his land.

2. The petitioner claims to be the owner of certain plots of land on a portion of which, it is alleged, he was under dire necessity of digging a tank. In course of excavation some sands came out which were kept on his own land not for the purpose of either selling or making any profit. Even then a case was started against the petitioner under sub-sections (2-A) and (2-B) of Section 4 of the West Bengal Land Reforms Act, 1956, which was introduced by amendment by West Bengal Land Reforms (Amendment) Act, 1966. The Additional District Magistrate, Estate Acquisition, who heard the case, imposed a fine of Rs. 1,500/-, but this fine of Rs. 1,500/- was reduced to Rs. 1,000/- on appeal before the Divisional Commissioner.

3. It appears that the Additional District Magistrate did not take any evi-

dence of the parties, but merely on the report of the J.L.R.O. or other information received from sources which are also not disclosed, he was satisfied that the petitioner contravened the provisions of sub-section (2-A) of Section 4 of the Act by permitting another person to quarry sand from his holding for commercial purpose. I fail to see how without any evidence the Additional District Magistrate, who is under an obligation to act judicially, could have proceeded to decide the matter only on a report of the J.L.R.O. even without examining him. I also do not find any other evidence or the particulars of information stated to have been received by the Magistrate in deciding the case. In fact Mr. Roy, the learned Advocate for the opposite parties, very fairly submits before me that excepting the report of the J.L.R.O. he also does not find any evidence adduced for establishing the offence of the petitioner. It is one of the fundamental concepts of well established judicial procedure that finding arrived at by authorities acting judicially or quasi-judicially, must be based on some evidence. Here in the instant case, the report of the J.L.R.O. without examining him was clearly inadmissible and cannot be considered as evidence on record.

4. Although such is the position, the appellate authority did not consider this aspect of the matter at all, but it equally proceeded to penalise the petitioner without any evidence to show that the petitioner committed any offence within the meaning of sub-section (2-A) of Section 4 of the Act. It may be that he reduced the fine of Rs. 1,000/-, but that again was based not on any evidence, but purely on surmises and suspicions and his finding is "that during the alleged excavation of tank on those plots of land for whatever purposes it may be sands were found under the surface land and the appellant allowed the licensee Sri Rafique Sarkar to extract sand and to remove the same for business purpose without previous permission from the State Government under sub-section (2-A) of Section 4 of the Act." I think, to say the least of it, the appellate authority which was required to decide the question of fact, ought to have applied its mind to see whether there was any evidence adduced on behalf of the prosecution who was under a duty to establish its case against the petitioner by adducing sufficient and proper evidence. On the other hand, it appears that the appellate authority cast the onus upon the petitioner to prove that he was not guilty of the offence with which he was charged. It is stated that the appellant also could not conclusively prove that the sands extracted from the said plots of land were removed for his own use and were not permitted to be removed by any other person for any other purpose. I think both

the Additional District Magistrate and the appellate authority utterly failed to make a judicial approach in taking its decision against the petitioner as they did so without any regard even to the elementary principle on burden of proof of criminal offence which lies heavily on the prosecution. In this view of the matter which I have taken, it is sufficient to dispose of this Rule.

5. But Mr. Mukherjee also has raised question involving construction of the sub-sections (2-A) and (2-B) of the Act. Sub-section (2-A) of Section 4 provides:

"(a) raiyat intending to quarry sand, or permit any person to quarry sand, from his holding.

(b) dig or use or permit any person to dig or use earth or clay of his holding for the manufacture of bricks or tiles, for any purpose, other than his own use shall make an application in Form AI for a permit for such quarrying or digging or use to the Additional District Magistrate through the Junior Land Reforms Officer of the area. A copy of the application shall be sent at the same time to the Sub-divisional Land Reforms Officer and to the Additional District Magistrate."

6. Sub-section (2-B) provides after amendment that "in case of offence being committed under sub-section (2-A) a fine not exceeding Rs. 2,000/- and where the breach is a continuing one a further fine not exceeding Rs. 50/- for each day is imposed.

7. On a fair reading of sub-section (2-A) it seems clear, there is thus distinction between clauses (a) and (b) of sub-section (2-A) as the first clause concerns quarrying sand and the second clause deals with digging of earth or clay. The question, therefore, is in the instant case, whether the petitioner can at all be convicted for quarrying sand which is the case of the prosecution. It is found by the Divisional Commissioner that the petitioner was excavating the tank, but the reasons which led the Commissioner to hold that even then the petitioner was guilty of the offence, were that the sands were found on the surface land and the appellant allowed the licensee to extract sand and to remove the same for business purpose. I fail to see how this is so. If in course of excavating a tank some sands come out, as they must in almost all cases from the surface of the earth, clearly, that cannot mean quarrying of sand or permitting any person to quarry sand from one's own holding. If that construction is put to this section the result, in my view, would be disastrous. Digging or excavating tank become completely prohibited or at least such excavation of tank cannot be undertaken without previous permission of the State Government. In my view, that is neither the provision nor such can be the

Intention of the legislature. It seems therefore clear that on the case made out against the petitioner, sub-section (2-A) of Section 4 or for the matter of that sub-section (2-B) which provides for imposition of fine, cannot have any application to the case of the petitioner. Considering the matter from both the aspects, it must be held that the impugned orders suffer from serious infirmities and must be struck down as invalid.

8. Accordingly, I set aside the orders and the Rule is made absolute. Fines, if paid, must be refunded to the petitioner.

9. There will be no order as to costs.

Petition allowed.

AIR 1972 CALCUTTA 449 (V 59 C 94)

FULL BENCH

ARUN K. MUKHERJEA, SABYASACHI MUKHARJI AND M. M. DUTT, JJ.

Nurul Hoda and others, Appellants v. Amir Hasan and another, Respondents.

Appeal No. 112 of 1964, Suit No. 260 of 1945, D/- 31-7-1972.

Index Note:— (A) Letters Patent (Cal.), CL 15 — "Judgment" — Tests stated — An order setting aside abatement under O. 22, R. 9, Civil P. C. is not a 'judgment', as it does not relate to the merits of the dispute, but only a step towards final adjudication of the dispute and as such is not a 'judgment' within the meaning of CL 15 of the Letters Patent — (X-Ref:— Civil P. C. (1908), O. 22, R. 9). (Para 10)

Brief Note:— (A) The following tests should be applied in considering whether a particular order amounts to a 'judgment' or not, namely. (i) whether the order in question puts an end to the proceeding so far as the Court dealing with it is concerned, in which the order was sought and made, (ii) the order must involve determination of some right or liability affecting the merits, (iii) an adjudication or a decision, which is not anything more than a step towards obtaining the final adjudication on the merits of the dispute in the proceeding is not judgment within the meaning of Letters Patent, (iv) where the decision involves an adjudication on the question of limitation or jurisdiction of the Court, in certain cases, such decisions would amount to 'judgment'. (Para 7)

Applying the above tests to an order setting aside an abatement under O. 22, R. 9, Civil P. C., the order in question does not relate to the merits of the dis-

pute. It is certainly a decision which affects the proceedings of the dispute but it is not a decision which affects the merits of the dispute, though the order in question puts an end to the particular application in which the order was sought for and obtained. In the aforesaid view of the matter it cannot be said that an order setting aside an abatement is a 'judgment' within the meaning of CL 15 of the Letters Patent. (Para 7)

A decision setting aside an abatement or refusing to set aside the abatement upon a particular view whether sufficient cause had been made out or not does not involve any question of jurisdiction, AIR 1957 Cal 727, Distinguished. (Para 8)

Nor does the order in question involve any question of limitation as such. Under the law of limitation time has been provided for making an application for bringing the heirs of the deceased defendant on record and time again has been provided for setting aside of the abatement by the Court on sufficient cause being shown. If, in a particular case, a Court sets aside abatement it does not in any way affect any right accrued to the defendant by virtue of the law of limitation. AIR 1922 Cal 335 & AIR 1928 Cal 184 & (1963) 67 Cal WN 18, Overruled; AIR 1953 SC 198 & AIR 1971 SC 2337 & AIR 1964 SC 215, Rel. on. Case law discussed. (Para 8)

Cases Referred: Chronological Paras

AIR 1971 SC 2337 = (1971) 1 SCR	
783. Radhey Shyam v. Shyam Behari Singh	5
AIR 1970 SC 2007 = (1971) 1 SCR	
657. Gajanan v. Brindaban	11
(1966) 70 Cal WN 670, Central Bank of India v. S. B. Hosliery Ltd.	8
AIR 1964 SC 215 = (1964) 3 SCR	
467. Union of India v. Ram Charan	6, 7, 13
(1963) 67 Cal WN 18, Sm. Tara Nevatia v. S. C. Dhur	9
AIR 1961 Cal 386, Laxminarayan Tamkorwalla v. Udairam Khemka	9
AIR 1960 All 692 = 1960 All LJ 387 (FB), Standard Glass Beads Factory v. Shri Dhar	5
AIR 1960 Cal 582 = 64 Cal WN 861, Md. Felumeah v. S. Mandal	8
AIR 1959 Cal 389 = 63 Cal WN 300, T. Bhagwandas v. Sitaram Srigopal	9
AIR 1957 Cal 727 = 61 Cal WN 559, Shorab Merwanji Modi v. Mansata Film Distributors	8
AIR 1953 SC 198 = 1953 SCR 1159, Ashrumati Devi v. Kumar Rupendra Deb	3, 4, 5, 9
AIR 1928 Cal 184 = 47 Cal LJ 82, Naimuddin Biswas v. Maniruddin Laskar	8

AIR 1925 Cal 473 = 40 Cal LJ 588, Mohd. Nuru Amin v. Monohar Saran Deb Mohanta 8
 AIR 1922 Cal 335 = ILR 49 Cal 62, Sarat Chandra Sarkar v. Maihar Stone and Lime Co. Ltd. 8, 9
 AIR 1917 PC 156 = 44 Ind App 218, Brij Inder Singh v. Kanshi Ram 11
 (1912) ILR 35 Mad 1 = 21 Mad LJ 1 (FB), Tuljaram Row v. Alagappa Chettiar 4
 (1872) 8 Beng LR 433 = 17 Suth WR 364, Justice of the Peace for Calcutta v. Oriental Gas Co. 4, 5

P. K. Das with Jayanta Mitra, for Appellants; B. K. Ghose with P. K. Roy and P. Khastgir, for Respondents.

SABYASACHI MUKHARJI, J.: On 16th February, 1945 suit No. 260 of 1945 was filed by the plaintiff, inter-alia, for a declaration that the partnership business of Haji Qudabux Mohammed Ibrahim stood dissolved on and from 16th February, 1945, in the alternative, for dissolution of the said partnership, for appointment of Receiver, accounts, enquiries, injunction and other reliefs. Messrs. N. C. Bural & Pyne were the Solicitors for the plaintiff at the time of the filing of this suit. On 6th of March, 1945 by an order in the said suit, the defendant, Zahir Hasan was appointed Receiver over the said partnership business. On 29th March, 1945 another suit being suit No. 507 of 1945 was filed by Nurul Hasan against his mother, brothers and sisters, inter alia, for partition and allotment in severalty of the properties and estates of Shaik Mohammed Ibrahim, since deceased. On 22nd May, 1945 by an order in suit No. 507 of 1945, Mr. P. K. Sen, Barrister-at-Law, was appointed Receiver of the estate and effects left by Shaik Mohammed Ibrahim, since deceased, including the said business and Zahir Hasan was thus discharged from further acting as Receiver of the said partnership firm. On 30th August, 1960 M/s. Pyne & Pyne became the plaintiff's Solicitors on dissolution of M/s. N. C. Bural & Pyne. On 23rd August, 1961 in suit No. 507 of 1945 the plaintiff obtained change from Messrs. Pyne & Pyne to Messrs. P. D. Himatsinka & Co. On 27th of September, 1961 when Mallick, J. was delivering judgment in suit No. 507 of 1945, Amir Hasan submitted certain alleged terms of settlement for being recorded, thereupon the learned Judge was pleased to adjourn delivering judgment to enable the said Amir Hasan to make application in the said suit for recording the terms of settlement. On 18th of April, 1962 the application made by Amir Hasan for recording the alleged terms of settlement was dismissed. On 11th May, 1962 Mallick, J. delivered the judgment in suit No. 507 of 1945, inter alia,

declaring the shares of the sons and daughters of Sheikh Mohammed Ibrahim, since deceased, in the estate of the said deceased and directing a reference to ascertain the estate and effects of Sk. Mohammed Ibrahim. On 7th December, 1962 Nurul Hasan being defendant in suit No. 260 of 1945, died. Some time thereafter the plaintiff applied for and obtained an order of substitution dated 11th March, 1963 in appeal proceeding arising out of suit No. 507 of 1945. By 7th March, 1963, time to make application for substitution of the heirs of the deceased, defendant No. 1, expired. On 23rd March, 1963 the plaintiff instructed Messrs. P. D. Himatsinka & Co. to obtain change from Messrs. Pyne & Pyne. On 3rd April, 1963 Messrs. P. D. Himatsinka & Co. sent a Warrant of Attorney for consent signature of Messrs. Pyne & Pyne. On 5th April, 1963, Messrs. P. D. Himatsinka & Co. received back the said Warrant from Messrs. Pyne & Pyne with their consent signature. On 11th April, 1963 cause papers relating to the above suit were sent by Messrs. Pyne & Pyne to Messrs. P. D. Himatsinka & Co. On 6th of May, 1963 summons was taken out for the present application. On 27th June, 1963 an order was passed by A. N. Ray, J. setting aside the abatement, recording the death of Nurul Hasan and ordering amendment of the plaint by substitution of the names of the heirs and legal representatives of Nurul Hasan in the cause title of the plaint. The learned Judge did not give any reason in the order. On 29th April 1964 appeal No. 112 of 1964 was filed against the said order of A. N. Ray, J. dated 27th June 1963. The said appeal came up for hearing before a Division Bench of this Court consisting of Sinha, J. (as his Lordship then was) and A. C. Sen, J. A preliminary point arose in the said appeal, namely, whether an appeal lay against an order setting aside an abatement under Order 22, Rule 9 of the Code of Civil Procedure. In view of the conflict of decisions of this Court, Sinha, J. felt that this was a matter which should be decided by a Full Bench. In the premises under Chapter XXXI-A, Rule 1 of the Original Side of this Court, the appeal has been referred to this Full Bench.

2. Under the Code of Civil Procedure read with the Limitation Act by 7th March, 1963 the suit had abated against the deceased defendant. The plaintiff had 60 days from that date to make an application for setting aside the abatement by making out sufficient cause. The plaintiff had applied in time for setting aside the abatement in this case. It is, however, disputed that he had made out sufficient cause. That is a contention on the merits. The trial Court has set aside the abatement. The short ques-

tion is, does an appeal lie from such an order? There is no dispute that under the Code there is no appeal provided. Clause 15 of the Letters Patent, 1865 provides appeal from "judgment". The question therefore, is can the order of the trial Judge in this case be described as "judgment" in terms of Cl. 15 of the Letters Patent of 1865?

3. Innumerable decisions were cited at the Bar, dealing with the question whether a particular order is a "judgment" or not. It is not necessary to deal or discuss all of them here. Sometimes experience, sometimes logic has led the courts to take one or the other view. It will, however, be necessary to deal with three Supreme Court decisions, two of which deal with the meaning of the expression "judgment" in clauses of the Letters Patent of the High Courts and the other with the question of the nature of the order setting aside abatement. Counsel for the appellant relied very strongly on the decision of the Supreme Court in the case of *Asrumati Devi v. Kumar Rupendra Deb*, AIR 1953 SC 198. There the Supreme Court was considering the question whether an order for transfer of a suit under Cl. 13 of the Letters Patent, is a "judgment" within the meaning of Cl. 15. By Cl. 13 of the said Letters Patent the High Court had power to remove certain suits pending in courts within its jurisdiction to the High Court. It was held by the Supreme Court that such an order neither affected the merits of the controversy between the parties in the suit itself, nor did it terminate or dispose of the suit on any ground. An order for transfer, it was further observed, could not be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground.

4. Under clause 12 of the Letters Patent the High Court has jurisdiction to grant leave to file suit in the High Court, if part of the cause of action arises within the jurisdiction of the High Court. The High Court has right to revoke or rescind the leave granted. The Supreme Court held that there was a difference between an order refusing to rescind leave granted under clause 12 of the Letters Patent and the one under clause 13 directing the removal of a suit from one Court to another, and there was no good reason to hold that the principle applicable to one applied to the other also. The meaning of the expression 'judgment' was construed in the case of *Justice of the Peace for Calcutta v. Oriental Gas Co.*, 8 Beng LR 433, and the Supreme Court in the aforesaid case of AIR 1953 SC 198 (supra) quoted the observations of the Chief Justice Sir Richard Couch to the following effect:

"We think that 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined".

The Supreme Court also discussed several authorities. At page 200 of the report, the Supreme Court observed as follows:—

"It cannot be said, therefore, that according to Sir Richard Couch every judicial pronouncement on a right or liability between the parties is to be regarded as a 'judgment' for in that case there would be any number of judgments in the course of a suit or proceeding, each one of which could be challenged by way of appeal. The judgment must be the final pronouncement which puts an end to the proceeding so far as the Court dealing with it is concerned. It certainly involves the determination of some right or liability, though it may not be necessary that there must be a decision on the merits. This view, which is implied in the observation of Sir Richard Couch, C. J., quoted above, has been really made the basis of the definition of 'judgment' by Sir Arnold White, C. J. in the Full Bench decision of the Madras High Court to which reference has been made, vide (1912) ILR 35 Mad 1 (FB). According to White, C. J. to find out whether an order is a 'judgment' or not, we have to look to its effect upon the particular suit or proceeding in which it is made. If its effect is to terminate the suit or proceeding, the decision would be a 'judgment' but not otherwise. As this definition covers not only decisions in suit or actions but 'orders' in other proceedings as well which start with applications, it may be said that any final order passed on an application in the course of a suit, e.g., granting or refusing a party's prayer for adjournment of a suit or for examination of a witness, would also come within the definition. This seems to be the reason why the learned Chief Justice qualifies the general proposition laid down above by stating that:—

"an adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of Letters Patent". The Supreme Court indicated that the Supreme Court was not giving an exhaustive definition of the word 'judgment'.

5. The question, therefore, is, does not the order of the learned trial judge in this case involve determination of

some right or liability though such determination may not be a decision on the merits. In this case, the merits of the controversy in the suit remain unaffected by the order in question. The order in question, however, affects the right of the plaintiff to proceed with the suit. The controversy in the suit and the points in dispute therein remain unaffected by the order in question. No right or liability of the party in respect of the points in dispute in the suit are touched by the order setting aside the abatement. Counsel for the appellant, however, contended that the order in question affected the plaintiff's right to proceed with the suit and the defendant's right to stop further prosecution of the suit. So far as the controversy whether the suit had abated or not had been finally adjudicated by the said order. Therefore, it was contended, that the order in question was a 'judgment' because it was the final pronouncement which had put an end to the application for setting aside the abatement and involved determination of the right of the defendants to stop prosecution of the suit any further. Before the question is further examined, it is necessary to refer to another decision of the Supreme Court upon which reliance was placed, namely, the decision in the case of *Radhey Shyam v. Shyam Behari Singh*, AIR 1971 SC 2337. There the Supreme Court was considering clause 10 of the Letters Patent of the Allahabad High Court, which was similarly worded. The respondent in that case had obtained a decree for Rs. 9,000/-. In execution proceedings taken out by him, the appellant's one fourth share in a house was put up for sale and a proclamation setting out the date and hour when the sale would be held was duly issued. The sale, however, was postponed to July 30, 1956 at the instance of the appellant and on his offering to pay a part of the decretal amount. At the auction sale held on the adjourned date the respondent himself purchased the said one fourth share of the appellant for Rs. 8,000/-. The appellant filed an application for setting aside that sale under Order XXI, Rule 90 of the Code of Civil Procedure on the ground that contrary to the provisions of Rule 69 of that Order, the notice relating to the adjourned auction sale did not set out the hour when the auction would be held though the original proclamation under which the auction sale was to be held on the earlier date specified both the hour and the date. The appellant contended that the failure to mention the hour contravened Order XXI, Rule 69 and that such a contravention was a material irregularity which vitiated the sale. The objection was overruled by the execution Court. The appellant thereupon filed an appeal in the High Court where

a learned single Judge upheld the objection holding that the failure to set out the hour amounted to a material irregularity, in consequence whereof the appellant had been prejudicated by the sale having fetched too low a value. On this finding the learned Judge allowed the appeal and set aside the auction sale. Aggrieved by the said order, the respondent filed a Letters Patent Appeal under Cl 10 of the Letters Patent of the Allahabad High Court. A Division Bench of the High Court reversed the order passed by the learned single Judge and allowed the appeal. Following the Full Bench decision of that High Court in *Standard Glass Beads Factory v. Shri Dhar*, AIR 1960 All 692 (FB) the division bench rejected the appellant's contention that no Letters Patent Appeal lay against such an order and held that the order of the learned single Judge was a 'judgment' within the meaning of the clause 10 of the Letters Patent. The Supreme Court held that an order in a proceeding under Order XXI, Rule 90, was a 'judgment' inasmuch as such a proceeding raised a controversy between the parties therein affecting their valuable rights and the order allowing the application certainly deprived the purchaser of the right accrued to him as a result of the auction-sale. Therefore, appeal under clause 10 lay from an order of a Single Judge of the High Court in an appeal from an order of an execution Court on an application under Order XXI, Rule 90. After referring to the decision and the observations in the case of AIR 1953 SC 198 (supra) the Supreme Court observed at page 2339 of the report as follows:—

"It will be noticed that the order in question was on an application in the suit as a step-in-aid towards the determination of the controversy between the parties in the suit. It was, therefore, that the said observation was made that the order sought to be appealed against did not affect the merits of the controversy in the suit nor did it terminate or dispose of the suit. For an order to be a 'judgment' it is not always necessary that it should put an end to the controversy in the suit or should terminate the suit. Even the narrower definition of a 'judgment' as given by Couch, C. J. in the *Justice of the Peace for Calcutta*, (1872) 8 Beng LR 433 = 17 Suth WR 364 was that it must mean a decision which affects the merits of the question between the parties by determining some right or liability and such a decision might be either final or preliminary or interlocutory".

6. The other decision of the Supreme Court to which reference need be made is the decision in the case of *Union of India v. Ram Charan*, (1964) 3

SCR 467 = (AIR 1964 SC 215). At page 474 of the report Raghubar Dayal, J. observed as follows:—

"Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be overstrict in expecting such proof of the suggested cause as it would accept for holding certain facts established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance".

7. It is not necessary for us to lay down any exhaustive definition of the expression 'judgment'. But it appears from the aforesaid decisions and the subsequent decisions to be referred hereafter that the following tests should be applied in considering whether a particular order amounts to a 'judgment' or not, namely, (i) whether the order in question puts an end to the proceeding so far as the Court dealing with it is concerned, in which the order was sought and made, (ii) the order must involve determination of some right or liability affecting the merits, (iii) an adjudication or a decision, which is not anything more than a step towards obtaining the final adjudication on the merits of the dispute in the proceeding is not judgment within the meaning of Letters Patent, (iv) where the decision involves adjudication on the question of limitation or jurisdiction of the Court, in certain cases, such decisions would amount to judgment. It is necessary to examine how far the aforesaid tests can be applied to the order in question, namely, an order setting aside the abatement. In this connection we must bear in mind the observations of Raghubar Dayal, J. mentioned hereinbefore in the case of (1964) 3 SCR 467 = (AIR 1964 SC 215) (*supra*) that an order setting aside an abatement does not relate to the merits of the dispute. It is certainly a decision which affects the proceedings of the dispute but it is not a decision which affects the merits of the dispute, though the order in question puts an end to the particular application in which the order was sought for and obtained. In the aforesaid view of the matter we are of the opinion that it cannot be said that an order setting aside an abatement is a 'judgment' within the meaning of Cl. 15 of the Letters Patent of the High Court.

8. There are decisions of the Allahabad, Bombay, Rajasthan, Punjab and Manipur High Courts holding the

view that order setting aside abatement is not 'judgment' within the meaning of Letters Patent. We need not refer to the said decisions which were cited at the Bar. In Calcutta High Court, however, there has been a contrary trend. In the case of Sarat Chandra Sarkar v. Maihar Stone & Lime Co. Ltd., AIR 1922 Cal 335 the Division Bench of this Court held that an order setting aside an abatement was a 'judgment' within the meaning of Clause 15 of the Letters Patent and was therefore appealable. Reliance was placed for this on an unreported decision in Appeal No. 16 of 1918 dated 19th of June, 1918. Richardson, J. observed that setting aside of the abatement deprived the party in whose favour the abatement operated of a valuable right, and that was why it was considered as a judgment. Apart from what has been mentioned hereinbefore no other reasons were indicated why an order setting aside abatement should be considered as a 'judgment'. It is true that an order setting aside abatement affects valuable rights and affects the proceedings of the dispute but it does not affect the merits of the dispute. Therefore, though the order affects valuable rights of the parties and should not be lightly made, it cannot, in our opinion, be considered 'judgment' on that ground. In the case of Mohamed Nuru Amin v. Monohar Saran Deb Mohanta, AIR 1925 Cal 473, it was on the other hand held by the Division Bench of this Court that no appeal lies. In the case of Naimuddin Biswas v. Maniruddin Laskar, AIR 1928 Cal 184, it was held by the Division Bench of this Court that an order of abatement by virtue of the death of the party was virtually a decree as it disposed of the plaintiff's claim as completely as if the suit had been dismissed. Mallick, J. observed in the said judgment that the order of abatement operated as a judgment as between the parties to the same extent as a judgment on merits. The case of Shorab Merwanji Modi v. Mansata Film Distributors, AIR 1957 Cal 727 dealt with different question. It was held that an order refusing to stay a suit under Section 10 of the Civil P. C., was a 'judgment' within the meaning of Clause 15 of the Letters Patent. It was held that where a question of the jurisdiction of the Court to entertain or proceed with a suit or proceeding was involved and a decision on that question was given, such decision affected the merits of the controversy between the parties. We are in this case not concerned with that question. It may be that where questions of jurisdiction or of limitation arise, decisions may be 'judgments' in certain circumstances. In the instant case, counsel for the appellant, contended that the order in this case also involved a ques-

tion of jurisdiction. We are unable to agree. The learned trial Judge undoubtedly had jurisdiction to make an order setting aside the abatement or refusing to set aside the abatement. A decision setting aside an abatement or refusing to set aside the abatement upon a particular view whether sufficient cause had been made out or not does not involve any question of jurisdiction. The learned trial Judge might have been right or might have been wrong in his valuation of the facts and on his conclusion as to whether sufficient cause had been made out or not. He had the jurisdiction to decide either way namely, whether sufficient cause had been made out or not and a decision either way, right or wrong, is not a decision on the question of the jurisdiction of the Court. We are, therefore, unable to accept the position that in this case any question of jurisdiction of the Court was involved. Similarly, where questions of limitation or res judicata are involved decisions in respect of the same may, in certain circumstances be 'judgments'. It was so held in the case of Central Bank of India v. S. B. Hosiery Ltd., (1966) 70 Cal WN 670. In the case of Md. Felumeah v. S. Mandal, 64 Cal WN 861 = (AIR 1960 Cal 582) it was held that an order varying interim order was a 'judgment' within the meaning of the Letters Patent. We are again not concerned with this question. We do not express any opinion in respect of the same. Counsel for the appellant further contended that question of limitation was involved in the instant case, because by the lapse of time and due to the conduct of the plaintiff a right had accrued to the defendant which was being affected by the order in question. We are unable to accept the contention that the order in question, involved any question of limitation as such. Under the law of limitation time has been provided for making an application for bringing the heirs of the deceased defendant on record and time again has been provided for setting aside of the abatement by the Court on sufficient cause being shown. If, in a particular case, a Court sets aside abatement it does not, in our opinion, in any way affect any right accrued to the defendant by virtue of the law of limitation.

9. In the case of Laxminarayan Tamkorwalla v. Udairam Khemka, AIR 1961 Cal 386, the Division Bench of this Court had occasion to consider some of the decisions referred to hereinbefore. The Division Bench felt that according to the Supreme Court in the case of AIR 1953 SC 198 (supra) any order to be 'judgment' the adjudication need not be on the merits of the controversy between the parties, but it must be a decision affecting the merits of the case. The Division Bench was concerned with an order

under Rule 5, Order 9 of the Code of Civil Procedure with which we are not concerned in the instant case. In the case of T. Bhagwandas v. Sitaram Sri-gopal, 63 Cal WN 300 = (AIR 1959 Cal 389), the Division Bench held that an order setting aside a decree and restoring suit to file was not a 'judgment' and therefore not appealable. Such an order decided nothing as to the merits in controversy between the parties but merely reopened the controversy. In the case of Sm. Tara Nevatia v. S. C. Dhur, (1963) 67 Cal WN 18 the Division Bench of this Court following the decision in the case of AIR 1922 Cal 335 (supra) and the decision in the case of AIR 1961 Cal 386 held that an order setting aside an abatement of a suit was a 'judgment' under Cl. 15 of the Letters Patent. The Division Bench did not give any independent reason.

10. For the reasons indicated hereinbefore we are of the opinion that the Calcutta decisions, so far as they have held that order setting aside abatement is a 'judgment' under clause 15 of the Letters Patent, are not correct and an order setting aside abatement is not a 'judgment', as it does not relate to the merits of the dispute, but only a step towards final adjudication of the dispute and as such is not a 'judgment' within the meaning of clause 15 of the Letters Patent.

11. Counsel for the appellant contended that we should not disturb the decisions of the Division Benches of this Court which had held that such orders were appealable. Counsel contended that a rule of procedure which had been established should not be departed from. Reliance was placed upon a decision of the Judicial Committee in the case of Brij Inder Singh v. Kanshi Ram, 44 Ind App 218 = (AIR 1917 PC 156) and on the observations at page 225 of the report. There, however, the Judicial Committee observed that a rule of procedure which had been laid down by the Full Benches in all the Courts of India and had been acted upon for many years, should not be departed from. Reliance was also placed on the decision of the Supreme Court in the case of Gajanan v. Brindaban, AIR 1970 SC 2007 where the Supreme Court had observed that the view which had been accepted for a long time by the highest Court and stood for a long period of time, should not be interfered with because many transactions both in respect of property and contracts had taken place upon the basis of the said decision. It is true that if a decision has stood the test of time and which has been laid down by the highest Court, and according to which people had adjusted their affairs, should not be de-

parted from. But in this case, as we have noticed before, there has been wide divergence of opinion between the different High Courts in this country. As a matter of fact several High Courts in India as indicated before have taken a view that such an order was not a 'judgment' within the meaning of the Letters Patent while in many of the decisions of the Calcutta High Court a contrary view had prevailed. It however appears that as early as 1925 a different view was expressed by a Division Bench of this Court, and doubts have arisen on this question from time to time. There has been yet no Full Bench pronouncement on this question, and though the rule of procedure might affect some pending appeals it would not affect any transaction. In the aforesaid view of the matter and in view of the tests indicated by the Supreme Court we are unable to accept the position that we should not differ from the said decisions of the Division Benches on this point.

12. In the aforesaid view of the matter we are of the opinion that no appeal lies.

13. Counsel for the appellant contended before us that in this case no sufficient cause had been made out why abatement should be set aside. Counsel also drew our attention to several decisions dealing with the question of sufficient cause. Counsel also placed reliance upon several decisions dealing with the question that the application for setting aside should explain the delay and the conduct of the applicant. In the view we have taken on the other aspect of the matter that no appeal lies, it is not necessary for us to discuss this aspect of the matter. We are, however, constrained to observe that the cause indicated in the affidavit does not seem to be very convincing. As mentioned hereinbefore, the learned trial Judge did not indicate any reason. The Supreme Court in the case of (1964) 3 SCR 467 = (AIR 1964 SC 215) had observed that the Court in considering whether an applicant had established sufficient cause though need not be overstrict, should, nevertheless, carefully examine the question whether sufficient cause was made out or not. However, it appears that in this case parties were disputing for a long long time. It further appears that there were several litigations. It is also clear that there was a change of Attorney. In those circumstances in respect of other matters it has been mentioned that there were applications for substitution. Obviously this application had not been made because as the applicant had said that he had forgotten about the same. Though it is not a very convincing proof of the sufficiency of the cause for setting aside an abatement but if in the background of

the facts of this case the learned trial Judge had thought it fit to set aside the abatement it should not be interfered with in the appeal. However, this question need not be pursued any further in view of our conclusion on the first question, that is to say, no appeal lies from an order setting aside the abatement.

14. In the aforesaid view of the matter this appeal fails and is accordingly dismissed. The costs of this appeal and of this reference to this Full Bench would be costs in the suit.

ABUN K. MUKHERJEA, J.: 15. I agree.

M. M. DUTT, J.: 16. I agree.
Appeal dismissed.

AIR 1972 CALCUTTA 455 (V 59 C 95)

ANIL KUMAR SEN, J.

Ramesh Ch. Sood, Petitioner v. A. S. O. Sub-Division, Ranaghat and others, Opposite Parties.

Civil Rule No. 6658(W) of 1968, D/-10-9-1971.

(A) W. B. Estates Acquisition Act (1 of 1954), S. 44 (2a) — Notice requiring holder to show cause against action under section without giving grounds for initiation of proceeding and without stating why and in what manner the finally published record of rights needs revision is liable to be quashed as being incompetent exercise of suo motu power and as violating rules of natural justice — (X-Ref:— Constitution of India, Art. 226). AIR 1968 SC 843, Followed. (Para 5)

(B) W. B. Estates Acquisition Act (1 of 1954), S. 44 (2a) — Revenue Officer or Assistant Settlement Officer cannot enquire into the title of holder — He has only to decide on basis of possession.

A proceeding under Section 44 (2a) initiated for purpose of determining holder's title vis-a-vis his father to find out who was the real owner or for making a roving enquiry and for requiring holder to prove correctness of the entry in record of rights was beyond the power of the officers under the provision. By so doing he would be usurping the function of ordinary Civil Court. The scope of powers under Section 44 (2a) must be determined in the light of Sections 39 to 43 and Rule 26. (Paras 5 & 6)

(C) W. B. Estates Acquisition Act (1 of 1954), S. 44 (2a) and Sch. B, R. 6 — Correctness of entry in record of rights has to be enquired into by the Assistant Settlement Officer himself and not by deriving any impression from enquiry held by another officer. (Para 7)

(D) Constitution of India, Art. 226 — Alternative Remedy — Provision for appeal under S. 44 (3) of W. B. Act 1 of 1954 did not bar writ challenging proceeding and order under S. 44 (2a) which was beyond the jurisdiction of the Officer and also suffered from breach of rules of natural justice — (X-Ref:— Tenancy Laws — W. B. Estates Acquisition Act (1 of 1954), Ss. 44 (3) and 44 (2a).

(Para 8)

Cases Referred: Chronological Paras
AIR 1968 SC 843 = (1968) 2 SCR
492, Swastik Oil Mills v. H. B.
Munshi 5

S. N. Ghosai, for Petitioner; P. K. Sen Gupta, for Opposite Parties.

ORDER:— In this Rule the petitioner is challenging an order dated August 2, 1968 passed in a proceeding initiated suo motu under Section 44 (2a) of the West Bengal Estates Acquisition Act, 1953 (hereinafter referred to as the said Act).

2. There is no dispute that the disputed land appertaining the several khattians stands recorded in the name of the present petitioner in the finally published record-of-rights. A proceeding under Section 5-A of the said Act was unsuccessfully initiated in or about June, 1968, but as the transfers had taken place long prior to May 5, 1953, such proceeding was dropped. But immediately thereafter a suo motu proceeding under Sec. 44 (2a) was instituted by the Assistant Settlement Officer and a notice dated July 17, 1968 was issued on the petitioner. This notice however discloses no ground for exercise of powers under Section 44 (2a) but only reads as a notice fixing a date of hearing. It recites that whereas an application has been filed under Section 44 (2a) and whereas the said application has been fixed for hearing on July 22, 1968, therefore the petitioner is directed to appear to show cause if any. The petitioner appeared and he was called upon to support the entries in his favour. He produced certain documents of purchase of some of the disputed plots from different persons all effected in the year 1947 and 1952. The Assistant Settlement Officer however came to the conclusion that such purchases were made benami by the father of the petitioner in petitioner's name. On such finding he directed deletion of the name of the petitioner in respect of the disputed plots and instead thereof directed such land to be recorded in the name of petitioner's father. This was the order which was passed on August 2, 1968 and which is the subject-matter of challenge in this Rule.

3. Mr. Gorai appearing in support of this Rule has raised two points in support of his contention that the impugned order is wholly without jurisdiction. In

the first place, Mr. Gorai contends that if the proceeding was initiated on any application as indicated by the notice, then it is clearly barred by limitation as prescribed by the Act; if on the other hand, the proceeding was initiated suo motu the notice falls short in not disclosing any ground or reason why such a proceeding was initiated and it does not indicate why or in what manner the finally published record-of-rights need any revision. Secondly Mr. Gorai contended that the Assistant Settlement Officer had no jurisdiction in law to enter into the question of title in the manner done by him.

4. The Rule is being contested by the respondents who have filed an affidavit-in-opposition and Mr. P. K. Sen-gupta is appearing to support the order.

5. In my view both the contentions raised by Mr. Gorai are of great substance. It is not disputed that if initiated on an application the proceeding is barred by limitation prescribed by the Act. The respondents themselves in their affidavit therefore claim the proceeding to be one initiated suo motu. Unfortunately the notice discloses no ground why such a proceeding is being initiated. Nor does it indicate why or in what manner the finally published record needs revision. Except describing the notice as a notice of a proceeding under Section 44 (2a) there is nothing in the notice to indicate that it is a proceeding for revision of finally published record-of-rights. This Court has repeatedly held following the decision of the Supreme Court in the case of Swastik Oil Mills v. H. B. Munshi, AIR 1968 SC 843 that no proceeding under Section 44 (2a) can competently be initiated except by disclosing some grounds for exercise of such suo motu powers. It is but a part of the principles of natural justice that a man must be told as to why or in what manner or for what reason the records standing in his favour are to be revised. Or in other words, he must know the case which he is to meet in the proceeding. A proceeding which is initiated in breach of this minimum requirement is not in accordance with law. At the hearing my attention has been drawn to an ex parte order recorded on July 13, 1968 which led to the initiation of the proceeding. This order indicates that the Assistant Settlement Officer formed an opinion that the son (the petitioner) had been inducted only as a benamdar in order to retain more land than what is allowable for retention by the father and it was therefore necessary to enquire into the right, title and possession of the lands recorded in the name of the son. In my view if the proceeding was initiated only to adjudicate the title of the petitioner vis-

a-vis the father to find out whether son is the real owner or merely the benamdar for the father or not it was not within the jurisdiction of the Assistant Settlement Officer to hold any such adjudication. On the other hand, if it was initiated to make a roving enquiry and call upon the petitioner to support the entry which on final publication stands in his name it was also beyond the jurisdiction of the Assistant Settlement Officer. Of course, it would be within his jurisdiction to be prima facie satisfied that the land never belonged to the petitioner or was not in his possession and the entry as it stands is erroneous so that it should be corrected. But in the present case the proceeding was not initiated on any such prima facie decision. For these reasons I must accept the first contention of Mr. Gorai that the proceeding was not lawfully initiated.

6. The second contention of Mr. Gorai is of equal importance. The impugned order indicates that the Assistant Settlement Officer straightway went in to adjudicate the title. Upon his findings documents so far produced indicated that many of these plots were purchased between 1947 and 1952 from third parties by registered deeds in the name of the petitioner. The rent receipts prior to vesting were not produced but the rent receipts for the subsequent period were produced to show payment of rent in respect of most of these plots by the petitioner. The Assistant Settlement Officer however found that when these plots were purchased at a time when the petitioner was minor and when the petitioner was living in the same mess with his father these plots must have been purchased by the father in the benami of his son. Unfortunately not only the records but also the documents so far disclosed stand in the name of the petitioner. None of the parties including the State for over ten years disputed the title of the petitioner. The question is whether the Assistant Settlement Officer had any authority to question the title and then decide it in the manner done by him. In my considered opinion he is not entitled to do so. In doing so he would be usurping the function of the ordinary Civil Court. The powers conferred by Section 44 (2a) must be adjudged in the light of the provisions of Sections 39 to 43 and Rule 26 of the rules framed under the Act. None of these provisions in any manner indicate that either the Revenue Officer or the Assistant Settlement Officer is given any authority to launch an adjudication purely on title. On the other hand, Rule 6 of Schedule B to the rules clearly indicates that the question of title can be gone into only in a summary manner and when any dispute is raised as to title the Revenue Officer

must proceed on the basis of possession. These rules read in the light of the statutory provisions clearly indicate that the legislature never intended to transfer a part of the Civil Court's jurisdiction to these settlement authorities in adjudicating pure issues of title. Whether the ostensible owner is the real owner or benamdar is a disputed question both of law and facts and involve consideration of various materials which can in my view never properly be adjudicated by either a Revenue Officer or an Assistant Settlement Officer and in a proceeding either under Section 44 or 44 (2a). It is for this reason that the rules have indicated that even where any such dispute as to title is raised the Settlement Officer or the Revenue Officer must proceed on the basis of possession and leave the parties to have their title adjudicated in a Civil Court.

7. The Assistant Settlement Officer having thus decided the title against the petitioner had gone over to consider possession. In so doing he relied on an enquiry report by a Revenue Officer. Such report again on the statement of the Enquiring Officer is based upon an impression gathered by him on examination of local witnesses that it was the father who was possessing the lands. Such witnesses were not examined in this proceeding. Where the father and son live together as in the present case normally it would be difficult to distinguish who is actually in possession and possession must naturally follow the title. In any event witnesses were not examined in the proceeding but witnesses were examined by a Revenue Officer who carried the impression to the Assistant Settlement Officer and the Assistant Settlement Officer on such impression held against the petitioner. No doubt the Assistant Settlement Officer also relied on the entries as in the Khasra khatian as also certain B Form returns filed by the father. The Khasra khatian however is one which was prepared before attestation and in the absence of any evidence that the final entry as made after attestation suffers any particular error, the Khasra khatian cannot override the final publication. Nor does any error or irregularity in the returns submitted by the father affect the petitioner's title or the records standing in his name. In any event reading the order as a whole I have no manner of doubt that the Assistant Settlement Officer has passed the final order substantially on his findings on the title which he had gone into without any jurisdiction. In this view the second point raised by Mr. Gorai must also succeed.

8. An objection was taken that the impugned order being appealable under Section 44 (3) this Court should not in

exercise of its writ jurisdiction set aside such an order when no appeal was preferred under the statute. In my view when on the findings made hereinbefore the proceeding is beyond the jurisdiction of the Assistant Settlement Officer and is also violative of the ordinary principles of natural justice, petitioner's not preferring an appeal under Section 44 (3) would not debar this Court from interfering in this jurisdiction.

9. On the conclusions as above this application succeeds. The impugned order is hereby set aside. The Rule is made absolute.

10. Let a Writ in the nature of Certiorari do issue quashing the aforesaid proceeding and the final order passed therein.

11. I further direct that the security deposited by the petitioner with the Collector of Nadia should now be refunded after adjustment of his dues to the State. There will be no order as to costs.

12. Nothing said in this order will prevent the respondents from taking any steps that they may be entitled to take in accordance with law.

Petition allowed.

AIR 1972 CALCUTTA 458 (V 59 C 96)

R. N. DUTT, J.

Binoj Kumar Saha and another, Petitioners v. The Revenue Officer, Malda and others, Opposite Parties.

Civil Revn. Case No. 1709 of 1969, D/- 30-7-1971.

West Bengal Estates Acquisition Act 1953 (1 of 1954), S. 2 (b) — Tank and bund thereof are not agricultural lands.

A tank is not used for purposes of agriculture or horticulture, though it may be used for pisciculture and other purposes. Even if the water of the tank be used for irrigation purpose, that does not make it agricultural land and therefore the tank and its bund could not be directed to vest in the State under the Act. (Para 3)

Sudhangshu Bhusan Sen and Miss Archana Roy, for Petitioners; Chandidas Roy Chowdhury and Amal Kumar Basu Chowdhury, for Opposite Parties Nos. 1 to 4.

ORDER:— This Rule is against an order of a Revenue Officer under Section 47 of the West Bengal Estates Acquisition Act directing plots Nos. 215 and 218 of mouza Ghansahar amongst other plots to be recorded as vested in the State.

2. One Bimal Krishna Sanyal, opposite party No. 5, was the owner of these two plots. He was an intermediary within the meaning of the Act. He exercised option under Section 6 (5) of the Act, submitted a 'B' Form statement and he retained plots Nos. 215 and 218. Plot No. 215 has been recorded as a tank with an area of 3.71 acres and plot No. 218 has been recorded as the bank of the tank with an area of 10.37 acres. Some time in 1963 opposite party No. 5 sold these two plots to the petitioners. Some time in 1969 the Revenue Officer started the instant proceeding under Section 47 of the Act but no notice was served on the petitioners and the instant order was made by the Revenue Officer on May 2, 1969 in the absence of the petitioners. Subsequently, the petitioners filed an application but since the matter had already been disposed of no action was taken thereon. Thereafter the petitioners obtained this Rule.

3. I have said that plot No. 215 is the tank and plot No. 218 is the bank of the tank. These are not agricultural lands. Obviously, opposite party No. 5 retained these as tank fishery. Mr. Roy Chowdhury who appears for the State submits that the settlement records shows that the water of the tank was used for irrigation purpose and so, these two plots should be held to be agricultural lands within the meaning of the Act. This argument cannot be accepted. Agricultural land means land ordinarily used for the purposes of agriculture and horticulture and including such land, notwithstanding that it may be lying fallow for the time being. The tank is obviously not used for purposes of agriculture or horticulture. This may be used for pisciculture; the water may be used for drinking purpose or other purposes and even for irrigation purposes, but that does not make it an agricultural land. The intermediary, who was the owner of these two plots, retained it and included it in the 'B' Form statement submitted by him and thereafter he sold it to the petitioners. So, there is no justification for the Revenue Officer for directing that these two plots should be recorded as vested in the State.

4. In the result, the Rule is made absolute. The order of the Revenue Officer directing plots Nos. 215 and 218 of mouza Ghansahar to be recorded as vested in the State is set aside.

No order is made as to costs.

Order set aside.

AIR 1972 CALCUTTA 459 (V 59 C 97)

FULL BENCH

ARUN K. MUKHERJEE, SABYASACHI
MUKHARJI AND M. M. DUTT, JJ.Purusottam Lalji and others, Appel-
lants v. Ratan Lal Agarwalla and others.
Respondents.A. F. O. O. No. 141 of 1964, D/- 31-7-
1972.

Calcutta Municipal Act (33 of 1951),
S. 414 — Even in respect of matters
which involve violation of an unrelaxa-
ble building rules the Commissioner has
discretion not to order demolition if the
violation is not of serious nature — That
discretion must however be used bona
fide stating reasons therefor.

An existing sloped roof of the room
in the 4th storey was demolished and the
height of the walls of the said room was
increased by only 2 feet and a flat roof
was built in its place. There being no
serious violation of rule 30 of Schedule
16 of the Act and considering the fact
that the new construction did not mate-
rially affect the amenities of the adjoin-
ing premises the Commissioner, held, did
not act in excess of his jurisdiction in
not ordering demolition although the rule
could not be relaxed in the circumstances
of the case. (1965) 69 Cal WN 249, Ap-
proved; AIR 1956 SC 110, Rel. on; (1955)
59 Cal WN 776, Distinguished.

(Paras 5, 6)

Cases Referred: Chronological Paras

(1965) 69 Cal WN 249, Yudhisthir Kumar Dutt v. Commr. of Corpn. of Calcutta	1, 4
AIR 1956 SC 110 = 1956 Cri LJ 285, Corpn. of Calcutta v. Mul- chand Agarwalla	4, 5
(1955) 59 Cal WN 776, Subhasini Nandi v. Corpn. of Calcutta	1, 5
AIR 1938 Cal 36 = 41 Cal WN 1373, Corpn. of Calcutta v. Bangshidhar Bidasaria	4
(1906) ILR 34 Cal 341 = 4 Cri LJ 408, Chuni Lal Dutt v. Corpn. of Calcutta	4
(1906) 10 Cal WN 182, Sk. Abdul Samad v. Corpn. of Calcutta	4

B. Das and Tapas Banerjee, for Ap-
pellants; B. S. Bagchi, Mrs. Archana Sen
Gupta and Alokendu Mukherjee (for Nos.
1 and 2) and Bratin Banerjee and R. K.
Bose (for Corpn. of Calcutta), for Res-
pondents.

SABYASACHI MUKHARJI, J. —

Ratan Lal Agarwalla and Lakshmi Chand
Agarwalla, are the owners of three-fourth
share and trustees for remaining one-
fourth share in premises No. 21, Hanspu-
kur First Lane, Calcutta. The adjoining
premises No. 20-A, Hanspukur First Lane,

is a trust property of which the trustees
are mentioned in paragraph 3 of the peti-
tion under Art. 226 of the Constitution
to this Court. It was alleged in the peti-
tion that at the back of premises No.
20-A, Hanspukur First Lane, there was
a space in which there existed a struc-
ture with Raniganj tiled sloped roof. It
has been further alleged that the owners
of the premises raised the height of the
walls and constructed a roof thereon
without any sanction by the Corporation
of Calcutta. On a complaint by the peti-
tioners action was taken by the Corpora-
tion of Calcutta. A notice was issued
under Section 416 of the Calcutta Muni-
cipal Act, 1951, and thereafter the matter
came up before the Commissioner under
Section 414 of the said Act. Upon this
the Commissioner having considered the
matter passed the following order on 16th
May, 1962—

"Heard representatives of both the
owners and the complainants. There is
a roof, but the R. T. roof has been ad-
mittedly converted to flat terrace roof.
The character of the roof has been chang-
ed without sanction. If the party pays
all charges as per Corporation Resolutions
within one month from the date of com-
munication of this order, the case may be
dropped failing which the roof will be
demolished."

The petitioners thereafter made an ap-
plication under Art. 226 of the Constitu-
tion and a rule nisi was issued. The
matter came up for hearing before
Banerjee, J. According to the learned
Judge there was infringement of R. 30 of
Schedule XVI of the Calcutta Municipal
Act, 1951 which could be relaxed under
R. 31. The learned Judge was of the
view that it did not appear from the
order of the Commissioner whether the
unauthorised construction deserved re-
laxation under Rule 31 nor did the Com-
missioner take the approval of the Stand-
ing Building Committee when making
the order of relaxation. In the afore-
said view of the matter the learned
Judge was of the view that the order of
the Commissioner could not be sustain-
ed and he accordingly quashed the order.
The learned Judge however observed
that the said order would not prevent
the Commissioner from exercising the
power under Rule 31 of Schedule XVI
of the Calcutta Municipal Act in accord-
ance with the law. An appeal was pre-
ferred from the said order and judg-
ment of Banerjee, J. The appeal came
up for hearing before the Division Bench
of this Court consisting of Sinha, J. (as
his Lordship then was) and Sen, J. It
was argued before the learned Judges of
the appellate court that under Sec. 414
the Commissioner had a discretion in the
matter and if the Commissioner had ex-
ercised the discretion such exercise of

the discretion could not be and should not be interfered by this court. The learned Judges were of the opinion that though this point was not taken before Banerjee, J. the appellants were entitled to urge this point as being a question of law. Their Lordships however were of the view that under Section 414 there was undoubtedly a discretion, but in respect of matters which involved violation of unrelaxable rules the Commissioner had no discretion and should always pass an order for demolition. The learned Judges referred to the decision of this court in the case of Pramila Sundari v. Corporation of Calcutta and to a bench decision in the case of Subhasini Nandi v. Corporation of Calcutta, (1955) 59 Cal WN 776. Their Lordships however felt that the view that their Lordships were inclined to take was in conflict with the division bench decision of this Court in the case of Yudhisthir Kumar Dutt v. Commr. of Corpn. of Calcutta, (1965) 69 Cal WN 249. In the aforesaid view of the matter their Lordships felt that two questions of importance arose, namely:—

"1. Under Section 414 of the Calcutta Municipal Act, 1951, has the Commissioner an absolute discretion to make or not to make, an order of demolition?

2. Can he refuse to make an order, where there is an unauthorized construction infringing rules which are either—

(a) not relaxable under the provisions of the said Act or

(b) are relaxable but have not been relaxed?"

Accordingly their Lordships referred this appeal under Rule 1 of Chapter XXXIA of the Original Side of this Court. The question for our consideration is the scope and effect of Section 414 so far as it affects the power and discretion of the Commissioner.

2. In order to decide the questions involved in this case it is necessary to consider the relevant statutory provisions. The Schedule XVI of the Calcutta Municipal Act, 1951 contains rules as to the use of building-sites and the execution of building work. Sec. 376 of the Calcutta Municipal Act, which is in Chapter XXII provides that no piece of land shall be used as a site for the erection of a new building, and no new building shall be erected, otherwise than in accordance with the provisions of the said Chapter, namely, Chapter XXII and Schedule XVI of the Act, and any orders, rules or by-laws made under the said Act. The expression, "new buildings" has been defined under Section 5, sub-section (49) of the Calcutta Municipal Act, 1951. Section 387 of the Act provides that subject to the provisions of

Section 388, and the provisions of other sections contained in Chapter XXII of the Act, Schedule 16 and or any orders, rules and by-laws made under the Act, relating to the erection of new buildings, shall, subject to the rules in Part X of the said Schedule XVI, apply to every alteration of, or addition to, any building, and to any other work (except that of necessary repairs not involving any of the works specified in Rule 90 of the Schedule XVI) made or done for any purpose in, to, or upon any building. Section 388 deals with the powers to relax provisions of the said Chapter, namely, Chapter XXII and Schedule XVI. It has been provided that in the case of an erection of any new building as defined in sub-clause (b) (c) or (d) of clause (49) of Section 5, and in the case of any addition or alteration or other work referred to in Section 387, such relaxation of the provisions of the Chapter and Schedule XVI may be made as the Commissioner may think fit. It provides further that no such relaxation shall apply to cases other than those specifically mentioned in Schedule XVI, and such relaxations are not likely to prejudicially affect the sanitation or ventilation of the building or other buildings in its vicinity. Therefore the effect of Section 388 is that only such deviations from the rules in Schedule XVI can be permissible if they are relaxable under the said Schedule and provided further that such relaxation do not prejudicially affect the sanitation or ventilation of the building in question or of other building in the vicinity. Section 414 is contained in Chapter XXIV of the Act which deals with demolition, alteration and stopping of unlawful work. In view of the controversy in this case, it is necessary to set out Section 414 which is as follows:—

"414. (1) If the Commissioner is satisfied—

(i) that the erection of any building—

(a) has been commenced without obtaining any permission required to be obtained by or under this Act, or

(b) is being carried on or has been completed otherwise than in accordance with the particulars on which such permission was based, or

(c) is being carried on or has been completed in breach of any provision contained in this Act or in any rules or by-laws made thereunder, or of any direction or requisition lawfully given or made under this Act or under such rules or by-laws, or

(ii) that any alteration of, or addition to, any building or any other work made or done for any purpose in, to or upon any building, has been commenced or is being carried on or has been completed

in breach of or otherwise than in accordance with, any sanction granted under Section 387 in contravention of the provisions of Section 396 or 397, or

(iii) that any alteration required by any notice issued under Rule 22 of Schedule XVI has not been duly made, he may, without prejudice to any action that may be taken under any other provision of this Act, by written notice require the person responsible to demolish such erection, alteration, addition or other work or to make the alteration, as the case may be, or to show cause why such erection, alteration, addition or other work should not be demolished or the alteration should not be made.

(2) The Commissioner may issue a notice under sub-section (1) notwithstanding the fact that the valuation of such building has been made under Chapter XI for the assessment of the consolidated rate.

(3) If the person responsible fails—

(a) to demolish such erection, alteration, addition or other work, or to make the alteration, or

(b) to show sufficient cause to the satisfaction of the Commissioner or an officer specially appointed by the Corporation with the approval of the State Government in this behalf, as the case may be, why such erection, alteration, addition or other work, should not be demolished, or the alteration should not be made, the Commissioner may order—

(i) the demolition of the erection, alteration, addition or other work, or

(ii) the making of the alterations: Provided that a copy of the order shall be served upon the owner and the occupier thereof and no such action shall be taken until the expiry of thirty days from the date of the service of the said order.

(4) Notwithstanding anything contained in the foregoing sub-sections, no action shall be taken under this section in respect of any erection, alteration, addition or other work executed more than twelve years before the issue of the notice under sub-section (1): Provided that the onus of proving that the work was done more than twelve years previously shall lie on the person responsible.

(5) In this section the expression "person responsible" includes the owner, the occupier and any other person who executes the erection, alteration, addition or other work or who is liable to make any alteration required by any notice issued under Rule 22 of Schedule XVI."

S. 414-A which was inserted by S. 99 of the Calcutta Municipal (Second Amend-

ment) Act, 1964 provides that any person dissatisfied with the order of the Commissioner made under sub-section (3) of Section 414 may, within thirty days from the date of the order, present an appeal accompanied by a copy of the order to the Tribunal constituted under Section 391-B and the President of the Tribunal may stay the execution of the order for such period or periods as he may think fit or until the disposal of the appeal. Section 415 deals with demolition or alteration of work in certain other cases. It is not necessary for the present purpose, to set out the said sections. Section 537 of the Act provides for various penalties. It provides for the punishment of fine as well as imprisonment for contravention of the offences mentioned therein. Certain punishments for contravention of provisions of Schedule XVI have also been provided in the said section. Section 543 deals with the liability of fine for putting buildings to other than declared use. Section 544 provides for fine for using building for carrying on offensive trade without previous declaration. It is not necessary for the purpose of this application to deal with the said section. As mentioned hereinbefore Schedule XVI of the Calcutta Municipal Act deals with the rules as to the use of the building site and the execution of building works. Rule 30 of the said Schedule deals with the requirement of open space in rear of building, regulating the rear height. In Rule 31 power has been given for relaxation of certain provisions of Rule 30 to the Commissioner in certain specified contingencies and in certain manner. In this connection reference may be made to S. 388 referred to above.

3. An analysis of the different provisions of the Act makes it clear that the buildings should conform to certain rules and before construction of new buildings sanction must be obtained. The rules to which the buildings should conform have been mentioned in the Act and powers have been given to the Commissioner to relax the rules for the purpose of sanction, in certain cases upon certain contingencies. If a building is constructed or continued to exist, which has been constructed without sanction or contrary to the rules, powers have been given to the authorities to impose penalties as well as to order demolition and alteration of the building. As noticed before, authority has been given to the Commissioner to order demolition, alteration and stopping of unlawful work in respect of such buildings by virtue of Section 414 of the Act. If an application is made for sanction, the said sanction should be granted in accordance with the rules provided. Relaxation is only possible in the manner indicated in

the rules in granting such sanction. But the question that arises in this case is that where there has been no relaxation or in a case where the rule cannot be relaxed, in such a case, if a building or a portion thereof has been constructed or altered, what is the scope of the power of the Commissioner under Section 414 of the Calcutta Municipal Act, 1951?

4. Before this question is considered further, it is necessary to refer to the facts of this case. From the affidavit of Ramanath Bose, who is the Superintendent (Building) of the Corporation of Calcutta, it appears that prior to 13th August, 1961 it was brought to the notice of the Corporation of Calcutta that certain unauthorised constructions were being made on the fourth storey of the premises No. 20-A, Manspukur First Lane. On 13th August, 1961 District Building Surveyor I, inspected the said premises in the morning and it was found out that a room in the fourth storey was being constructed on the western side with increased height. It appeared that the existing sloped roof of the said room had been demolished and the height of the wall on the Western side of the said room had been increased by 2 feet and iron beams had been fixed being preparatory to and for the purpose of placing the roof over the said beam. When the inspection took place no roof however, had been placed on the beam. It was found that the said alteration was being done without any sanction. Therefore, a notice under Section 416 of the Calcutta Municipal Act, 1951 was addressed to the owner. Thereafter a notice under Section 414 of the Calcutta Municipal Act was issued and pursuant thereto the owner of the building submitted a signed statement. The owners of the offending building as well as the adjoining building were heard. Thereafter on the 16th of May, 1962 the Commissioner passed the order mentioned hereinbefore. It is apparent that the existing sloped roof of the room in the 4th storey had been demolished and the height of the walls of the said room on the western side had been increased by only 2 feet and a flat roof or terrace had been built in its place. According to the Superintendent (Building), there was no serious infringement or violation of any building rule, nor was there any obstruction of light or air in to the adjoining premises. It is clear that there was slight infraction of R. 30 of Sch. XVI of the Act. The infraction was to a very small extent, but the infraction was in respect of a rule which could not have been relaxed in the circumstances of this case and had not been in fact relaxed by the Commissioner by any prior order. In those circumstances, instead of passing the order for demolition, the Commis-

sioner passed the order in question. The main point that was contended for on behalf of the adjoining owner was that in case of building or a part of the building, which had been built in violation of Rule 30 of Schedule XVI and relaxation in respect of which had not been granted and/or could not be granted, under Section 414 the Commissioner had no option left to him, but had to order demolition of that portion. It was contended that the Commissioner having not done that had acted illegally and in excess of his jurisdiction. The case of *Sk. Abdul Samad v. Corpn. of Calcutta*, 10 Cal WN p. 182 was a case dealing with the Calcutta Municipal Act, 1899. Under Section 449 of the Act the Magistrate was empowered to order demolition of building constructed in breach of the sanction. The section used the expression "may". It was held that the expression vested upon the magistrate a discretion and the expression "may" should not be construed as "shall". Similar views were expressed in the case of *Chuni Lal Dutt v. Corpn. of Calcutta*, ILR 34 Cal 341. That was a case under the Calcutta Municipal Act, 1899. There it was held that the Municipal Magistrate should exercise the discretion with due regard to those rules, which guided Court of Equity in granting injunctions, with this difference that he had also to consider whether or not a building ought to be demolished on the ground of its being a danger or obstruction to the public. There the Magistrate had ordered demolition, and in the facts of that case and in the light of the sections it was held that the Magistrate passed the order erroneously and without properly exercising his jurisdiction. Reference may be made to the decision in the case of *Corp. of Calcutta v. Bangshidhar Bidasaria*, 41 Cal WN 1373 = (AIR 1938 Cal 36). That was a case under the Calcutta Municipal Act, 1923. There the Court was considering the question whether order for demolition should have been passed by the Magistrate. Sec. 363 of the said Calcutta Municipal Act, 1923 provided as follows:—

"363. (1) If the Corporation are satisfied—

(1) that the erection of any new building—

(a) has been commenced without obtaining the written permission of the Corporation,

(b) is being carried on or has been completed otherwise than in accordance with the particulars on which such permission was based, or

(c) is being carried on or has been completed in breach of any provision contained in this Act or in any rules or by-laws made thereunder, or of any

direction or requisition lawfully given or made under this Act or under such rules or by-laws, or

(2) that any alteration of, or addition to, any building or any other work made or done for any purpose in, to or upon any building, has been commenced or is being carried on or has been completed in breach of, or otherwise than in accordance with, any sanction granted under Sections 330, 340 or 341, or

(3) that any alterations required by any notice issued under Rule 22 of Schedule XVII have not been duly made, they may, after giving the owner of such building an opportunity of being heard, apply to a Magistrate, and such Magistrate may make an order directing that such erection, alteration, addition or other work, as the case may be, or so much thereof as has been executed unlawfully as mentioned in clauses (1), (2) or (3), or that any structure, specified under the Explanation to clause (d) of Rule 53, or the Explanation to clause (iv) of Rule 81, of Schedule XVII as a structure to be demolished or altered, shall—

(i) be demolished by the owner thereof or altered by him in accordance with the order of the Magistrate to the satisfaction of the Corporation, as the case may require, or

(ii) be demolished or altered by the Corporation at the expense of the said owner;

Provided that the Magistrate—

(a) shall not make any order under this section without giving the owner and occupier of the building to be so demolished or altered full opportunity of adducing evidence and of being heard in his defence, and

(b) may make any such order notwithstanding the fact that a valuation of such building has been made by the Executive Officer under Chapter X for the assessment of the consolidated rate: Provided that where the Corporation have instituted proceedings under S. 493, no application shall be made under this section.

(2) Notwithstanding anything contained in sub-section (1), no proceedings shall be instituted thereunder in respect of any work which has been done more than five years before the institution of such proceedings:

Provided that the onus of proving that the work was done more than five years previously shall lie on the owner." It was held by Biswas, J., that the Magistrate could refuse to pass an order for demolition of an unauthorised structure when he was satisfied that the case was not a fit one for such an order. In the case of the Corpn. of Calcutta v. Mul-

chand Agarwala, AIR 1956 SC 110, the Supreme Court was considering a case under the Calcutta Municipal Act, 1923. The Supreme Court had occasion to consider the ambit of the jurisdiction granted to the Magistrate under Section 363 of the Calcutta Municipal Act, 1923 and the Supreme Court held that the Magistrate might pass an order for demolition of the building, and though the word 'may' might in some contexts be construed as meaning 'shall' that was not the sense in which it had been used in Section 363. It was held that S. 363 did not require that when a building was shown to have been erected without permission or completed otherwise than in accordance with the terms of the permission or in breach of the building rules, an order for its demolition should be made as a matter of course. The section gave the Magistrate a discretion whether he should or should not pass such an order. The provisions of the Section 414 of the Calcutta Municipal Act, 1951 came to be considered by a Division Bench of this Court in the case of (1965) 69 Cal WN 249 and the Division Bench held that the power conferred under Section 414 did not provide that the Commissioner must make an order for demolition in every case where he was satisfied that any erection, alteration or addition of any building had been made or was being carried on in contravention of the Act or the Rules made thereunder. While on the one hand the section conferred upon the Commissioner the power to make an order for demolition, on being satisfied about any unauthorised construction, the section at the same time conferred upon him, the power to issue a notice to show cause on the party, why an order for demolition should not be made.

5. It appears to us that the Section 414 vests upon the Commissioner a discretion. The discretion is, for the purpose of facilitating the scheme and the object of the Calcutta Municipal Act, 1951. That discretion must be used bona fide and not on any extraneous ground. The section also enjoins that the Commissioner should exercise discretion quasi judicially, that is to say, by giving the parties an opportunity to show cause. The parties are given opportunity to show cause why an order for demolition should not be made. Therefore, if in an appropriate case where it is found that there has been infraction of the rule, which cannot be relaxed or which has not been relaxed the parties show sufficient cause to the Commissioner for example that the infraction is of minor nature or has not in any way affected the sanitation or ventilation and the amenities of the building in question and other adjoining premises, then the

Commissioner has the discretion not to order demolition. Sufficient cause has not been defined. It is inappropriate to do so — it must depend upon the facts and circumstances of each particular case. If an authority charged with the duty to see the observation of the rules has been given the discretion to decide whether any infraction of the rules or construction without sanction should be rectified by demolition or not, it would not be proper to circumscribe or curtail that discretion. The ratio of the principle decided by the Supreme Court in the case of AIR 1956 SC 110 would also apply to the provisions of this section, though the language of the section is slightly different and in this case the discretion has been given not to an independent judicial body, but the discretion has been given to the administrative head of the Corporation, to be exercised in a quasi-judicial manner. These in our view do not make any difference as to the nature of the discretion given. We are, therefore, on this aspect of the matter in respectful agreement with the view expressed by the Division Bench in the case of (1965) 69 Cal WN 249. In the judgment of reference, reliance was placed on a decision in the case of (1955) 59 Cal WN 776. In our opinion that case did not deal with the nature of the discretion given to the Magistrate under Section 363 of the Calcutta Municipal Act, 1923 or to the Commissioner under Section 414 of the Calcutta Municipal Act, 1951. Therefore, it is not necessary to discuss the aforesaid decision in detail. Reliance was also placed in the referring judgment on a decision in the case of *Pramila Sundari Dasi v. Corpn. of Calcutta* of P. B. Mukharji, J., (as his Lordship then was). The facts of that case were slightly different. But it appears that there is some observation by the learned Judge to the effect that the Corporation had no power to allow an unauthorised construction to continue by virtue of an order under Section 414 of the Act. If, by the said observation, it was meant by the learned judge that the Commissioner had no discretion at all, in an appropriate case, not to order demolition even in a case where the construction was in violation of the rules, with respect we cannot agree with the said view for the reasons mentioned hereinbefore. We will now deal with the two questions mentioned in the referring judgment. So far as the first question mentioned hereinbefore we are of the opinion that the Commissioner has a discretion either to make an order for demolition or not to make an order for demolition. That discretion is in no way circumscribed, but the Commissioner cannot act arbitrarily or on extraneous grounds. If on consideration of the facts

of a particular case the Commissioner is satisfied that there is sufficient cause why an order for demolition should not be made even in case of unauthorised construction infringing rules which are either not relaxable under the Act or which have not been relaxed, he has the discretion not to make an order for demolition. That disposes of the second question raised in the referring judgment.

6. Counsel for the respondent adjoining owner contended that in the order in question the Commissioner had not indicated any reason. Counsel is right. Quasi judicial authorities should give some indication of the reason in the order. But though no reasons had been stated in the order, the background of the making of the order has been fully explained in the affidavit of the Corporation of Calcutta and in view of the fact that it appears to us that it was a very small infraction that was the reason for making the order in question, especially in view of the fact that there was some construction before and the new construction did not materially affect the amenities of the adjoining premises. This matter has continued for a very long time and it would not be proper in this case to refer the matter back to the Commissioner for the purpose of stating the reasons. We must, however, emphasise the importance of giving some indications of the reasons in the order. We, therefore, hold that the Commissioner has a discretion to order demolition or not to order demolition even in a case where the construction was unauthorised, but that discretion must be used bona fide and on proper materials and not on the extraneous ground, but upon the facts of each particular case. Having considered the matter from that point of view, it appears to us that we cannot hold that the Commissioner has used discretion in view of the facts and circumstances of this case improperly or arbitrarily.

7. In the aforesaid view of the matter this appeal is allowed, the judgment and order of Banerjee, J., dated 11th July, 1963 are hereby set aside and the application under Article 226 of the Constitution is dismissed and the rule nisi issued is discharged. In the facts and circumstances of this case there will be no order as to costs of this appeal.

ARUN K. MUKHERJEA, J.:— 8. I agree.

M. M. DUTT, J.:— 9. I agree.

Reference answered in affirmative.

AIR 1972 CALCUTTA 465 (V 59 C 98)

AMARESH ROY AND

AMIYA KUMAR MOOKERJI, JJ.

Ramesh Prosad Agarwal, Petitioner
v. Union of India, Respondent.Appln. for leave to appeal to the
Supreme Court S. C. A. No. 16 of 1972,
D/- 2-6-1972.

Index Note:— Constitution of India, Art. 133 (1) — Defence of India Act (No. 35 of 1939), S. 19 (1) (b) and (f) — High Court while hearing appeals under the Defence of India Act, functions as a Court and not as an Arbitration Tribunal — But its decision is not a judgment, decree or final order within Art. 133 (1) — (X-Ref:— Civil P. C. (1908), Ss. 109 and 110). (Para 5)

Brief Note:— The decision given by the High Court in an appeal against award under Section 19 (1) (f) of Defence of India Act is a determination from which special leave to appeal to Supreme Court under Art. 136 lies. AIR 1968 SC 384 modifying the view in AIR 1958 SC 947, Rel. on. (Paras 5 and 6)

Cases Referred: Chronological Paras

AIR 1968 SC 384 = (1968) 1 SCR

372, Collector, Varanashi v. Gour†

Shankar Misra

AIR 1958 SC 947 = 1959 SCR 1177,

Hans Kumar Kishan Chand v.

Union of India

A. M. Mitra, Jnanendra Coomarr Dutt, and Motilal Agarwal, for Petitioner; P. K. Sen Gupta and P. N. Palit, for Opposite Party.

AMARESH ROY, J.:— This is an application under Art. 133 (1) (a), (b) & (c) of the Constitution of India, and it arises out of an appeal that was disposed of by the judgment of a Division Bench of this Court composed of by my learned brother the Hon'ble Mr. Justice Amiya Kumar Mookerji sitting with the Hon'ble Mr. Justice P. N. Mookerjee. P. N. Mookerjee, J. has left this Court on superannuation. This application has been assigned to this Bench by my Lord the Hon'ble the Chief Justice by an order dated 19th April, 1972.

2. The application arises out of a proceeding for acquisition of land under the Defence of India Act. Property, sought to be acquired comprised land and structures thereon. The area of the land was 1 bigha 10 cottash and 14 Chs. The Collector's offer was at the rate of Rupees 500/- per cottah for the land and Rupees 30,394/- for the structures. The total offer made by the Collector came to Rs. 48093.02 paise. The claimant claimed at the rate of Rs. 1,500/- per cottah for the land and Rs. 60,274/- for the struc-

tures. The claimant also claimed statutory allowance of 15% under the law. The Arbitrator allowed a compensation of Rs. 61,661/- including 15% statutory allowance and interest at the rate of 5% per annum. Against the decision of the Arbitrator the claimant appealed to this Court and by the judgment of the Division Bench mentioned above this Court enhanced the amount of compensation to Rs. 45,334/- for the land and Rs. 30,875/- for the structures. The total coming to Rs. 76,209 with the usual statutory allowance of Rs. 15 per cent. This Court also awarded to the claimant interest at the rate of 5% per annum. That was awarded by the learned Arbitrator but with a little variation as to the period.

3. Against that decision of this Court the present application has been made praying for a certificate of fitness under Art. 133 (1) (a) (b) and (c) of the Constitution of India.

4. Appearing on behalf of the applicant the learned Advocate Mr. A. M. Mitra has contended that the judgment sought to be appealed from is which is not an affirmance and the proposed appeal according to Mr. Mitra satisfies the valuation test. He also contended that it is also a final order because it has finally determined the lease between the parties and therefore, it comes directly under Art. 133 (1) (a) of the Constitution.

5. Mr. Sengupta, appearing on behalf of the respondent contends that the instant case does not come within the provision of Art. 133 (1) (a) of the Constitution, as the decision given by this Court in appeal against the award is not a decree, judgment or final order. The decision of the Arbitrator appointed under Section 19 (1) (b) of the Defence of India Act, is expressly referred to in Section 19 (1) (f) as an "award". An appeal is a continuation of the original proceeding which is an arbitration proceeding. It is contended that the character does not change when it has been brought up before an appellate Court. In this respect two decisions of the Supreme Court have been discussed before us. In the case of Hans Kumar Kishan Chand v. Union of India, AIR 1958 SC 947, their Lordships observed that it is not every decision given by a Court that could be said to be a judgment, decree or order within the provisions of the Civil P. C. It will depend on whether the proceedings in which it was given, came before the Court in its normal civil jurisdiction. Their Lordships referred to the Court for determination by way of arbitration or where it comes by way of appeal against an award, then the decision is not a judgment, decree or order under the Code of Civil Procedure. In that case Supreme Court held that the High Court

in hearing and deciding the appeal of the present nature acts essentially as an Arbitration Tribunal, and for that reason the decision of the High Court in the appeal under that provision of the Defence of India Act is not a judgment, decree or order within the meaning of Sections 109 and 110, Civil P. C. In a later decision in the case of Collector Varanashi v. Gouri Shankar Misra, AIR 1968 SC 384 the Supreme Court held that under Section 19 (f) of the Act the High Court functions as a "Court" and not as a designated person or arbitration tribunal. It was held in that decision of the Supreme Court that the decision rendered by the High Court under Section 19 (1) (f) of the Defence of India Act is a 'determination', and hence, it is within the competence of the Supreme Court to grant special leave to appeal under Art. 136 of the Constitution.

6. By effect of those two decisions, in our view, the law stated that High Court in hearing appeals under the Defence of India Act functions as a Court. To that extent the later Supreme Court decision has modified the view of that Court as it appears in the earlier decision mentioned above. But at the same time in the later decision the Supreme Court has left unaltered the previous view that the decision given by the High Court in an appeal against the award is neither a decree, nor a judgment nor final order. But their Lordships have held in that later decision that the decision rendered by the High Court under Section 19 (1) (f) of the Defence of India Act is a "determination". The word 'determination' occurs in Art. 136 but does not occur in Art. 133 of the Constitution of India. In our view the position therefore is that, even if it be held that the proposed appeal satisfy the valuation test, it does not satisfy the other conditions in so far the decision of the Division Bench of this Court dated 12th May, 1970 in appeal against Award under the Defence of India Act is not a decree, judgment or final order within the meaning of Art. 133 (1) of the Constitution. That being so, the certificate of fitness for an appeal to the Supreme Court cannot be granted.

7. In the result the application is dismissed.

8. There will be no order as to cost.

AMIYA KUMAR MOOKERJI, J.:

9. I agree.

Application dismissed.

AIR 1972 CALCUTTA 466 (V 59 C 99)

SANKAR PRASAD MITRA AND

ARUN KUMAR JANAH. JJ.

M/s. Kothari Trading and Investment Co. Pvt. Ltd., Petitioner v. Union of India, Opposite Parties.

Civil Rule No. 2230 of 1971, D/- 28-6-1972.

Index Note:— (A) Civil P. C. (1908), S. 80 — Railway Administration making part payment in full settlement of claim after issue of first notice under S. 80 and plaintiff accepted the same under protest — Suit for balance if maintainable without second notice.

Brief Note:— (A) Held. after acceptance of the payment by the plaintiff even under protest, a new set of facts had arisen giving rise to a fresh cause of action and therefore fresh notice was necessary to be given for providing opportunity to Government to consider whether the balance of the plaintiff's claim should be paid or not. Therefore the suit was not maintainable. (Para 3)

N. C. Ganguly, for Petitioner; Ajoy Kumar Basu, for Opposite Parties.

SANKAR PRASAD MITRA, J.:

This Rule has been obtained against the Judgment of the Small Cause Court, Sealdah, delivered on the 27th April, 1971 in S. C. C. Suit No. 1061 of 1970. Two consignments of 145 Bags of Sugar belonging to the plaintiffs were booked on April 1, 1968 under N/R No. 297704 and on May 2, 1968 under R/R. No. 847875 from Biswas and Bazzur respectively on the North Eastern Railway. The goods were to be delivered at Kantapukur on the Eastern Railway. The plaintiff alleged that there was shortage of 530.200 Kgs. in the first consignment and 414.600 Kgs. in the second consignment due to the negligence of the Railway Administration. For the first consignment the plaintiff claimed Rs. 877.27. For the second consignment the plaintiffs claim for Rs. 792.52. The Railway Administration paid to the plaintiff Rs. 731.22 in respect of the first consignment and Rs. 663.68 in respect of the second consignment. The plaintiff instituted the suit for recovery of the balance of Rs. 146.05 for the first consignment and Rs. 129.91 for the second consignment.

2. It appears that both the payments, aforesaid, by the Railway Administration were made in full settlement of the plaintiffs claim but the plaintiff accepted the said sums under protest. The learned Judge has held that the plaintiff's claim with regard to the first consignment was maintainable but as the protest for the second consignment was

made long after the receipt of the money, the claim in respect thereof could not be sustained. We do not intend to express any view on these findings.

3. The learned Judge has dismissed the suit altogether on the ground that no fresh notice under Section 80 of the Code of Civil Procedure was served on the General Manager of the Railway concerned so far as the balance of the plaintiff's two several sums aforesaid is concerned. In our opinion, the learned Judge has come to the correct conclusions. After acceptance of the two sums, mentioned above by the plaintiffs, a new set of facts had arisen. The said two sums were offered in full settlement of the plaintiff's claims. The plaintiff accepted the said sums, it is alleged, under protest and the plaintiff intended to sue for the balance of his claims. This is a new set of facts giving rise to a cause of action (not pleaded in the notice under Section 80). The reliefs claimed in the suit are also much less than the reliefs claimed in the notice under Section 80. The object of this notice, it is well known, is to give the Government concerned, an opportunity to reconsider its legal position and to make amends or settle the claims without litigation. It is true that the notice should not be construed in a pedantic manner or in a manner completely divorced from common sense. But in the instant case, we find that the Government was given no opportunity at all to consider whether in view of the plaintiff's alleged acceptance under protest the balance of the plaintiff's claims should be paid off. The original notice under Section 80 which the plaintiff had served, did not fulfil the requirements of law. In these premises we are inclined to uphold the judgment of the lower Court.

4. This Rule is discharged. There will be no order as to costs.

JANAH, J. :— 5. I agree.
Revision dismissed.

AIR 1972 CALCUTTA 467 (V 59 C 100)

AMARESH ROY AND

AMIYA KUMAR MOOKERJI, JJ.

The State of West Bengal, Petitioner
v. Mohamad Hanif, Respondent.

Supreme Court Appls. Nos. 10 and 11 of 1972, D/- 2-6-1972 for leave to Appeal to Supreme Court against Judgment and decree of this Court in O. D. Nos. 296 and 377 of 1959, D/- 9-11-1970.

Index Note:— Constitution of India, Art. 133 (1) — Judgment, decree or final order — Decision of High Court in appeal

HP/HP/E363/72/LR/KSB

against award of compensation under Section 19 (1) — Leave to appeal — Defence of India Act.

Brief Note:— The decision of the High Court in appeal against an award under Section 19, Defence of India Act, is not a decree, judgment or final order within the meaning of Art. 133 (1) of the Constitution. That being so, no certificate of fitness to appeal to the Supreme Court can be granted. AIR 1958 SC 947 & AIR 1968 SC 384, Foll. (Para 9)

Cases Referred: Chronological Paras
AIR 1968 SC 384 = (1968) 1 SCR

372, Collector, Varanashi v. Gouri

Shankar Misra 7, 8, 9

AIR 1958 SC 947 = 1959 SCR 1177,

Hans Kumar Kishen Chand v.

Union of India 5, 9

P. K. Sen Gupta and N. G. Das, for Petitioner; Bankim Chandra Banerjee and Gaganendra Krishna Deb, for Respondent.

AMIYA KUMAR MOOKERJI, J :—

These are two applications under Article 133 (1) of the Constitution praying for Certificates for leave to appeal to the Supreme Court against the judgment and decree of a Division Bench of this Court dated 9th of November, 1970, passed in two appeals from Original Decree Nos. 296 and 377 of 1959. The said appeals were directed against an award given by the Arbitrator, 24-Parganas, in a reference under Section 19 of the Defence of India Act, in respect of payment of terminal compensation. The premises No. 11, Canal South Road, also known as Pagladanga, was requisitioned including the land and structure under the Defence of India Rules. The said property was derequisitioned on 13th of August, 1946. The owner claimed terminal compensation to the tune of Rupees 609424/-. The Lands Hiring and Disposal Department of the Government assessed the compensation at Rs. 154515.50. The owner did not accept the department's assessment, as a result, the matter was referred to the Arbitrator. The reference was originally heard by Sri J. C. Mazumdar, who made an award on 18-8-1951. Against that award both the owner and the Government appealed to this Court. This Court allowed those appeals and the case was remitted back to the Arbitrator for rehearing with certain directions. The case was reheard by the new Arbitrator who passed an award for Rs. 154515.50. From that award, the claimant preferred appeal from Original Decree No. 296 of 1959, the Government also challenged the said award in other appeals — appeal from original decree No. 377 of 1959, seeking to reduce the award to Rs. 53350.00.

2. The Division Bench of this Court allowed the claimant's appeal

No. 296 of 1959 in part, enhanced the award of compensation to Rs. 2,80,759/- and dismissed the Government's appeal No. 377 of 1959.

3. The petitioner, the State of West Bengal being aggrieved against the said judgment and decree of the Division Bench, intends to prefer two appeals to the Supreme Court and prays for Certificate of fitness for leave to appeal under Art. 133 (1) of the Constitution.

4. Mr. Sen Gupta, appearing on behalf of the petitioner, contends that the judgment sought to be appealed from, is one of reversal; the proposed appeal satisfies the valuation test. It is also a final order because it has finally determined the lis between the parties. Therefore, it comes directly under Art. 133 (1) (a) of the Constitution.

5. Mr. Banerjee, appearing on behalf of the respondent, contends that the instant case does not come within the purview of Art. 133 (1) (a) of the Constitution, as the decision given by this Court in appeal against the award is not a decree, judgment or final order. The decision of the Arbitrator appointed under Section 19 (1) (b) of the Defence of India Act, is expressly referred to in Section 19 (1) (f) as an 'award'. An appeal is a continuation of the original proceeding and if the original proceedings are arbitration proceedings, their character do not change when they are brought up before an appellate tribunal. In support of his contentions, Mr. Banerjee relied upon the decision of the Supreme Court in Hans Kumar Kishen Chand v. Union of India, AIR 1958 SC 947.

6. The Supreme Court observed in that case that it is not every decision given by a Court that could be said to be a judgment, decree or order within the provisions of the Code of Civil Procedure. It will depend on whether the proceedings in which it was given, came before the Court in its normal civil jurisdiction. When the dispute is referred to the Court for determination by way of arbitration or where it comes by way of appeal against an award, then the decision is not a judgment, decree or order under the Code of Civil Procedure. The Supreme Court came to the conclusion that the word 'arbitration' in Section 19 (1) (g) of the Act covered the entire proceedings from their commencement before the Arbitrator to their termination in the High Court on appeal, where an appeal had been preferred, and the High Court in hearing and deciding the appeal, acted essentially as an Arbitration Tribunal. Therefore, the decision of the High Court in the appeal under that provision, is not a judgment, decree or order within the meaning of Sections 109 and 110, Civil Procedure Code.

7. The above judgment of the Supreme Court has again come up for consideration in Collector, Varanashi v. Gouri Shankar Misra, AIR 1968 SC 384. In that case, the Supreme Court held that under Section 19 (f) of the Act the High Court functions as a 'Court' and not as 'a designated person' or 'Arbitration Tribunal'. And it is further held that the decision rendered by the High Court under Section 19 (1) (f) of the Defence of India Act is a 'determination', and hence, it is within the competence of the Supreme Court to grant special leave to appeal under Art. 136 of the Constitution.

8. Mr. Sen Gupta contends that the Supreme Court held in the above case, AIR 1968 SC 384 that the High Court is a 'Court', accordingly, it should be held that the order passed in the appeal under Section 19 (1) (f) is a final order within the meaning of Art. 133 (1) (f) of the Constitution.

9. It is true that the Supreme Court did not accept the position that the High Court is not a Court when it hears appeal under Section 19 (1) (f) of the Act but at the same time in the later decision the Supreme Court has left unaltered the previous view in Hans Kumar Kissen Chand's case, AIR 1958 SC 947 that the decision given by the High Court in an appeal against the award, is neither a decree, judgment or final order. Moreover, in the Collector of Varanashi's case, AIR 1968 SC 384 the Supreme Court has specifically held that the decision rendered by the High Court under S. 19 (1) (f) of the Act is a 'determination' which occurs in Art. 136 but does not occur in Art. 133. The position, therefore, is that although both the proposed appeals satisfy the valuation test but they do not satisfy the other conditions in so far as that the decision of the Division Bench of this Court dated 9th of November, 1970, in appeal against an award under the Defence of India Act, is not a decree, judgment or final order within the meaning of Art. 133 (1) of the Constitution. That being so, no Certificate of fitness to appeal to the Supreme Court can be granted.

10. In the result, these applications are dismissed.

11. There will be no order as to costs.

Applications dismissed.

AIR 1972 CALCUTTA 469 (V 59 C 101)**SANKAR PRASAD MITRA AND****A. K. JANAH, JJ.**

Chittaranjan Mondal, Petitioner v. Sankar Prosad Sahani, Respondent.

L. P. A. T. No. 3178 of 1971 in Civil Rule 3439(F) of 1971, D/- 18-5-1972.

Index Note:— (A) Letters Patent (Calcutta), Cl. 15 — Judgment — Order refusing to grant injunction restraining execution of judgment decree is appealable.

Brief Note:— (A) Where in an appeal against a decree for ejectment an application is made by the tenant for an injunction restraining the landlord from executing the decree and such application is dismissed by a single Judge of the High Court hearing the appeal the order of single Judge is a 'judgment' within the meaning of Cl. 15 of the Letters Patent and hence is appealable as the same is passed in an independent proceeding ancillary to the appeal. ILR 35 Mad 1 (FB) & AIR 1935 Cal 35, Followed.

(Para 8)

Cases Referred: Chronological Paras

- AIR 1960 Cal 582 = 64 Cal WN
861, Mohd. Felumeah v. S. Mondal 7
- AIR 1957 Cal 727 = 61 Cal WN
559, Shorab Merwanji Modi v. Mansata Film Distributors 7
- AIR 1953 SC 198 = 1953 SCR 1159,
Asrumati Debi v. Rupendra Deb 7
- AIR 1935 Cal 35 = 39 Cal WN 155,
Lea Badin v. Upendra Mohan Roy Chaudhury 5
- (1912) ILR 35 Mad 1 = 21 Mad
LJ 1 (FB), Tuljaram Row v. Alagappa 3
- (1872) 8 Beng LR 433 = 17 Suth
WR 364, Justices of the Peace of Calcutta v. Orient Gas Co. 2

Apurbadhan Mukherjee, Kanan Kumar Ghosh and N. Chowdhury, for Petitioner; Syamaprasanna Roy Choudhury, for Respondent.

SANKAR PRASAD MITRA, J.:—

This Rule is against an order of Amaresh Roy, J. made on the 23rd November, 1971. The plaintiff instituted an Ejectment Suit in the City Civil Court. By its judgment delivered on July 12, 1971, the City Civil Court passed a decree for ejectment. The tenant-defendant preferred an appeal to this Court. It was Appeal No. 2365 of 1971. In this appeal the tenant-defendant made an application for an injunction restraining the plaintiff from executing the ejectment decree. This application for injunction came up for hearing before Amaresh Roy, J. and His Lordship dismissed the application on the 23rd November 1971. Against this order of

dismissal the tenant-defendant has preferred a Letters Patent Appeal and this Rule has been obtained in connection with that appeal.

2. Mr. Roy Choudhury appearing for the plaintiff in the Ejectment Suit has raised a preliminary objection. He says that the order of Amaresh Roy, J. dismissing the application for injunction is not a 'judgment' within the meaning of Cl. 15 of the Letters Patent. The order according to Mr. Roy Choudhury does not affect the merits of the controversy between the parties nor does it determine any right or liability of any of the parties. In other words, the order does not decide either wholly or partly any of the matters in dispute in the suit itself. Mr. Roy Choudhury contends that the word 'judgment' in Cl. 15 of the Letters Patent means a judgment or decree which decides the case one way or the other either in its entirety or in part. It does not, says Mr. Roy-choudhury, mean a decision or order of an interlocutory character, which merely decides some isolated point not affecting the merits of the case. Learned Counsel has referred us to a large number of decisions in support of his contention as aforesaid. We do not intend to deal with all the cases cited. For our purpose in this matter it is necessary to mention the decision of Sir Richard Couch, C. J., in the Justices of Peace v. The Oriental Gas Co., (1872) 8 Beng LR 433. Couch, C. J. has stated:

"We think 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined".

3. This view of Couch, C. J. has been considered from time to time by numerous decisions by this Court as well as other High Courts and the definition of 'judgment' which the learned Chief Justice gave was variedly interpreted. In a Full Bench decision of the Madras High Court in Tuljaram Row v. Alagappa, (1912) ILR 35 Mad 1 (FB), White, C. J. has considered the view of Couch, C. J. and has stated: "The test seems to me to be not what is the form of adjudication but what is its effect in the suit or proceeding in which it is made."

4. White, C. J. has laid down three tests for determining whether an order is a 'judgment' within the meaning of the corresponding clause of the Madras Letters Patent. These tests are as follows:—

(1) If its effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned; or

(2) if the non-compliance therewith will have the effect to put an end to such suit or proceeding; or

(3) if it is passed in an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective when obtained) e.g., an order on an application for temporary injunction or for the appointment of a receiver.

5. Mookerjee, J. (sitting with Patterson, J.) in *Lea Badin v. Upendra Mohan Roy Chaudhury*, 39 Cal WN 155 = (AIR 1935 Cal 35) had to deal with an order made by a single Judge on the Original Side of this Court discharging an interim receiver appointed ex parte. His Lordship was of the view that the order was appealable. It was a 'judgment' within the meaning of clause 15 of the Letters Patent. It is also appealable under Order 43, Rule 1 of the Code of Civil Procedure. Mookerjee, J. has considered extensively the view of Sir Richard Couch, C. J. and that of White, C. J. of the Madras High Court. His Lordship presiding over this Division Bench has expressed the hope that some day this Court would "abandon its fond adherence to the antiquated definition of Couch, C. J. and boldly acknowledge its allegiance to the tests laid down by White, C. J."

6. This is a Division Bench judgment therefore, that followed the third principle laid down by White, C. J. and held that the order in question was appealable.

7. In another Division Bench in *Shorab Merwanji Modi v. Mansata Film Distributors*, 61 Cal 559 at p. 565 = (AIR 1957 Cal 727) Chakravartti, C. J., has stated that even Sir Richard Couch himself did not adhere to the strict construction which he had laid down in his subsequent decisions. Chakravartti, C. J., is inclined to treat the Madras test as only a variant of the Calcutta test. More or less the same view was adopted in the Division Bench Judgment of this Court delivered by P. N. Mookerjee, J., in *Mohammed Felumeah v. S. Mondal*, AIR 1960 Cal 582. P. N. Mookerjee, J. has stated in paragraph 18 of the judgment at page 587 that the strict construction of the Calcutta test to which Chakravartti, C. J. referred, is no longer pertinent after the Supreme Court's observation in *Asrumati's case*, AIR 1953 SC 198.

8. The position, therefore, is that in the present state of the law it is open to us to apply the third test of White,

C. J. to the facts of this case. The order of Amaresh Roy, J. refusing to grant an injunction restraining execution of the judgment decree was passed in an independent proceeding which was ancillary to the appeal and as such it is a 'judgment' within the meaning of Cl. 15 of the Letters Patent. We hold that this is an appealable order.

9. By consent of parties the appeal is also treated as in the day's list and this Rule and the appeal are disposed of as follows:

(1) there will be an order of injunction restraining the plaintiff in the ejectment suit from executing the ejectment decree passed by the City Civil Court till the disposal of F. A. T. No. 2365 of 1971;

(2) the tenant-defendant is directed to deposit in the City Civil Court by the 30th June 1972 all arrears of rent upto April 1972 if such arrears have not already been deposited with the Tikha Controller;

(3) the tenant-defendant will deposit in the City Civil Court the sum of Rs. 36 payable by him in respect of the month of May 1972 on or before the 15th June 1972 and would go on depositing the said sum month by month according to the English Calendar on or before the 15th day of the following month;

(4) the plaintiff in the Ejectment Suit will be at liberty to withdraw all sums deposited in terms of this order in the City Civil Court as also deposits, if any, made with the Tikha Controller;

(5) this order is made without prejudice to the rights and contentions of both the parties;

(6) there will be no order as to costs of this rule and the appeal out of which this Rule arises;

(7) the hearing of the main appeal may be expedited.

JANAH, J.:— 10. I agree.

Appeal allowed.

AIR 1972 CALCUTTA 470 (V 59 C 102)

K. J. SEN GUPTA, J.

Chunilal Basu and another, Petitioners v. The Hon'ble Chief Justice of the High Court at Calcutta and others, Respondents.

C. R. No. 1452 (W) of 1971, D/- 15-5-1972.

(A) Letters Patent (Calcutta) (1865) — Constitutional validity — Letters Patent is still in force within meaning of Art. 372 read with Art. 225 of the Constitution — It cannot also be struck down as ultra vires the Preamble of the Con-

EP/HP/D169/72/RSK

stitution. (X-Ref:— Constitution of India, Preamble, Arts. 372 read with Art. 225). (Paras 35, 36)

The provisions of Section 106 of the Government of India Act, 1919, S. 223 of the Government of India Act, 1935, Cl. 2 (1) of India (Adaptation of Existing Laws) Order, 1947, and of Section 18 (3) of Independence Act, 1947 have saved Letters Patent, 1865, which was the existing law. Further, provisions of S. 50 (2) (d) of the Advocates Act, 1961, which have only altered some of the provisions regarding admission of the Advocates, Vakils and Attorneys lend assurance that the provisions of Letters Patent continued even after commencement of the Constitution. (Paras 25, 27, 28, 31, 33, 35)

It is unfortunate that even after so many years of Independence of India we are being governed by the law which indicates the foreign domination but on that score alone the Letters Patent cannot be struck down inasmuch as the said Letters Patent has been adopted and protected under the provisions of the Constitution itself. (Para 36)

(B) Calcutta High Court (Jurisdictional Limits) Act (1919). — Fixation of territorial limit of original jurisdiction based on economic and historical reasons is not ultra vires, Art. 14 of the Constitution. (X-Ref:— Constitution of India, Art. 14.) (Paras 43, 47)

People residing outside the jurisdiction as fixed by Calcutta High Court (Jurisdictional Limits) Act, 1919 can be said to be a class by themselves and those persons who are living inside the jurisdiction so settled may also be said to be a class to be treated similarly. As such there cannot be any discrimination amongst the persons so placed in those different areas. (Para 43)

If the historical evolution of the judicial system as well as socio-economic complex of the country is traversed it is seen that the different presidency Towns are replete with peculiar features of their own, necessitating special provisions in law that are distinct from other areas of the States where such Towns are situated. These distinctive provisions in law are recognised by law as reasonable classification and as such cannot be impugned on the ground of discrimination violative of Art. 14. (Para 47)

(C) Constitution of India, Art. 14 — Challenge to constitutionality of statute on ground of unreasonable classification — Burden of proof. (Para 45)

It is incumbent upon the petitioner who invokes Article 14 to furnish all facts in his affidavit which will render the classification unreasonable and also to show how he has been affected by the offending law. (Para 45)

(D) Advocates Act (1961), S. 34 (2) (iii) — Rule-making power conferred on High Court is not ultra vires Art. 14 of the Constitution. (X-Ref:— Constitution of India, Art. 14.) (Para 52)

Clause (iii) to sub-section (2) of Section 34 of the Act is a merely enabling section giving authority to the High Court to make rules for some specified purpose. The said provision by itself cannot be assailed on the ground of discrimination. Further no Court can enter into discussion on the basis of a hypothetical proposition that if rules are framed seeking to impose any restrictions as to persons who shall be entitled respectively to plead and to act in the High Court in exercise of its original jurisdiction they will be discriminatory. The rule-making power which has been given to the High Court is given to the best possible authority in whom the people and the legislature have absolute confidence. (Paras 50, 51)

Cases Referred: Chronological Paras

AIR 1971 SC 1002 = (1971) 1 Civ. Ap. J. 176, U. N. Rao v. Smt. Indira Gandhi	50
AIR 1971 Cal 354 = C. O. No. 6796 (W) of 1968, E. H. Tippoo v. Chief Justice of India	45
AIR 1967 SC 212 = 1967 Cri LJ 265, State of Nagaland v. Ratan Singh	47
AIR 1967 SC 691 = (1967) 1 SCR 15, Jalan Trading Co. (P.) Ltd. v. Mill Majdoor Sabha	42
AIR 1966 SC 1607 = (1966) 3 SCR 488, Ram Prashad v. State of Punjab	44
AIR 1964 SC 1179 = 1964-6 SCR 846, State of Madhya Pradesh v. Bhopal Sugar Industries Ltd.	41
AIR 1963 SC 222 = (1963) 2 SCR 353, Lachmandas v. State of Punjab	41
AIR 1962 SC 981 = 1962 Supp (2) SCR 257, Bhailya Lal Shukla v. State of Madhya Pradesh	47
AIR 1959 All 660 = 1959 Cri LJ 1253, Mehar Chand v. State	45
AIR 1957 Mad 403 = 70 Mad LW 367, Md. Zackeria Firm v. Srinivas and Co.	46
AIR 1956 SC 20 = (1955) 2 SCR 887, Purshottam Govindji Halai v. B. M. Desai	45
AIR 1955 Cal 138 = 1955 Cri LJ 441, Natbar Jena v. The State	47
AIR 1955 Mad 100 = 1955 Cri LJ 452, B. N. Ramkrishna Naidu, In re	46
AIR 1954 SC 524 = 1954 SCA 395, Babul Ch. Mitra v. Chief Justice and other Judges of Patna High Court	51
AIR 1952 SC 75 = 1952 Cri LJ 510, State of West Bengal v. Anwar Ali Sarkar	51

AIR 1952 SC 369 = 1953 SCR 1,
Aswani Kr. Ghosh v. Arobinda
Bose

50

K. J. John, for Petitioners; Gouri Nath Mitter, Advocate-General, S. C. Bose, D. Gupta, Sr. Standing Counsel, B. C. Basak, Jr. Govt. Advocate, C. R. Dutt, Suprakash Banerjee (for Nos. 1, 3, 8 and 9), D. N. Das, Bhagabati Prosad Banerjee (for No. 2) R. C. Deb, A. K. Basu, J. N. Roy, Prasanta Kr. Banerjee and Mrs. U. B. Mukherjee (for No. 4) and A. K. Dutt, Bireswar Bhattacharjee, Amar Nath Dhole, Subimal Mitra, Pramatha Nath Palit, and Miss Sabitri Sen (for No. 5), for Respondents.

ORDER:— The petitioners who are citizens of India have challenged the constitutionality of the Letters Patent of 1965, the Calcutta High Court (Jurisdictional Limits) Act, 1919 and Section 34 (2) (3) of the Advocates Act, 1961 on the ground that they offend the provisions of Article 14 of the Constitution of India.

2. Similar application was filed by the petitioner No. 2 Sri. E. H. Tippto and another which came for consideration before D. Basu J. as to its maintainability. The said petition was dismissed on the ground that there were not sufficient averments to show which would render the alleged classification unreasonable and also to show how they were affected by the offending law. It was held that unless such averments were made the opposite parties could not get an opportunity to controvert such allegations or to set up further grounds for which the classification, if any, may be sustained. D. Basu, J. however, permitted them to file fresh application either by themselves or along with others with proper averments. The said order was passed in C. O. 6796 (W) of 1968 on Jan. 25, 1971.

3. After that, the present application has been filed on 5-2-1971.

4. The petitioner No. 1 is an Advocate practising in this High Court. The petitioner No. 2 is a journalist, auditor, printer and publisher of various newspaper-periodicals and a Director of Engineering Times Publication (P.) Ltd. having its registered office at 8, Dharmatala Street, Calcutta. They made separate averments of their own while challenging the impugned Acts. According to the petitioner No. 1, he is to practise even before the Appellate Side of this High Court and also in the mofussil Court like Alipore. In Alipore Court he can be directly engaged by the client and he can also receive his fees directly from them. Whereas in the Original Side he can only accept the brief through attorneys and his fees through them. Direct appointment and payment of fees,

according to him, is full proof original and impressive and also it is satisfactory. His further contention is that the Original Side's rules, customs and practices affect the petitioner's right to practise freely and without any hindrance and as such these rules, customs and practice are discriminatory. By way of example he has said that there are two lists (i) one for Original Side (ii) and another for Appellate Side. For this procedure he is to incur unnecessary expenditure for subscribing two lists.

5. The petitioner No. 1 further states that the provisions of the Letters Patent as well as Calcutta High Court (Jurisdictional Limits) Act, 1919 are illegal, void and ultra vires and injurious to the petitioner practising as an Advocate with all his rights and privileges conferred by the Advocates Act, 1961 and/or discriminatory under Article 14 of the Constitution of India.

6. Next comes the averments made by the petitioner No. 2 who is a journalist about whom reference has already been made. In connection with carrying his profession as a publisher and owning properties and in course of his business both at Calcutta and outside of its jurisdiction he has to file frequently cases in different courts. His contention, inter alia, is that the trial of suits in the very first instance by a High Court Judge is accredited with much better advantages with privileged limitations regarding the appeal stage, and that such adjudication eventually turns out to be more speedy, economic and convenient, and that such advantage is not available in Alipore or other Mofussil Courts. His further contention is that had there been a single jurisdiction and system of doing justice at least within a conceivable and reasonable set of conditions including area, forum, facilities, representation by Advocates etc., a person may get much better treatment and also good result in such cases.

7. Both the petitioners have challenged the validity and vires of the Calcutta High Court (Jurisdictional Limits) Act, 1919 passed in pursuance of/or in exercise of the powers vested by clause 11 of the Letters Patent for the High Court of Judicature for the Presidency of Calcutta. They also have challenged the Letters Patent of the Year 1865 which was proclaimed by Queen Victoria in the Year 1865. It is said that the Letters Patent must have come to an end after the passing of the Government of India Act, 1915, Government of India Act, 1935 and particularly after the Constitution of India came into force. It was contended that as the Letters Patent of the Year 1865 was illegal and ultra vires, the Act, namely, the Calcutta High Court (Jurisdictional Limits) Act, 1919 which

was passed under the power derived from clause 11 of the Letters Patent, 1865 should also be considered to be invalid, illegal and ultra vires. They further challenged the provisions of the above mentioned Calcutta High Court (Jurisdictional Limits) Act, 1919 which will be referred hereafter as the Act on the ground that the local limits as contained in the said Act which is still now invoked is wholly illegal, unreasonable and discriminatory and that the same having not been based upon any reasonable classification at present is hit by Art. 14 of the Constitution of India. According to the petitioners, the Letters Patent aforesaid and all the acts, things and practices based thereupon are highly illegal and outrageous to the elementary concept of nationality and sovereignty and repugnant to the Constitution of India inasmuch as they are couched in the statutory language of the Victoria era and these documents should be considered to be colonial documents still being continued and as such it affects the sovereignty of India. Accordingly, they should be struck down.

8. The validity of Section 34 (2) (3) of the Advocates Act, 1961 has also been challenged on the ground that it is hit under Art. 14 of the Constitution of India.

9. Certain other allegations were made against the Attorneys and some controversies were raised in the matter of appointment of High Court Judges but at the time of hearing, these matters were not pressed. Accordingly they made a prayer for (a) issue of a Rule nisi calling upon the respondent to show cause why they should not be restrained from acting further in the purported exercise of power under the letters patent in the High Court at Calcutta; (b) restraining them to give effect to the limits as prescribed in the High Court (Jurisdictional Limits) Act, 1919 (XV 1919) prescribing ordinary original Civil jurisdiction of the same; (c) the declaration that Section 34 (2) and (3) of the Advocates Act 1961 is ultra vires the Constitution of India; (d) a Rule calling upon the respondent or such of them as may be appropriate to show cause why a writ of the nature of certiorari directing the respondent or some of them to bring the relevant records and paper connecting with the letters patent for the High Court at Calcutta and the Rules prevailing in the ordinary original civil jurisdiction prescribing such limits as indicated in the Calcutta High Court (Jurisdictional Limits) Act, 1919.

10. On the averments of the petition a Rule nisi was issued to show cause against the prayers made by the petitioners as noted in the order dated May 26, 1971.

11. The notice having been served, the respondents Nos. 4, 5 and 8 have filed affidavit-in-opposition. Respondent No. 4 is the Secretary, Bar Library Club. He has stated, inter alia, that the allegations of the petitioners are not true and none of the acts and also the Letters Patent as referred to in the petition can be said to be ultra vires as the same do not offend Article 14 of the Constitution. According to him, requirements of any Rule of law or of practice prevailing in the Original Side of this High Court is in no way incompatible with the petitioner No. 1's right as an Advocate under the Advocates Act.

12. The respondent No. 8, Registrar, Original Side has also supported the contention of respondent No. 4 in addition to that in his affidavit-in-opposition he has referred to some provisions of the Rules — "Rules of the High Court relating to application under Art. 226 of the Constitution" and submitted that it ought to have been filed in the Original Side and that it was not maintainable in the Appellate Side of this Court. Respondent No. 5, Secretary, Bar Association has also filed an affidavit-in-opposition. He has seriously contested the allegations of respondent No. 8, Registrar, Original Side that such an application is not maintainable in the Appellate Side, like the petitioners, he has asserted that subsections (2) and (3) of Section 34 of the Advocates Act, 1961 is ultra vires the Constitution.

13. All the respondents have been represented by different Advocates. Mr. R. C. Deb argued on behalf of the respondent No. 4 i.e., the Secretary of the Bar Library Club. The learned Advocate General also made his submission before this Court on behalf of the Chief Justice of the High Court at Calcutta but no affidavit-in-opposition has been filed by any other respondents except respondent Nos. 4, 5 and 8. Mr. Jhon appears on behalf of the petitioners, Mr. R. C. Deb and the Advocate General appeared on behalf of the Bar Library Club and Chief Justice respectively. Mr. Dutt appearing on behalf of the Secretary Bar Association has supported petitioners on their allegation regarding the validity of sub-clauses 2 and 3 of S. 34 of the Advocates Act. Other learned Advocates adopted the arguments of Mr. Deb and the learned Advocate General.

14. Mr. Jhon has confined his arguments to three points:

(i) That the Letters Patent 1865 came to an end after the passing of the Government of India Act, 1915, Government of India Act, 1935 and Independence Act, 1947. Even if it is said that Letters Patent, 1865 was not disturbed by those

Acts, after the promulgation of the Constitution of India on the 26th January, 1950, the same could not survive. Accordingly, Letters Patent 1865 is illegal having lost its force and its authority being superseded by the Acts referred to above and as such it is ultra vires and the authorities concerned should be restrained from giving effect to the provisions of the said Letters Patent.

(ii) That the provisions of the Calcutta High Court (Jurisdictional Limits) Act, 1919 is bad in law and ultra vires the Constitution on two-fold grounds: (a) the said Act having been based under the authority of clause 11 of Letters Patent, 1865 is bad and illegal, inasmuch as the Letters Patent had no force at the time when the said Act was enacted (b) that the areas butted and bounded in the said Act to show the boundary of Presidency Town of Calcutta was unreasonable and arbitrary. Accordingly it offends Article 14 of the Constitution. As such it is ultra vires and should be struck down.

(iii) That the provisions of the sub-sections (2), (3) of Section 34 of the Advocates Act, 1961 are discriminatory inasmuch as it discriminates Advocates practising in the High Court exercising original jurisdiction in the matter of pleading and acting. Accordingly it also offends Article 14 of the Constitution.

15. These are the points which have been formulated by Mr. Jhon. It has been noticed that various allegations were made in the petition but at the time of argument Mr. Jhon has confined himself to the points as referred to above.

16. Before I proceed further I would like to give a short history as to how the High Court at Calcutta was constituted. The history how the judicial system existed during the time of East India Company and how the High Court at Calcutta was constituted has been noted by Mr. Herbert Cowell, Barrister-at-law in his Tagore Law Lecture in the book named and styled as History and Constitution of the Courts and Legislative Authorities in India. There was great uncertainty in judicial administration during the time of the East India Company in India and in Bengal particularly. During the period of 1726 and 1774 the Mayor's Court at Calcutta which derived its authority and jurisdiction directly from the Crown in England was established. In this period the Company's Courts and the Courts manned by the representatives of the Mogul also continued to exercise jurisdiction concurrently and independently of the Mayor's Court. Thereafter one regulating Act was passed in 1773 authorising establishment of Supreme Court. Next Supreme

Court in Calcutta which derived authority and jurisdiction directly from the Crown was established. During this period also the Company's Courts continued to exercise concurrent and separate jurisdiction. The establishment of the Supreme Court at Calcutta by itself could not solve the problem. On the contrary, the Supreme Court came in direct conflict with the Courts established by East India Company exercising their own jurisdiction.

17. To stabilise the uncertainties and chaos in judicial administration, British Act, 1861 (24-25 Vict. C. A. P. 104) was passed authorising Her Majesty, by Letters Patent to erect and establish a High Court of judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William and also to erect and establish High Courts of Madras and Bombay for those Presidencies. The said Act empowered Her Majesty, Queen of England to establish High Courts in India by Letters Patent and such Letters Patent to contain the power and jurisdiction of the different High Courts to be established. Pursuant to this, Queen of England issued Letters Patent of 1862 establishing the High Court in Bengal. The said Letters Patent was replaced by the Letters Patent of 1865. Since then the High Court at Calcutta came into existence.

18. I am tempted to refer to the observations made by Mr. E. C. Ormand, in his revised notes on the Rules of the High Court of Judicature of Fort William in Bengal (1914) in its introduction while giving short history about the establishment of High Court at Calcutta. Though it is a very concised one, it depicts a true picture of the uncertainties of the position of the judicial system during the time of East India Company necessitating the formation of the High Court at Calcutta. The following are his observations:

"It was, however, out of the growing pains of this conflict of jurisdiction and violence of dispute to which it led and the subsequent amicable composition of that dispute that the present High Court in its existing form was born." That is how High Court was established with all its powers and privileges.

19. After the establishment of the said High Court so far as the Presidency Town of Calcutta was concerned, it effected a merger of the Supreme Court with other Courts as existed during the time of East India Company. In the meantime the extinction of the East India Company was completed and the Mofussil Courts which were Company's Courts were taken over by the Crown and they were made Subordinate to the High Court. Thus by the measures connected

with the establishment of the Calcutta High Court there was, for the first time, created a unified judicial system for the whole province of Bengal under a single uniform control, that of the High Court itself.

20. As already referred, in 1865 new Letters Patent replacing those of 1862 were issued. The opposite parties' contention is that under those Letters Patent, from then upto the present day the High Court at Calcutta drew its jurisdiction with certain modifications made at times by local legislature.

21. In this background it is to be considered whether these Letters Patent are still in existence which might be said to be the source of powers and jurisdiction which High Court is exercising in certain matters. Mr. Jhon has submitted that these Letters Patent have come to an end.

22. Mr. Jhon has challenged the validity of the Letters Patent, 1865 and asserted that the provisions of the said Letters Patent came to an end after the passing of Govt. of India Act, 1919. But I am afraid that this contention of Mr. Jhon cannot be accepted in view of the provisions made in the Act itself. Part IX of the said Act made provisions for the Constitution of the High Court. Section 101 of that Act referred to the High Courts established by the Letters Patent. Section 106 of the Act clearly made provisions for the continuance of the powers and authority of the High Courts which were vested in them by Letters Patent. It was further provided that subject to the provisions of any such Letters Patent, all such jurisdictions, powers and authority as were vested in those Courts at the commencement of that Act would continue. Thus it is seen that the said contention of the petitioners is not sustainable and the same fails.

23. It has further been argued that the Letters Patent should be deemed to have come to an end after the passing of the Government of India Act, 1935. Chapter II of Part IX made provisions for the High Court in India. Section 219 referred to the several High Courts including the High Court of Calcutta. Section 223 of that Act made provisions for the jurisdiction of existing High Courts. It runs thus:

"Subject to the provisions of this part of the Act to the provisions of any order in Council made under this or any other Act and to the provisions of any Act of the appropriate legislature enacted by virtue of powers conferred on that legislature by this Act, the jurisdiction of and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of the justice in

the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of Part III of this Act".

24. Reference may be made to the above provisions regarding the "law administered in any existing High Court". That clearly shows that the law which was administered by the High Court at the relevant time was to continue. In view of the provisions referred to above, Mr. Deb has submitted that the Letters Patent as existed at the appointed date should be considered to be continuing even under the provisions of the Government of India Act, 1935.

25. I also agree with the said contention of the learned Counsel for the respondent No. 4 and I hold that the passing of the Government of India Act, 1935 had no adverse effect on the Letters Patent, 1865 which were so long guiding the procedure, rules and regulations made by the High Courts under the provisions of the said Letters Patent.

26. Mr. Jhon has also submitted that even if the Letters Patent could be said to be continuing after the passing of the Government of India Act, 1935, the same must be deemed to have come to an end after the enactment of Indian Independence Act, 1947 giving birth to two dominions, namely, India and Pakistan.

27. In support of his contention Mr. Jhon has, however, referred to the definition of "existing Indian Law" as appears in clause 2 (1) of the India (Adaptation of Existing Indian Laws) Order, 1947 and contended that it excluded any Act of Parliament, or any order in Council, Rule or other instrument made under an Act of Parliament or the General Clauses Act, 1897. But he has omitted to note that in that very definition the laws in force were saved. The Letters Patent, 1865 was the law in force and regulated the powers of the High Court in Calcutta. Thus the said definition is of no avail to the petitioners. In addition reference may be made to Section 18 (3) of the Indian Independence Act, which again saved the existing laws. So Mr. Jhon's contention in this respect is not acceptable.

28. Mr. Jhon has next submitted that deletion of the Letters Patent from the provisions of the Government of India Act, 1935 is evident from some of the provisions of India Provisional Constitution (Amendment) Orders, 1948. By clause 2 (a) of that Order the words "His Majesty" and "Letters Patent" as appearing in the proviso (a) to sub-section (1) of Section 219 of the Government of India Act, 1935 were substituted

by the words "the Governor General" and "orders" respectively. From the above Mr. Jhon has contended that the "Letters Patent" were omitted and as such it should be held that the existence of the provisions of the Letters Patent should be taken to have come to an end. It is, however, to be noted that the said amendment was made in respect of the power for the establishment of a High Court to replace any Courts mentioned in sub-section (1) of S. 219 of the Government of India Act, 1935. Similarly, the power which was given to His Majesty to constitute or re-constitute High Court by Letters Patent under S. 229 of Government of India Act 1935 was delegated to the Governor General and that he was further authorised by "order" to constitute or re-constitute High Court and that the said Governor General was not to derive his power for such purpose from the Letters Patent. Thus the amendment which was made in India Provisional Constitution (Amendment) Order 1948 was made for that specific purpose. The said order, however, did not touch the other provisions of the Letters Patent. As such the said contention also fails.

29. Mr. John has lastly contended that after the promulgation of Constitution of India on 26-1-1950, the Letters Patent ceased to have any force. In support to his contention he has referred to the definition of "existing Central Law" as appears in clause 2 (1) (b) (iii) of the Adoption of Laws Order, 1950. He has further referred to the definition of "Indian Law" as defined in sub-section (3) of the General Clauses Act (Act 10 of 1897). According to Mr. Jhon the said definition of "existing Central Law" excludes an Act of Parliament of United Kingdom or any order in Council, Rule and other Instruments made under such an Act. As the letters patent is an enactment under the provisions of Parliament of United Kingdom it should be considered to have been excluded from the definition of existing central laws and accordingly the Letters Patent which is the outcome of the Act of Parliament of United Kingdom, should not be considered as the "existing Central Law".

30. Next Mr. Jhon placed before me the definition of "Indian Law" as defined in sub-section (29) of S. 3 of the General Clauses Act (Act X) of 1897. It runs thus:—

"Indian Law shall mean any Act, Ordinance, Regulation, Rule, Order, by-law or other Instrument, which before the commencement of the Constitution, had the force of law in any province of India or part thereof or thereafter had the force of law in any Part A State or Part C State or part thereof but does not

include any Act of Parliament of United Kingdom or any Order in Council, rule or other instrument made under such Act".

Mr. Jhon has submitted from the above definition that as the Letters Patent was promulgated under the provisions of the Act of Parliament it should never be considered to be a part and parcel of the Indian Law and that it should have no application in any part of India after the promulgation of the Constitution. From the above Mr. Jhon has submitted that the Letters Patent should be deemed to have come to an end.

31. Mr. Deb, learned Counsel for the respondent No. 4, on the other hand, has disputed the said contention and asserted that the Letters Patent cannot be said to have come to an end. According to Mr. Deb, those provisions are still in force. Mr. Deb has drawn the attention of the Court to Chapter V of the Part VI of the Constitution of India. Article 214 to Art. 231 of the Constitution relate to the establishment and Constitution of the High Court as well as appointment of High Court Judges and some other provisions concerning High Court. The relevant Article for our consideration is 225 of the Constitution. The said Article reads "subject to the provisions of this Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by this Constitution, the jurisdiction of and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution". Article 372 (1) may also be referred to in this connection. It provides

"notwithstanding the repeal by this Constitution of the enactment referred to in Art. 395 but subject to the other provisions of this Constitution all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by competent legislature or other competent authority"

Mr. Deb has submitted that the underlined portions of the Articles referred above are relevant for the determination of the point at issue. The Letters Patent, being the law in force and the law administered on the appointed day, should be taken as continuing as law of the land. In answer to the contention of Mr. Jhon regarding the implication of the "existing

Central Laws" — Mr. Deb, on the other hand, contended that we should not import the words "existing central laws" in those Articles (Arts. 225 and 372) to give some meaning to the same when those words are excluded and the words "law in force" and "Law administered" have been used. I also agree with the said contentions of Mr. Deb and hold that the Letters Patent 1865 being the law in force and also being the law administered, the same were not affected by the definition of the "existing Central Law". As such the said contention of Mr. Jhon fails.

32. In this connection the attention of the Court has been drawn to the clause 15 and clause 21 of the Supplementary provisions in Part III of the Adoption of Laws Order 1950. The cumulative effect of these clauses is also to save the laws in force and as such Mr. Deb has contended that under no circumstances the Letters Patent can be said to have been repealed or to have come to an end.

33. Mr. Deb next submitted that the contention of Mr. Jhon regarding the definition of "Indian Law" as appears in sub-section (29) of Sec. 3 of the General Clauses Act cannot be supported. Mr. Deb has referred to the above Arts. 225 and 372 of the Constitution of India and submitted that in those Articles there is no reference to the "Indian Law". Accordingly the definition of 'Indian Law' as given in the General Clauses Act will have no bearing on the point at issue. On giving my anxious consideration to the submission made at the bar by the respective parties, I am of the opinion that there is considerable force in the submission of Mr. Deb. In this connection reference may also be made to clause (d) of sub-section (2) of S. 50 of the Advocates Act (Act 25 of 1961) by which the provisions of the Letters Patent of the High Court and any other law in so far as they relate to admission and enrolment of legal practitioners have been repealed. The result is that the clauses 9 and 10 of the Letters Patent 1865 by which the powers were given to the High Court in admitting Advocates, Vakils and Attorney and in making Rules for their qualifications have been repealed and provisions have been made, in that respect, in the Advocates Act itself. It is, therefore, seen that even in the year 1961, after the Constitution of India came into force, the Letters Patent was in force and that some of its provisions regarding the admission of the Advocates, Vakils and Attorneys were only altered and new provisions have been made by the Indian Parliament. This, therefore, in my view lends further assurance to the contention of Mr. Deb that provisions of the Letters

Patent which have not yet been repealed or altered by the Constitution of India or by any other legislation passed, are still continuing and regulate the working of the Calcutta High Court in the State of West Bengal. For the reasons stated above, I hold that the provisions of the Letters Patent which have not yet been repealed or altered are still continuing in force.

34. According to Mr. Jhon the provisions in Chapter V, Part VI of the Constitution of India are self-sufficient and all the powers have been given thereunder to High Court to run its administration and as such the letters patent are deemed to have been repealed by implication. The said contention has got little force inasmuch as the High Court's Civil Jurisdiction has been incorporated in clause 11 of the Letters Patent which cannot be found in the Constitution itself. Similarly, under clause 12 the High Court of Calcutta have been exercising the original jurisdiction as to suits as mentioned in that clause. In clause 13 the High Court's extraordinary civil jurisdiction has been provided. Clause 15 provides for the appeals which are not otherwise provided for. In this connection reference may be made to Section 96 of the Civil P. C. Therein provision has been made for appeal from original decree passed by the Court but no such provisions have been made with regard to the judgment and decree passed in the Original Side of the High Court presided over by a Judge of that Court. But such appeals may be preferred against such judgment and decree in this High Court under the provisions of clause 15 of the Letters Patent. That also shows that the Letters Patent exists and are continuing in force. It is needless for me to refer to other provisions of the Letters Patent upto clause 45. Each one of these clauses have got its special importance and that but for these clauses the High Court in its Original, Appellate and Criminal Jurisdiction could not have worked in accordance with the law, and these powers have been retained by the High Court only under the Letters Patent which are still continuing. The cumulative effect of the above provisions is that the Letters Patent cannot be said to have been abolished either by implication or by any specific provisions of law. In the result, that contention of Mr. Jhon also fails.

35. For the reasons stated above I find that the Letters Patent of 1865 is not ultra vires the Government of India Act 1935 or of the Indian Independence Act 1947 and as such these Letters Patent are still in force within the meaning of Art. 372 read with Article 225 of the Constitution of India.

36. Mr. Jhon next contends that India is a sovereign democratic republic and any law which may be said to challenge the said sovereignty should be declared to be ultra vires the Constitution and as such the same should be struck down. The attention of the Court is drawn to the language of Letters Patent which started with the name of Victoria of the United Kingdom of Great Britain and Ireland, Queen, Defender of faith, and it is submitted that the Letters Patent was the law prescribed for colony and it enacted a colonial law, couched and worded with the superior attitude, defying the sovereignty of India, as such it should be struck down as it infringes the sovereignty of India as contained in the preamble of the Constitution. Hence Mr. Jhon has submitted that it is unfortunate that even after so many years of Independence of India, we are being governed by the Law which indicates the foreign domination. Apparently the position appears to be unfortunate but on that score merely alone the Letters Patent cannot be struck down, inasmuch as the said Letters Patent as indicated above, has been adopted and protected under the provisions of the Constitution itself. As such the Letters Patent is now existing under the authority of the Constitution. Hence the above submission of Mr. Jhon cannot be accepted.

37. I shall now deal with the contention of Mr. Jhon by which the constitutionality of the provision of the Calcutta High Court (Jurisdictional Limits) Act 1919 has been challenged. The said Act has been challenged on two-fold grounds:

(a) that the said Act having been based under the authority of clause 11 of the Letters Patent 1865 is bad and illegal in view of the fact that the Letters Patent had no force at the time when that Act was enacted.

(b) that the areas butted and bounded in the said Act is unreasonable and arbitrary. Accordingly it offends Art. 14 of the Constitution. As such it should be declared to be ultra vires and should be struck down.

38. The contention of Mr. Jhon with regard to the first point raised above that the Letters Patent having come to an end, the Calcutta High Court (Jurisdictional Limits) Act 1919 cannot be said to be valid law as it was enacted under the authority, derived under the said Letters Patent is not acceptable. In view of my finding that the Letters Patent are still in existence, the contention of Mr. Jhon in this behalf is not sustainable.

39. The second contention of Mr. Jhon with regard to the Calcutta High

Court (Jurisdictional Limits) Act 1919 may now be taken up for consideration. It requires a detailed discussion as it involves some complicated question of law. His main contention is that in Calcutta in spite of great extension of the town in recent years, the original civil jurisdiction is at the present day absurdly confined to illogically restricted limits which do not even cover the whole city. Accordingly it should be considered to be unreasonable and arbitrary enactment making a discrimination between a person and person, denying the citizen equality before the law or the equal protection of the laws within the territory of the State of West Bengal.

40. Mr. Deb, on the contrary, has submitted that in the matter of fixation of territorial jurisdiction the legislature must have unfettered power of selection, otherwise it may lead to an absurd situation. Mr. Deb has drawn the attention of the Court to certain statements of the petitioners, in the petition filed, wherein it is said:—

"Had there been a single jurisdiction and system of doing justice at least within a conceivable and reasonable set of conditions including area, forum facilities, representation by Advocate etc. your petitioner No. 2 states that your petitioner's legal rights and obligations were to receive a much better treatment and the present injury to your petitioner's right to property including the right to get justice having been caused by the factors aforesaid which are discriminatory or at least been rendered as such by historical change of events and circumstances would not have occurred". From the above it is contended by Mr. Deb that according to the petitioner the working in the original jurisdiction of the High Court at Calcutta is based on sound principles and that the litigants are to get better justice. Accordingly there is no sense in saying that the system which is better should be struck down to bring in a system which is inferior (if at all).

41. Mr. Deb next contends that it cannot always be said that Art. 14 of the Constitution forbids classification absolutely. According to Mr. Deb it permits classification by legislature, provided the following tests are answered:—

(1) That the classification is founded on an intelligible differentia and

(2) that the differentia has a rational relation to the object to be achieved by statute in question.

According to him classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group. The classification may be founded on different bases, name-

ly, geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the enactment. Learned Advocate General also has contended that application of unequal laws or procedure in different parts of the country is reasonably justified on historical reasons and geographical or territorial classification founded on those historical reasons should also be upheld. Mr. Deb has pointed out the history of events which led to the creation of Presidency Town of Calcutta, which has its own peculiarities with regard to its economic and factual background. Accordingly the exercise of the original jurisdiction by the High Court at Calcutta within the specified limits as is seen in the Calcutta High Court (Jurisdictional Limits) Act 1919 is permissible under the law and it does not offend Art. 14 of the Constitution. In support of his contention he has referred to the decision in case of the State of Madhya Pradesh v. Bhopal Sugar Industries Ltd., AIR 1964 SC 1179. In support of his said contention Mr. Deb also has placed before this Court the decision of Lachmandas v. State of Punjab, AIR 1963 SC 222 wherein it has been held by the Supreme Court that it does not always forbid reasonable classification and for this purpose even one person or group of persons can be considered as class, though Art. 14 prohibits discriminatory legislation directed against one individual or class of individuals.

42. To meet the contention of Mr. Jhon that the petitioners are not getting proper justice outside the jurisdiction of the Presidency Town of Calcutta, it is contended by Mr. Deb that such a contention cannot be upheld for the reasons that it is not always discriminatory merely because it involves hardship or inequality of burden. In support of his contention Mr. Deb has referred to the case of Jalan Trading Co. (P) Ltd. v. Mill Majdoor Sabha, AIR 1967 SC 691. Mr. Justice Shah speaking for the Court observed:

"..... if the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. With a view to secure particular objects a scheme may be selected by the legislature, wisdom whereof may be open to debate; it may even be demonstrated that the scheme is not the best in the circumstances and the choice of the legislature may be shown to be erroneous, but unless enactment fails to satisfy the dual test of intelligible classification and rationality of the relation with the object of the law it will not be subject to judicial interference under Art. 14.

Equal treatment of unequal objects, transaction or persons is not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by law".

43. After careful consideration of the submissions advanced at the bar regarding the point at issue I think that the plea of invalidity on the ground that it infringes Art. 14 of the Constitution must also fail inasmuch as the petitioners can be said to have been placed amongst the persons similarly circumstanced in the area. People residing outside the jurisdiction as fixed by Calcutta High Court (Jurisdictional Limits) Act 1919 can be said to be a class by themselves and those persons who are living inside the jurisdiction so settled may also be said to be a class to be treated similarly. As such there cannot be any discrimination amongst the persons so placed in those different areas.

44. Mr. Deb also contends that different acts in different parts of the same State can also be sustained on the ground that the differentiation arising from geographical classification is based on historical reasons. Reference has been made to the case of Ramparashad v. State of Punjab, AIR 1966 SC 1607.

45. In support of the contention of Mr. Deb reference has also been made to the case in AIR 1959 All 660. (Mehar Chand v. State) wherein it has been held that classification may be founded on different basis, namely geographical or according to the objects or occupation or the like. It has also been contended that in addition to the above what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. He further contends that there is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. That presumption should also be raised in favour of that particular legislation which passed the impugned Act. In support of his contention Mr. Deb has referred to the case of Purushottam Gobindjee Halai v. B. M. Desai, AIR 1956 SC 20. Mr. Deb has also submitted that under the law it is for the person who assails a legislation as discriminatory to establish that it is not based on a valid classification. Thus the onus is on the petitioner to show that. In this connection reference has been made to certain portion of the judgment of Basu, J. passed in C. O. No. 6796(W) of 1968 (reported in AIR 1971 Cal 354) wherein Basu, J. held that it is a settled law that the classification made by legislature would be presumed to be reason-

able unless the contrary is alleged and established by the petitioner. Basu, J. further held that it is, therefore, incumbent upon the petitioner who invokes Art. 14 to furnish all facts in his affidavit which will render the classification unreasonable and also to show how he has been affected by the offending law. I most respectfully agree with the said observation of Mr. Justice Basu. No new facts other than these stated in the previous application have been stated for the consideration in this case. That is another infirmity from which this application of the petitioner suffers. In this application the petitioner No. 1 states that he is to subscribe for the two lists—one published for the cases in the Appellate Side and another published for the cases in the Original Jurisdiction of the High Court and for that he is to spend more money. This cannot be considered as discrimination as all the advocates placed in the similar circumstance are to subscribe for those lists, if, of course, they like, to have the same. On the other hand, from the statements of the petitioner No. 2 it is seen that the working in the Original Jurisdiction of the High Court is highly satisfactory and according to him better justice can be had there. For the above reasons it is seen that nothing has been shown by the petitioner by which it can be said that the said classification is discriminatory offending Art. 14 of the Constitution of India.

46. The learned Advocate General contends that in the matter of fixation of limit of original jurisdiction of the Calcutta High Court by the Act, Calcutta High Court (Jurisdictional Limits) Act 1919, the legislature must have considered the difference in the economical structure and the tempo of life in Presidency Town of Calcutta and outside. The case of the *Md. Zackeria Firm v. Srinivas & Co.* reported in AIR 1957 Mad 403 has been referred in support of the contention that such a classification, if made on that score, should be said to be a reasonable classification. In this context reference may also be made to the decision in *In Re B. N. Ramkrishna Naidu*, AIR 1955 Mad 100 wherein it has been held that the meaning of equality, contemplated in Art. 14 does not fetter the discretion of the State to pass appropriate laws to meet different situations and solve different problems that arise in the affairs of the State dedicated to the ideal of promoting the common weal of the nation entrusted to its charge. It has further been observed therein:

"In applying the doctrine of equality, therefore, no narrow dogmatic constitutional niceties should hamper the true exposition of the Constitution as a living practical instrument of Government of

men and affairs. Thus, equality before the law and the equal protection of the laws would not be offended by territorial discrimination based upon reasonable classification arising from the particular factual background relating thereto".

47. The next submission of the learned Advocate General in this context is that special laws may be made for special areas without offending Art. 14 of the Constitution. In my opinion this submission is well founded. To appreciate this point at the background of petitioner's grievance as made out in the petition, one has to bear in mind that special or specified areas may have special or peculiar problems calling for solution in a particular manner, ways and means of life requiring, tending thereto in a special manner. If the historical evolution of the judicial system as well as of socio-economic complex of our country is traversed it is seen that the different Presidency Towns are replete with peculiar features of their own, necessitating special provisions in law that are distinct from other areas of the States where such Towns are situated. These distinctive provisions in law which have grown out of special and peculiar socio-economic needs of such areas are recognised by law as reasonable classification and as such cannot be impugned on the ground of discrimination violative of Art. 14 of the Constitution. This view also gets support from a Bench decision of this Hon'ble Court as reported in AIR 1955 Cal 138, (*Natabar Jana v. The State*). Reference to the case in *State of Nagaland v. Ratan Singh*, AIR 1967 SC 212 may also be made in this behalf. It has been observed therein:

"It is not discrimination to administer different laws in different areas. The Presidency Towns have got special procedures which do not obtain in other areas. We have known of trials by jury in one part of India for an offence which was not so triable in another. Similarly what is offence in one part of India is not an offence in another. Regional differences do not necessarily connote discrimination and laws may be designed for effective justice in different ways in different parts of India if people are not similarly circumstanced".

To sustain the contention that in the same State different laws may be applicable on historical reasons and geographical classification is permissible I may refer to the case of *Bhaiya Lal Shukla v. State of Madhya Pradesh* reported in AIR 1962 SC 981. The historical background how and why, the High Court at Calcutta was established has already been stated hereinbefore. The Presidency Town of Calcutta has its own peculiari-

ties and problems widely differing from the other parts of the country.

48. For the aforesaid reasons I hold that Calcutta High Court (Jurisdictional Limits) Act 1919 is not violative of Art. 14 of the Constitution and as such it is not ultra vires the Constitution. Consequently the prayer for striking down the said Act must fail.

49. The last contention of Mr. John is that the clause (iii) of sub-section (2) and sub-section (3) of S. 34 of the Advocates Act (Act 25 of 1961) is ultra vires as it offends Art. 14 of the Constitution. Mr. Dutt appearing for the Secretary, Bar Association has also supported the said contention.

50. According to Mr. Dutt the Advocates have been given the right to practise law as noted in Section 29 of the Advocates Act. Right to practice of an Advocate should mean both the right to act and to plead in course of his engagement. In support of his contention reference has been made to the case in *Aswani Kr. Ghosh v. Arobinda Bose*, AIR 1952 SC 369 wherein Supreme Court held that the word 'practice' as applied to the legal practitioner in India includes in the absence of any limiting or restrictive context both the functions of acting and pleading. Mr. Dutt therefore, submits that the very fact that the High Court at Calcutta was given the power to make rules to determine the persons who shall be entitled respectively to plead and to act in the High Court in exercise of its original jurisdiction, can be said to be discriminatory. According to Mr. Dutt, if any rule seeking to impose any restriction in this respect, is framed by the High Court, the same will lead to a discrimination. The submission in this respect by Mr. Dutt in my view, is not sound, it is based more on imaginary grievance than on facts. No Court should enter into discussion on the basis of a hypothetical case, and particularly in constitutional matters. The said view gets support in the decision of the case *U. N. Rao v. Smt. Indira Gandhi*, AIR 1971 SC 1002 wherein it has been observed: "in constitutional matter it is advisable to decide only those points which necessarily arise for determination on the facts of the case". Bearing the aforesaid principle in mind, let us now examine the relevant provisions as contained in sub-section (2) of S. 34 of the Act, and its clause (iii) which are set out hereinbelow: Sub-section (2): "without prejudice to the provisions contained in sub-section (1), the High Court at Calcutta and the High Court at Bombay may make rules. Clause (iii): "determining the persons who shall be entitled respectively to plead and to act in the High Court in the exercise of its original jurisdiction". It is, therefore, seen that clause (iii) to

sub-section (2) of S. 34 of the Act is a merely enabling section giving authority to the High Court to make rules for some specified purpose. The said provision by itself cannot be assailed on the ground of discrimination. The rules framed thereunder by this Court have, however, been kept out of scrutiny in the present rule. It may also be mentioned that the petitioners sought to attack the rules framed by the High Court but they did not give the detailed reasons for the same. Those rules were the subject-matter of attack in a proceeding before D. Basu, J. Against the decision of Mr. Justice Basu an appeal has been preferred and the same is still pending. Accordingly Mr. John and Mr. Dutt did not press that point in this proceeding as the selfsame point is the subject-matter of another proceeding, pending in appeal.

51. Mr. Dutt, however, submits that though the rules are not being challenged in this proceeding the section itself has been challenged and on the ground of discrimination S. 34 (2) (iii) and (3) should be struck down. Mr. Dutt in support of his own contention has referred to the case of *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 and contends that legislature committed illegality by delegating power to the High Court to frame rules concerning the Advocates regarding their right to plead and to act before the High Court exercising original jurisdiction. This according to Mr. Dutt is based on certain classification by which equal right before the law can be said to have been denied. Moreover, unlimited and unfettered right given to some authorities to discriminate one person from another without any reference to any particular class is bad in law, and accordingly, it cannot be sustained. In the instant case Mr. Dutt could not say anything by which it can be said that clause (iii) of sub-section (2) of S. 34 can be said to be discriminatory. It speaks of the Advocates who will plead and act in the High Court. There is nothing to show that any such rules have been framed which can be said to have made distinction between lawyers and lawyers. As already noted we are not looking to the rules. The language of the impugned section is clear to show that it does not make any discrimination between lawyers and lawyers. Mr. Dutt further contends that unfettered powers have been delegated to the High Court to frame rules. Accordingly the said provisions cannot be supported under the law. In support of his contention Mr. Dutt also submitted that in the case referred to above, the provisions of the West Bengal Special Courts Act, 1950 was struck down for the reasons that special powers were delegated to the Officer of the State to decide which offences are triable by the

Special Court and against whom. In the instant case, however, the said principle cannot be applied. The cases referred to by Mr. Dutt are distinguishable and the facts involved are different. Mr. Deb referred to the case of Babul Ch. Mitra v. The Chief Justice and other Judges of Patna High Court, AIR 1954 SC 524 wherein the provision of S. 9 of the Indian Bar Councils Act was considered. The Supreme Court observed: "the proviso to section mentioned above, however, makes it clear that there is an overriding power in the High Court to refuse admission to any person at its discretion in spite of these rules. The vesting of power even in an unfettered form in the High Court to exercise discretion in the matter of enrolling advocates, who would be entitled to practise before it, does not, in our opinion amount to an unreasonable restriction. Such discretion will have to be vested in somebody and no other or more appropriate authority could be thought of, except the High Court itself".

In the background of that decision I also find that rule-making power which has been given to the High Court can be said to have been given to the best possible authorities in whom the people and the legislature have absolute confidence.

52. Giving my anxious consideration in the materials on record I am sorry I cannot agree with the contention of Mr. John and with Mr. Dutt that Cl. (iii) of sub-section (2) of S. 34 of the Advocates Act is ultra vires and that it in any way offends Art. 14 of the Constitution.

53. Regarding sub-section (3) of S. 34, Advocates Act Mr. John's contention is as Letters Patent is not in existence, the rules framed thereunder should be declared to be illegal. But it may be noted that the said contention of Mr. John does not hold good in view of my finding that the Letters Patent are still in force. As such said contention of Mr. John also falls.

54. The petitioners have asserted that the Barristers were created as a privileged class of persons making a discrimination between lawyers and lawyers. The said argument is no longer tenable after the passing of the Advocates Act 1961. Section 34 of the Act lays down the qualification required for admission as an Advocate. Bar-at-Law is such a qualification recognised by the Advocates Act. High Court has framed a common set of rules for barristers and advocates. Thus by the passing of the Advocates Act, unification of the Bar has been achieved. Mr. John also has not pressed this point. It may also be noted in this context that the petitioners have not made the attorneys party in this proceeding. Mr. John, therefore has

given up the point that the admission of the attorneys is discriminatory at the time of hearing. Accordingly the impugned section of the Advocates Act cannot be challenged on that score. It may also be noted that though respondent No. 8, Registrar, Original Side, asserted in his affidavit that such an application was not maintainable in the Appellate Side, no argument, however, was advanced on that score at the time of hearing and the same has been given up. As such I do not think it necessary to consider the same.

55. I hold, therefore, that the impugned sections, namely, Cl. (iii) of sub-section (2) and sub-section (3) of S. 34 of the Advocates Act are not ultra vires the Constitution and that they do not offend Art. 14 of the Constitution and as such they cannot be struck down.

56. In the result, the application fails and the Rule is discharged. In view of the nature of the application no order as to costs is made.

Order accordingly.

AIR 1972 CALCUTTA 482 (V 59 C 103)

SALIL KUMAR DATTA, J.

Asim Pramanik, Petitioner v. Vice-Chancellor, Burdwan University and others, Respondents.

C. R. No. 2395(W) of 1972, D/- 19-6-1972.

Burdwan University Regulations, Regulations 7 and 18 — Regulation 7 is not controlled by Regulation 18 — On the other hand Regulation 18 is controlled by Regulation 7. (Para 6)

Regulation 7 lays down two conditions for passing the Part II and Degree Examinations. One is the minimum 33% marks in each subject and the other is 35% in the aggregate. This Regulation is prescribing the conditions for success in the examinations with reference to the elective subjects only. At that point Regulation 7 is not providing the additional subject of the candidates. It is thus obvious that Regulation 7 is not controlled by Regulation 18 in absence of any provision providing otherwise, rather Regulation 18 is controlled by Regulation 7. Accordingly in its context Regulation 7 refers to only elective subjects. Regulation 18 which deals with the additional subject provides that marks in excess of 33% in the additional subject shall be added to the aggregate referred to in Regulation 7, secured by the candidate in the examination. This regulation does not say that such excess marks shall form part of the aggregate as defined in Regulation 7. The excess mark in absence of any further provision,

GP/HP/D763/72/JHS

is no part of the aggregate contemplated in Regulation 7. Accordingly it is obvious that the excess mark over 33% in the additional subject is not to be included in the aggregate defined in Regulation 7. Where however such excess mark is to be taken into consideration for other purpose, as for declaring a candidate passing the examination with Distinction, there is express provision for including such excess mark in the aggregate as has been laid down in Regulation 19. There is, therefore, no ambiguity or anomaly in the literal meaning of the provisions in the Regulations themselves.

(Paras 6, 7, 8)

(contd. on column, 2)

	English	Bengali	History	Political Science	Additional-Genera Science.
Total Marks	200	200	300	300	100
Marks obtained	68	66	100	110	50

Total marks of elective subjects & aggregate—344.

The petitioner contends that under Regulation 7 of the University Regulations a candidate, to pass the said examination as also the degree examination, has to obtain 33% marks in each subject and also 35% marks in aggregate. He obtained 33% marks in all elective subjects his total marks being 344. But he was short of 6 marks in the aggregate. Regulation 18 provides that marks obtained in excess of 33% in additional subject are to be added to the aggregate of candidates. So that in this case 17 marks are to be added to aggregate secured by the petitioner raising his total marks to 361 while the qualifying pass marks is 35% of the aggregate of the elective subjects that is 350. The petitioner further contends that he thus qualified for being declared to have passed the examination. But the University wrongfully and illegally refused to accept this contention in spite of representations by its letter of March 17, 1972. Annexure 'B' to the petition and took to the position therein that marks in excess of 33% in the additional subject is to be added only in the case of successful candidates. Such interpretation is not warranted by the language of Regulations 7 and 18 and the latter regulation does not state that marks in excess of 33% is to be credited only to successful candidates. The petitioner in these circumstances moved this Court in Constitutional Writ Jurisdiction for a writ in the nature of mandamus directing the University to rescind, withdraw or forbear from giving effect to the impugned order aforesaid and also for a writ in the nature of certiorari quashing the same.

Cases Referred: Chronological Paras

AIR 1969 SC 513 = 1969 Lab IC 837, Management, Sahadara (Delhi) Saharanpur Light Rly. Co. v. S. S. Rly. Workers Union 3

Ganga Narayan Chanda, for Petitioner; Tapas Banerjee, Malay K. Ghosh, for Respondents.

ORDER:— The petitioner in this case appeared in B. A. Part II Examination of 1971 of the Burdwan University. The marks he obtained in the said examination would be evident from the following table:—

2. On the service of the rule the University authorities have entered appearance and filed an affidavit-in-opposition disputing the contentions made in the petition and also opposing the prayer of the petitioner for issuance of the writs. It was contended that Regulation 7 provides the conditions for qualifying for the Part II and Degree examinations. The conditions are securing 33% marks in each subject and 35% marks in the aggregate, both in the elective subjects. Regulations 18 and 19 make it clear that the marks in excess of 33% in the additional subject is to be added to the aggregate of successful candidates only and such marks are not to be taken in consideration for securing minimum pass marks in the aggregate obtained by a candidate. In view of the marks obtained by the petitioner the decision of the University in not declaring him successful in the examinations is a legal and proper decision.

3. Mr. Ganga Narayan Chanda, learned Advocate for the petitioner has contended that the literal meaning of the language of Regulation 18 is that the marks in excess of 33% in the additional subject is to be taken into account in computing the aggregate marks secured by a candidate. He submitted that there was no warrant for inserting the word "successful" before the word "candidate" in Regulation 18 as the provision of the Regulation is clear and unambiguous. He has referred me to a decision in the case of Management, Sahadara (Delhi) Saharanpur Light Railway Co. Ltd. v. S. S. Railway Workers Union, AIR 1969 SC 513 in which it was observed that the Court ought to give a literal meaning to the language used by Parliament unless

the language is ambiguous or its literal sense gives rise to an anomaly or results in something which would defeat the purpose of the Act.

4. Dr. Tapas Banerjee, the learned Counsel appearing for the University authorities, has submitted on the other hand that Regulation 7 is not controlled by Regulation 18 and in construing Regulations 18 and 19, marks in excess of 33% is to be considered only after the candidate has fulfilled the conditions laid down in Regulation 7. It was further stated that this construction of the Regulations, followed since 1965, is a reasonable construction of the relevant regulations which also should be followed in this case.

5. It would be of proper at this stage to consider the regulations referred to by the parties. These regulations relate to the Bachelor of Arts, Science and Commerce Examinations of the University of Burdwan. Regulations 7, 18 and 19 are as follows:—

"7. In order to qualify for Part II Examination, a candidate must obtain a minimum of 33% marks in the M. I. L. and a minimum of 30% marks in each of the elective subjects in Part I Examination In order to pass Part II Examination and the Degree Examination as a whole a candidate must obtain 33% marks in each subject and 35% marks in the aggregate on the combined results of Part I and Part II Examinations

Regulation 18, Marks obtained in excess of 33% in the additional subject shall be added to the aggregate of candidates for Part II Examinations.

Regulation 19. A candidate who passes and obtains 50% marks or above in the aggregate of Part I and II Examinations taken together including the excess marks in the additional subject, if any, will be declared to have pass B. A. Examination with Distinction".

6. As we have seen the elective subjects together total 1000 marks. There are two conditions laid down in Regulation 7 for passing the Part II and Degree Examinations. One is the minimum 33% marks in each subject and the other is 35% in the aggregate. This Regulation is prescribing the conditions for success in the examinations with reference to the subjects which are referred to in the earlier part of the same regulation and the subjects are the elective subjects only. At that point Regulation 7 is not providing the additional subject of the candidates. It is thus obvious that Regulation 7 is not controlled by Regulation 18 in absence of any provision providing otherwise, rather Regulation 18 is controlled by Regulation 7. Accordingly in its context Regulation 7 refers to only elective subjects.

7. Turning now to Regulation 18, which with Regulation 19 deals with the additional subject, it would appear that provision has been made in the said Regulation to the effect that marks in excess of 33% in the additional subject shall be added to the aggregate referred to in Regulation 7, secured by the candidate in the examination. This regulation does not say that such excess marks shall form part of the aggregate as defined in Regulation 7. The excess mark in absence of any further provision, is no part of the aggregate contemplated in Regulation 7. Accordingly it is obvious that the excess mark over 33% in the additional subject is not to be included in the aggregate defined in Regulation 7.

8. Where however such excess mark is to be taken into consideration for other purpose, as for declaring a candidate passing the examination with Distinction, there is express provision for including such excess mark in the aggregate as has been laid down in Regulation 19. There is, therefore, no ambiguity or anomaly in the literal meaning of the provisions in the Regulations themselves. For these reasons, the action of the University in not declaring the petitioner as having passed B. A. Part II as also the Degree Examinations is, in my opinion, in accordance with law.

9. The rule accordingly fails and is discharged without any order as to costs. Interim order, if any, is vacated.
Order accordingly.

AIR 1972 CALCUTTA 484 (V 59 C 104)

AMIYA KUMAR MOOKERJI, J.

M/s. Hahnemen Publishing Co. P. Ltd., Appellant v. Dinesh Chandra Ghosh and others, Respondents.

A. F. A. D. Nos. 732, 734 and 735 of 1960, D/- 5-5-1972.

West Bengal Premises Tenancy Act (1950), S. 12 (1) Proviso (h) — Requirement of premises for building and rebuilding.

In a suit for ejectment under Proviso (h) to Section 12 (1) condition of the building is not the test. The determining factor is, whether the purpose for which the rebuilding is proposed is reasonable or not. A purpose to demolish an existing building and to reconstruct it into a bigger one cannot by itself be regarded as unreasonable. AIR 1950 Cal 74, Rel. on. (Paras 7, 16)

There is no law by which the Court could direct the landlord to alter his plans. All that the Court is required to do is to satisfy its conscience that the proposed building and rebuilding is not

a ruse to get rid of his existing tenants. (1968) 72 Cal WN 393, Rel. on.

(Para 19)

The public benefit cannot be the sole guiding factor to determine the landlord's reasonable requirement. (Para 20)

Reasonable requirement is a question of fact and the Court of appeal is the final Court of fact. The final Court of fact ought to consider the evidence relied upon by the trial Court and come to a firm finding on the issue. (Para 14)

(As the appellate Court failed to do so and dismissed the suit solely upon the view that the condition of the disputed premises did not require demolition or rebuilding, its decree was set aside and case remanded). (Para 21)

Cases Referred: Chronological Paras
(1968) 72 Cal WN 393, Monohar

Lal Mehta v. Raj Mohan Pandey 19
AIR 1950 Cal 74 = 54 Cal WN

366, Bhulan Singh v. Gnanendra
Kumar 15

Bijan Behari Das Gupta and Ashoke Kumar Sen Gupta, for Appellant; Prafulla Kumar Roy (Sr), Sudhir Ranjan Khastagir, Amal Kumar Ghosal and Provat Kumar Sen Gupta, for Respondents.

JUDGMENT:— These three appeals are by the plaintiff-landlord arising out of ejectment suits under clause (h) of the proviso to Section 12 (1) of the West Bengal Premises Tenancy Act, 1950 (hereinafter referred to as the 'Act') viz., that the premises is reasonably required by the landlord for the purpose of building and rebuilding plaintiff's case, in substance, was that the premises No. 1/29/1, Bowbazar Street, originally belonged to one Prafulla Bhar, but subsequently he leased out the same to the plaintiff, a partnership firm for 99 years. The plaintiff became lessee of the premises by a registered lease dated 8-10-1953. The defendants became tenants under the plaintiff by reason of the aforesaid lease. The plaintiff required the suit premises for the purpose of building and rebuilding and also under the terms of the said lease. The tenancy of the defendants had been determined by notice to quit but as the defendants did not vacate the premises, the plaintiff brought the above suits.

2. The defence in all the suits was, the denial of the plaintiff's requirement of different premises for building and rebuilding. The validity of the notice to quit was also challenged.

3. The trial Court decreed the plaintiff's suits upon the findings that the element of necessity for requirement of the different suit premises by the plaintiff for the purpose of building and rebuilding and its reasonableness have been made out. The proposed construction

would not lead to diminish accommodation or any public disadvantage within the meaning of explanation to S. 12 (1) of the Act; all the tenancy had been validly determined by notice to quit.

4. On appeal, the Court of appeal below set aside the judgment and decree of the trial Court and dismissed the plaintiff's suits upon the view that the state of the building was not such that it would require demolition or rebuilding; so the plaintiff's requirement of the houses for the purpose of building and rebuilding could not be called in any sense of the terms a reasonable requirement within the meaning of Clause (h) of Section 12 (1) of the West Bengal Premises Tenancy Act, 1950; in suit No. 1929 there had been no service of ejectment notice upon the defendant in that suit. The plaintiff being aggrieved against the said judgment and decree of the Court of appeal below preferred these second appeals in this Court.

5. Mr. Das Gupta, appearing on behalf of the appellant, contends that the Court of appeal below erred in law in holding that the proviso (h) to S. 12 (1) of the Act would have no application unless the state of the premises was such that it required to be built. That proviso does not mention building and rebuilding of the premises: what it states is, that proviso will apply where the premises is reasonably required by the landlord for the purpose of building and rebuilding. So the Court is required to consider whether the plaintiff has satisfied that his requirement is reasonable and he has got necessary funds to carry out such reconstruction.

6. Proviso (h) to Section 12 (1) lays down three classes of cases in which a landlord can get a decree for ejectment when the landlord reasonably requires the premises: (1) for the purpose of building and rebuilding; (2) his own occupation; (3) occupation of any person for whose benefits the house is held. The word 'reasonably' qualifies all the above three classes of cases.

7. There is nothing in the said proviso contended by Mr. Das Gupta to show that the landlord is entitled to get a decree for the purpose of building and rebuilding unless he could satisfy the Court that the building is old and dilapidated. The terms of the section are wide enough to include cases where the landlord reasonably requires the premises for the purpose of building and rebuilding and for his own purpose and other legitimate purposes. A purpose to demolish an existing building and to reconstruct it into a bigger one cannot by itself be regarded as unreasonable. It is not the state or the condition of the building that is to be considered but the reasonable re-

quirement of the landlord for building and rebuilding is the determining factor.

8. Mr. Roy, appearing on behalf of the respondents contends that the plaintiff has specifically stated in the plaint that in terms of the lease the plaintiff required the premises for the purpose of building and rebuilding.

9. In the instant case the plaintiff is claiming ejectment of the defendants under the first part of the proviso, viz. of requirement for building and/or rebuilding purposes. Requirement of plaintiff's own occupation has not been stated in the plaint. It is stated in paragraph 4 of the plaint that the premises is reasonably required by the plaintiff for the purpose of building and rebuilding and the plaintiff also relied for that purpose under the terms of the lease. Mr. Roy remarked that the plaintiff wanted to eject the tenants from the disputed premises for the purpose of building and rebuilding only because there was a condition in the lease that steps should be taken to get ejectment of the tenants and thereafter to construct a new house on the demised land. According to Mr. Roy, the plaintiff's suits should have failed on that ground alone.

10. The Court of appeal below found that particular clause in the lease was unlawful under Section 23 of the Indian Contract Act. Apart from that clause in the lease, if the plaintiff could establish that he reasonably requires the premises for building and rebuilding, obviously he is entitled to get a decree. The Court of appeal below dismissed the plaintiff's suits solely upon the view that the condition of the disputed premises did not require demolition or rebuilding.

11. Mr. Das Gupta contends that the plaint should contain the material facts and not the evidence by which they are to be proved. It is clearly stated in the plaint that the plaintiff reasonably requires the premises for the purpose of building and rebuilding. So that statement of fact alone constitutes the cause of action.

12. Mr. Roy points out that an objective test is to be satisfied upon objective facts which would lead to the conclusion that the landlord reasonably requires the premises. In absence of such facts in the Plaint it is impossible to come to the conclusion that the plaintiff requires the suit premises for the purpose of building and rebuilding.

13. Objective facts, which I understand, are those facts pertaining to its object; and an objective test is to treat a subject so as to exhibit the actual facts, not coloured by one's feeling or opinion. In the instant case, a specific issue was raised viz. Are the suit premises reasonably required by the plaintiff for the purpose of building and rebuilding? The

evidence led on that issue upon which the parties actually went on trial. Upon the consideration of the evidence adduced by the parties, the trial Court came to the conclusion that the plaintiff reasonably required the premises for the purpose of building and rebuilding. Therefore, I am unable to accept the contentions of Mr. Roy that in absence of stating the 'objective facts' in the plaint, the Court could not apply "objective test" in coming to the conclusion that the plaintiff reasonably required the premises for the purpose of building and rebuilding.

14. The Court of appeal below did not consider the evidence relied upon by the trial Court in coming to the conclusion that the requirement of the different suit premises by the plaintiff for the purpose of building and rebuilding and its reasonableness had been made out. The reasonable requirement is a question of fact and the final Court of fact ought to have considered and come to a firm finding.

15. It seems that the Court of appeal below fell into an error in holding that the principle of law as laid down by this Court in Bhola Singh's case, 54 Cal WN 366 = (AIR 1950 Cal 74), under the 1948 Act would not be applicable to 1950 Act inasmuch as 'bona fide requirement' in the former Act has been changed to 'reasonable requirement' in the latter Act. In order to get a decree on the ground of rebuilding, the Court has to be satisfied with the reasonableness of the requirement. In Bhola Singh v. Gnanendra Kumar, 54 Cal WN 366 = (AIR 1950 Cal 74) the landlord filed a batch of ejectment suits under proviso (f) to Section 11 (1) of the West Bengal Rent Control (Temporary Provision) Act, 1948. The said proviso is similar to proviso (h) to Section 12 (1) of 1950 Act. Harrish, C. J. observed that proviso (f) to Section 11 (1) of the Act does not mention premises requiring rebuilding. What it states is, that sub-section (1) shall have application if the landlord requires the premises bona fide for rebuilding. The state of the premises, therefore, is not an essential factor in the case.

16. Therefore, in my view, in a suit for ejectment under proviso (h) to Section 12 (1) of the West Bengal Premises Tenancy Act, 1950, the state or the condition of the building is not the test of building and rebuilding. The determining factor is, whether the purpose for which the rebuilding is proposed is reasonable or not.

17. The trial Court found that the proposed construction will not lead to diminish accommodation or any public disadvantage within the meaning of explanation to the proviso (h) of S. 12 (1) of the Act.

18. The Court of appeal below was of opinion that the disputed premises did not require to be built or rebuilt, so the question of extended public accommodation was not a vital point in the instant case and furthermore the plaintiff by constructing a new building on the remaining portion of the demised land could easily increase the accommodation if he really intends to increase the same.

19. There is no law by which the Court could direct the landlord to alter his plans. All that the Court is required to do is to satisfy its conscience that the proposed building and rebuilding is not a ruse to get rid of his existing tenants (vide, *Monohar Lal Mehta v. Raj Mohan Pandey*, (1968) 72 Cal WN 393).

20. The explanation to proviso (h) to Section 12 (1) of the Act, in my opinion, has got no nexus with the reasonable requirement of the landlord. The Court in granting the plaintiff a decree for ejectment on the ground of reasonable requirement for building and rebuilding, shall take into consideration the comparative public benefits or disadvantage by extending or diminishing accommodation. But the public benefit cannot be the sole guiding factor to determine the landlord's reasonable requirement. When the plaintiff succeeds in establishing his claim of reasonable requirement, thereafter, the explanation comes into play, but at the same time it cannot overweigh the landlord's reasonable requirement, even if any increased accommodation does not result from the proposed building.

21. Reasonable requirement is a question of fact. The trial Court found it in favour of the plaintiff-landlord. The Court of appeal below as the final Court of facts, is required either to accept or reverse the findings of fact arrived at by the Court below. This has not been done in the present case. The Court of appeal below did neither reject nor accept the findings of the trial Court and the evidence relied upon by the trial Court in coming to the conclusion that the plaintiff reasonably required the disputed premises for building and rebuilding. The Court of appeal below dismissed the plaintiff's suit mainly on the ground that the condition of the building did not require building and rebuilding and the plaintiff-company failed to prove its requirement supported by any resolution passed at a meeting of the Board of Directors. But such resolution by itself similar to the terms in the lease, in my opinion, does not conclusively prove reasonable requirement. So, mere absence of such resolution cannot disentitle the plaintiff to claim ejectment if he could satisfy its reasonable requirement by other material evidence. In deciding second appeals, I cannot decide the ques-

tion of facts, so under these circumstances, it is desirable that the appeal should be reheard by the Court of appeal below.

22. In the result, the second appeals Nos. 732 and 735 are allowed, the judgment and decree of the Court of appeal below are set aside and the appeals are remitted to the Court of appeal below for rehearing. The Full Bench of the Small Cause Court is directed to decide afresh the only point whether the plaintiff reasonably requires the premises for building and rebuilding, without taking into consideration the condition of the building and the terms of the lease dated 8-10-1953 between the plaintiff and its lessor and decide the appeals in accordance with law. As regards requirements of the Explanation to proviso (h) of Section 12 (1) of the Act, he will follow the directions as indicated hereinabove.

23. Regarding the notice to quit in suit No. 1929 which corresponds to the S. A. 734/60, I affirm the findings of the Court of appeal below that the notice of ejectment was not tendered to the defendant of that suit and accordingly S. A. No. 734/60 is dismissed.

24. There will be no order as to costs in any of the appeals.

Appeals allowed; case remanded.

AIR 1972 CALCUTTA 487 (V 59 C 105)

SANKAR PRASAD MITRA AND
SABYASACHI MUKHARJI, JJ.

Monoranjan Routh and others, Appellants v. State of West Bengal, Opposite Party.

C. R. Nos. 2565 and 2566 of 1968, D/- 21-4-1972.

West Bengal Land Development and Planning Act (1948), S. 8 (2)—Provisions have reduced and curtailed quantum of compensation payable in Land Acquisition proceedings and are therefore violative of Art. 14 of the Constitution; and are not saved by Art. 31-B and 9th Schedule thereto — (X-Ref.— Constitution of India, Arts. 14 and 31-B). (Para 3)

The various legislations of different States providing acquisition of land (including the W. B. Land Development and Planning Act 1948) have the 'object' of "acquisition" of lands and the purposes for which the acquisition is made are immaterial. The acquisition of land under these legislations is made on payment of nominal compensation while an adjoining land may be acquired under the Land Acquisition Act 1894, on payment of adequate compensation. (i.e., market value of the lands under Section 23 (2) of the

FP/GP/D514/72/SND/VBB

Land Acquisition Act 1894 plus 15% solatium), although both the lands are being acquired for public purposes. This differential treatment is not based on reasonable classification and substantial differences having reasonable relation to the objects sought to be achieved, and is violative of Art. 14 of the Constitution and is also not saved by Art. 31-B and the Ninth Schedule thereto. AIR 1968 SC 394 & AIR 1968 SC 1425 & AIR 1969 SC 168, Rel. on. (Paras 4 to 6)

Cases Referred: Chronological Paras
AIR 1969 SC 168 = (1969) 1 SCR

42, Ramanlal v. State of Gujarat
AIR 1968 SC 1425 = (1969) 1 SCJ

209, Balammal v. State of Madras 5
AIR 1968 SC 394 = (1968) 1 SCR

561, Dy. Commr. and Collector,
Kamrup v. Durganath Sarma 4

Amarendra Nath Gupta, S. B. Bakshi, Sunil Ghosh, Mrs. Krishna Gupta, for Petitioners; Provat Kumar Sengupta and Sudhir Kumar Kar, for the State.

SANKAR PRASAD MITRA, J.:

The facts of this case have been set out in our Judgment delivered on April 21, 1969. In view of the contentions raised on behalf of the petitioners so far as clause (b) of Section 8 (1) of the West Bengal Land Development and Planning Act, 1948 (hereinafter referred to as "the Act") is concerned we directed the Special Land Acquisition Judge at Alipore to report to us whether the lands in question were in the same state on the date of publication of notification as they were on December 31, 1946. The report of the First Special Additional Land Acquisition Judge is now available. He has stated that the lands were not on the date of the publication of the notification under sub-section (1) of S. 4 of the Act (that is on the 19th July, 1962), in the same state as they were on the 31st December, 1946 and that substantial improvement or development was made after that date.

2. This report of the First Additional Special Land Acquisition Judge makes the questions that were raised before us on Section 8 (1) (b) purely academic. If the lands on the date of the publication of notification were not in the same state as they were on the 31st December 1946 "the condition" prescribed in the latter part of clause (b) of Section 8 (1) of the Act is not attracted to these lands at all. We are not therefore, giving our answers to questions 1 and 2 which Mr. Amarendra Nath Gupta raised on behalf of the petitioners when the matter was first heard before us. Mr. Sengupta appearing for the State has submitted that the provision in the latter part of clause (b) of Section 8 (1) should be read as a legal assumption and not a physical or factual assumption. We are unable to accept this contention on the

language used in the latter part of Cl. (b) of Section 8 (1). This provision speaks of a "condition" and not of any "assumption" either of fact or of law. We, therefore, overrule this contention of Mr. Sengupta.

3. We have, however, to answer question No. 3 of Mr. Gupta mentioned in our judgment of the 21st April, 1969. The question is: 'Whether the provisions of sub-section (2) of S. 8 of the Act relating to Section 23 (2) of the Land Acquisition Act, 1894, has reduced and curtailed the quantum of compensation payable under the present Act and is also violative of Art. 14 of the Constitution and if so, whether it is saved by Art. 31-B of the Constitution and the Ninth Schedule thereto?' This question has to be answered in favour of Mr. Gupta in view of the three Supreme Court decisions which he placed before us. The Supreme Court seems to be of the opinion that the object of these legislations is 'acquisition' of lands and the purposes for which the acquisition is made are immaterial. In other words the Supreme Court has chosen to give a restricted meaning to the "objects sought to be achieved" by a particular legislation. Personally we may be of the view that "objects" of a statute should be more liberally construed but these Supreme Court decisions are binding on us and an elaborate discussion of our views on the subject would be wholly immaterial. We, therefore, proceed to refer to the Supreme Court decisions relevant for determining the effect of sub-section (2) of S. 8.

4. In the Dy. Commr. and Collector, Kamrup v. Durganath Sarma, AIR 1968 SC 394 the Assam Acquisition of Land for Flood Control and Prevention of Erosion Act-1955 was considered. The Supreme Court has said that in the State of Assam some land may be taken under Assam Act No. 6 of 1955 for the purpose of works and other measures in connection with flood control and prevention of erosion on payment of nominal compensation while an adjoining land may be taken for other public purposes under the Land Acquisition Act, 1894 on payment of adequate compensation. This differential treatment of land acquired under the two Acts is not permissible under Art. 14. The constitutional guarantee of Art. 14 requires that all persons shall be treated alike in like circumstances and conditions. The Article permits reasonable classification and differential treatment based on substantial differences having reasonable relation to the objects sought to be achieved. The classification of land acquired for works and other measures in connection with flood control and prevention of erosion and land required for other public purposes has no reasonable relation to the object sought

to be achieved viz., acquisition of the land by the State. In either case, the owner loses his land and in his place, the State becomes the owner. And there is unjust discrimination between owners of land similarly situated by the mere accident of some land being required for purposes mentioned in Assam Act No. 6 of 1955 and some land being required for other purposes. The Assam Act was therefore held to be violative of Art. 14.

5. The next case is directly on the point of solatium which has been withdrawn by sub-section (2) of S. 8 of the Act. This is the case of *Balammal v. State of Madras*, AIR 1968 SC 1425. We set out below what Shah, J., speaking for the Supreme Court, has stated in paragraph 7 of this judgment at page 1428. Paragraph 7 runs thus: "..... In our judgment, counsel for the owners are right in contending that sub-clause (2) of Cl. 6 of the Schedule to Act 37 of 1950 in so far as it deprived the owners of the lands of the statutory addition to the market value of the lands under Section 23 (2) of the Land Acquisition Act is violative of the equality clause of the Constitution, and is on that account void. If the State had acquired the lands for improvement of the town under the Land Acquisition Act the acquiring authority was bound to award in addition to the market value 15 per cent. solatium under Section 23 (2) of the Land Acquisition Act. But by acquiring the lands under the Land Acquisition Act as modified by the Schedule to the Madras City Improvement Trust Act 37 of 1950 for the Improvement Trust which also is a public purpose, the owners are it is claimed deprived of the right to the statutory addition. An owner of land is ordinarily entitled to receive the solatium in addition to the market value for compulsory acquisition of his land if it is acquired under the Land Acquisition Act, but not if it is acquired under the Madras City Improvement Trust Act. A clear case of discrimination which infringes the guarantee of equal protection of the law arises and the provision which is more prejudicial to the owners of the lands which are compulsorily acquired must, on the decisions of this Court, be deemed invalid".

5-A. These observations of the Supreme Court clearly lay down that the solatium prescribed by the Land Acquisition Act cannot be withdrawn by specifying a particular purpose of acquisition in some other Act. The object in both cases, according to the Supreme Court is acquisition for public purposes. And it is discriminatory to provide that solatium shall be given for one land acquired under the Land Acquisition Act and would not be given for a neighbouring land acquired under a different statute

although both the lands are being acquired for public purposes.

6. There is one other point we have to consider. The Act, we are considering, as amended by West Bengal Act XXIX of 1951 has been included in the 9th Schedule to the Constitution. The provisions as they stood on the date of inclusion cannot, therefore, be challenged in Courts of law. But the protection of the 9th Schedule is not available to sub-section (2) of S. 8. The reason is that the original Act as amended in 1951 was introduced into the 9th Schedule on the 27th April, 1955. But sub-section (2) of Section 8 was enacted by another Act being Act 23 of 1955 on September 21, 1955. The amendments subsequent to introduction into the 9th Schedule are not protected by that Schedule. The Supreme Court in *Ramanlal v. State of Gujarat*, AIR 1969 SC 168 had to deal with the same problem. Their Lordships came to the conclusion that if amendment subsequent to inclusion in the 9th Schedule were to be given protection, it would amount to amendment of the 9th Schedule itself which no State legislature had power to do. On this view of the matter it is apparent that sub-section (2) of Section 8 without the protection of the 9th Schedule offends against Article 14 of the Constitution.

Our answer to the third question of Mr. Gupta set out above is that the provisions of sub-section (2) of Section 8 of the Act relating to Section 23 (2) of the Land Acquisition Act, 1894 has reduced and curtailed the quantum of compensation payable under the parent Act and is violative of Article 14 of the Constitution. These provisions are not saved by Art. 31-B of the Constitution and the Ninth Schedule thereto.

7. The Rules are, accordingly, disposed of. All interim orders made by this Court are vacated. We direct that the records be sent back to the Trial Court expeditiously for being dealt with according to law. There will be no order as to costs. Let the operation of this order be stayed for four weeks.

SABYASACHI MUKHARJI, J.:

8. I agree.

Order accordingly.

AIR 1972 CALCUTTA 489 (V 59 C 106)

HAZRA, J.

Sri Sri Iswar Jagannath Deb Jew and others, Plaintiffs v. Fatick Chand Seal and others, Defendants.

Suit No. 32 of 1964, D/- 11-4-1972.

Civil P. C. (1908), O. 40, R. 1 — Grant of permanent lease by receiver of debutter property — Permissibility.

FP/GP/D521/72/SSG

A debutter property cannot be sold or leased out except on the ground of urgent need or legal necessity. The leasing out of debutter property for such purpose can be made by the sebaits and trustees for the time being with the leave of the Court. Merely because a receiver has been appointed by High Court, on the application of one of the sebaits and trustees the court should not grant a permanent lease for 99 years in respect of a valuable debutter property. Nor does the court grant a certificate for legal necessity in such a case.

(Para 11)

Cases Referred: Chronological Paras

- AIR 1970 SC 439 = (1970) 1 SCR 936, Kalank Devi Sansthan v. Maharashtra Revenue Tribunal, Nagpur 8
- AIR 1961 All 73 = 1960 All LJ 467, Beharilal v. Thakur Radha Bal-labji 8
- (1937) 41 Cal WN 627 = ILR (1937) 2 Cal 133, Sree Ishwar Narain Jew v. Henry E. Soler 9
- (1943) Suit No. 595 of 1943 (Cal), Sri Ishwar Jagannath Deb Jew v. Girish Chandra Seal 4
- AIR 1929 Cal 828 = 50 Cal LJ 333, Srish Chandra Banerjee v. Deben-dra Nath Banerjee 7,10
- Gouri Mitter-Advocate General and M. N. Banerjee, for Plaintiffs; H. M. Dhar, for Defendant (Fatick Ch. Seal), Gopal Law, for Defendant (Umesh Ch. Seal).

ORDER:— This is an application by Mohan Chand Seal, the defendant No. 2 (b) in this suit, inter alia, for giving leave to Fatick Chand Seal, the Receiver, appointed in this suit, to lease out for a period of 99 years 30 Bighas of land at premises No. 98, Manicktolla Main Road, Calcutta to the intended lessee or les-sees.

2. Premises No. 98, Manicktolla Main Road, Calcutta (hereinafter called the said premises), is one of the proper-ties of the plaintiff deity. This is a very big and valuable property consisting of 40 bighas of land. On the high land of the said premises facing the road there is a two storied building including tem-ple, Nat Mandir, feeding house of the poor, charitable dispensary Jheel, tanks and there is also open low land. The plaintiff deity was installed in the Tha-kur Bari in the said premises. In or about 1948, the said premises was requi-sitioned by the Government of West Bengal. After the requisition the plain-tiff deity was located in another debut-ter property viz.: No. 14, Madan Datta Lane, Calcutta.

3. The question in this applica-tion is whether this court should grant leave to the Receiver appointed in this suit in an interlocutory application to

lease out, for 99 years 30 bighas out of 40 bighas of land, which is debutter pro-perty.

4. The relevant facts and circum-stances relating to the suit and the ap-plication are as follows:

One Durgadas Seal, since deceased, consecrated and established the deity Sri Sri Iswar Jagannath Deb Jew at pre-mises No. 57, Manicktolla Main Road, now known as No. 98, Manicktolla Main Road. By a Deed of Endowment dated October 1, 1916 the settlor settled and en-dowed several properties including the said premises in favour of the deity, and provided that after his death the trustee-ship and shebaitship would devolve upon his legal heirs according to the Bengal School of Hindu Law by which he was governed. On September 9, 1925, the settlor died intestate leaving him surviv-ing his seven sons, Manindra, Girish, Ashutosh, Umesh, Ganesh, Subal and Jadab as his heirs and legal representa-tives. The said sons of the testator be-came shebaits and trustees in items of the Deed of Endowment. Between 1925 and 1945 there were various litigations between the trustees and shebaits over the administration of the trust or the endowed properties. Manindra relin-quished his shebaitship and trusteeship. Ganesh, Subal and Jadab died intestate and unmarried. On May 3, 1943 the plaintiff No. 2 Premchand Seal who is the only son of Manindra instituted a suit in this court being Suit No. 595 of 1943 (Cal) (Sri Iswar Jagannath Deb Jew v. Girish Chandra Seal) inter alia, for re-moval of the trustees and appointment of plaintiff No. 2 as the sole trustee, for accounts and other incidental reliefs. By an order dated September 7, 1948 in Suit No. 595 of 1943 Mr. H. K. Bose, Bar-rister-at-Law, (as he then was) was ap-pointed as the Special Referee for the purpose of framing a scheme in accord-ance with the Deed of Endowment. The said Special Referee framed a scheme in or about September, 1950. There-after, on July 29, 1949, final decree was passed in Suit No. 595 of 1943 in accord-ance with the report or scheme of the management made by the Special Re-feree. Thereafter, Ashutosh died inte-state leaving defendant Fatick Chand as his only son and heir. On February 3, 1963, Girish died leaving his widow Badam Kumari, defendant No. 2 (a) and his only son Mohan Chand, defendant No. 2 (b) as his sole heirs and legal re-presentatives. The said Badam Kumari and Mohan Chand upon the death of Girish became trustees and shebaits in place of Girish. On March 6, 1962, upon the death of the said Manindra his son Prem Chand instituted this suit claiming to be a shebait and trustee and for re-moval of some of the shebaits and trus-

tees and for appointment of new shebait and trustees, for cancellation of the present scheme, for framing of a scheme of management and for other reliefs. In or about July 1967, an application was made by Premchand in this suit, for the appointment of a Receiver to the endowed estate and on the said application Fatick Chand was appointed as the Receiver of the debutter estate by an order dated August 16, 1967. On or about September 29, 1970 an application was made by Umesh Chandra Seal in this court and an ex parte order was passed by Masud, J. inter alia, that Fatick Chand, the Receiver appointed be at liberty to appoint the shebait, but this order was directed to be served on the Attorney of the applicant Premchand, with liberty to have this order vacated before the vacation court. Thereafter the said application was finally heard and on or about May 11, 1971 Masud, J. observed that lease for 99 years was equivalent for sale and asked the applicant to cause advertisement to be used in the newspapers, namely, the Statesman and the Viswamitra inviting offers for the sale of the property in the sealed cover and place them before his Lordship for his consideration. However Umesh withdrew the said application on May 11, 1971. This application by Mohan Chand has been made for the same or similar prayers as was made by Umesh before Masud J. According to the petitioner, Umesh withdrew the said application as he was then won over by Premchand the plaintiff in this suit.

5. Mr. Gouri Mitter, the learned Advocate General of West Bengal, appearing for the petitioner submitted as follows:

In or about August 1948, the said premises was requisitioned by the Government of West Bengal. Since the said requisition the said premises was in occupation of several thousands of refugees. The Government of West Bengal was paying a rent of Rs. 2,375/- per month exclusive of municipal taxes. The said premises had been de-requisitioned by the Government on or about the 9th October, 1967. The Board of Trustee decided unanimously to grant lease of 30 Bighas of low land out of the said property, namely, premises No. 98, Manicktolla Main Road. In course of the administration, the court has to pass an order for preservation and protection of the estate and for smooth running the estate. The Court has already appointed receiver in respect of the properties belonging to the deity including the said premises No. 98, Manicktolla Main Road. The said premises is now in the custody of Court by reason of appointment of the Receiver. The trustees have decided unanimously to grant lease of 30 Bighas

of low land of the said premises (the client of the Advocate General would not recognise the plaintiff as trustee and shebait). The trustees and shebait cannot give clear title to the lessee because this suit is pending now. Under O. 40, R. 1, the trustees are disabled to grant such a lease. Only the Receiver could grant such a lease in view of appointment of receiver in this suit and the Court should grant such leave to the receiver to make a lease in view of the absolute urgency of the case. In spite of the urgency the shebait cannot grant such a lease. Therefore, the Court should grant leave to the receiver to grant such a lease. It was submitted that the right to grant lease is not controlled by the deed of endowment at all. The right of the sebat is the right to carry out the seva and worship of the deity and the right of management of the properties. According to the Advocate General, urgent necessity exists for grant of lease in this case. The deity had to be removed to No. 14, Madan Dutta Lane, Calcutta where some of the sebaits stayed. The Government of West Bengal requisitioned the property in 1948 and de-requisitioned the property on October 10, 1967. The Government of West Bengal was paying a rent of Rs. 2,375/- per month exclusive of municipal taxes. During the period of requisition, the property could not be repaid. Before the requisition during the period of 1940 to 1946 which was war period, nothing could be done for repairs of the property due to conditions of war. During the period of requisition of the premises by the State of West Bengal the entire boundary wall on all sides of the premises were pulled down by the refugees and out of the bricks temporary houses were constructed by the refugees. As a result, the said premises was without any boundary wall. It is absolutely necessary that the thorough repairs should be done to the building and structures. It was decided by the sebaits that 14 bighas of jheel and 16 bighas of low land should be leased out. The learned Advocate General submitted that Sri Sri Iswar Jagannath Deb Jew must go back to its own temple. The temple needs immediate repairs. Unless the temple is repaired the deity cannot be located at the temple. The property had not been repaired for 32 years. A large sum of money is urgently needed for repairs. The right of the deity to be located at the temple at No. 98, Manicktolla Main Road should be immediately implemented. The Deity must go back to its old temple. The property is now being managed by the scheme. According to the Advocate General, Prem Chand has no right to oppose this application. The court should not postpone what all the

sebaits want. The income of the debutter estate is Rs. 55,000/- per year. There is a loss of Rs. 4,000/- every year. This deficit has to be met. It cannot be met unless the lease is granted.

6. The learned Advocate General finally submitted that sale of the said premises is not beneficial to the interest of the deity, because in case of sale, question of payment of capital gain tax would arise, whereas in case of long lease payment of selami or rent do not involve capital gains tax. The Advocate General stated that one cannot also shut his eyes to the fact that ceiling of urban properties would be imposed soon and the deity in such case may not get the benefit of such vast land. He submitted that it is for the benefit of the deity that this 30 bighas of land should be leased out as prayed for by the petitioner.

7. Mr. Gopal Law, appearing for the defendant Umesh Chandra Seal supported the case of the petitioner that this property should be leased out. Mr. Law submitted that his client Umesh Chandra Seal made an application on September 29, 1970 almost with the same prayer. There was an *ex parte* order passed by Masud J. But ultimately the said application was withdrawn by his client on May 11, 1971. He referred to a decision of this Court in AIR 1929 Cal 828 equivalent to 50 Cal LJ 333, (Srish Chandra Banerjee v. Debendra Nath Banerjee) and submitted that a receiver had no power to lease a debutter property without the sanction of the Court. Mr. H. M. Dhar, learned counsel appearing for Fatick Chand Seal supported the case of the petitioner. In this application, Fatick Chand Seal is not appearing in his capacity as Receiver but only as sebaits and trustee. Mr. Dhar submitted that for the purpose of this application no receiver's meeting need be called, neither Fatick Chand Seal as receiver is a necessary party to this application. The receiver was directed to act in terms of the scheme. The receiver is carrying on management in terms of the scheme. He said that the trustees and sebaits decided in a meeting that 10 bighas of land approximately with temple and nut-mandir be retained and the back portion be let out on a long lease to secure a recurring income. The terms of the lease had been agreed upon and all parties are willing to lease out 30 bighas of land out of the said premises for 99 years. He admitted that this was a trustee's meeting and not a meeting called by Fatick Chand Seal as Receiver, in this suit. Mr. Dhar submitted that leasing out was for the benefit of the estate and this Court as Court of Equity for the protection of the property of the deity should pass the order as prayed by the

petitioner. He also relied on the case reported in AIR 1929 Cal 828.

8. This application is opposed on behalf of the plaintiffs, Mr. M. N. Banerjee, the learned counsel appearing for the plaintiffs placed several provisions of the Deed of Endowment and invited my attention to the accounts of the estate annexed to the petition. This account shows expenditure over income at the rate of Rs. 4,609.16 per annum. Mr. Banerjee pointed out that in this account expenses for poor feeding has been shown to the extent of Rs. 8,384.86 but expenses for poor feeding can be made under the deed of endowment as also under the scheme only out of surplus income. Mr. Banerjee submitted that if there was no surplus income the excess expense could not and/or should not be made and in this way deficit in account be shown. According to the plaintiffs the accounts are not truly and properly maintained. If proper accounts were maintained there should not be any deficit at all. He submitted that there was no need to lease out the debutter property as prayed in the petition. Accounts are not audited as provided in the scheme. There is nothing to show what steps the receiver has taken with regard to augment the income of the estate. There is no meeting of the receiver and no notice was given to his client with regard to any meeting of the sebaits. Mr. Banerjee submitted that his client is claiming a declaration that he is a sebaits and one of the trustees of the endowed estate. He is also asking for removal of defendants other than defendants Nos. 2a, 2b, 4, 5 & 6 from trusteeship and sebaits. He is also asking for cancellation of the present scheme and framing of a new scheme. Mr. Banerjee relied on Dr. B. K. Mukherjee's Tagore Law Lecture on Law at Endowment, Third Edition, at page 198 and submitted that when there are more sebaits than one, they constitute one body in the eye of law, and all of them must act together. It is not competent for one of the sebaits to do anything in relation to the debutter estate without the concurrence either express or implied of his co-sebaits. In the suit he contended that the plaintiff Premchand might succeed. In the event only some of the sebaits are asking for leave to grant long lease without the concurrence of the other sebaits. Further, if long lease is granted the prayer for framing of a scheme as made in the plaint may be affected, because a very valuable property of the debutter estate would be leased out before the scheme could be framed. He submitted that the application is not maintainable and no order should be made. Mr. Banerjee invited my attention to Chapter XXI, Rules 9 and 10 of

the Rules of Original Side, High Court and submitted that if the receiver wanted to spend beyond the amounts mentioned in the scheme he must have called the meeting and should have applied to Court for directions. Nothing has been done in this case. On the other hand Fatick Chand Seal in his capacity as sebaite and trustee is supporting the petitioner. Fatick Chand Seal as Receiver has been made a party to this notice of motion and he has not filed any affidavit in his capacity as Receiver. He further submitted that his client's case is that portions of premises No. 98, Manicktolla Main Road has been let out and Fatick Chand Seal is not maintaining true and proper accounts. A photograph showing scraps of iron heaped and stacked in a portion of premises No. 98, Manicktolla Main Road has been annexed to the affidavit of Prem Chand Seal. Mr. Banerjee submitted that the lands belonging to the estate at No. 98, Manicktolla Main Road are allowed to be used by third parties and the debutter estate must be receiving income. He further said that it is not mentioned in the petition who is the supposed lessee. Nobody knows the particulars about the proposed lessee. With regard to the question of removal of the deity at the temple at No. 98, Manicktolla Main Road, Mr. Banerjee submitted that de-requisitioning was made in 1968. Long time passed since then and after such a length of time when the suit is likely to be heard soon, it cannot be said that before the hearing of the suit major portion of the land should be leased out for 99 years so that the temple can be repaired for removal of the deity in the temple. Mr. Radha Pada Banerjee appearing for Ranimoni Mallick supported Mr. M. N. Banerjee. He also submitted that this application is not maintainable. He submitted that the court has no jurisdiction to pass such an order to grant lease of a valuable debutter property for 99 years. Mr. R. P. Banerjee referred to B. K. Mukherjee, on Hindu Law of Religious and Charitable Trust, Third Edition at page 238 for the proposition that the court has no jurisdiction to grant an application by a sebaite to sanction his transaction on the ground of necessity. Mr. Banerjee referred to AIR 1970 SC 439 (Kalank Devi Sansthan v. Maharashtra Revenue Tribunal) and AIR 1961 All 73 (Beharilal v. Thakur Radha Balabji). In the Allahabad case, it was held that the power of a manager of an idol is analogous to those of the manager of an infant. Whether a transaction by the Manager is beneficial to the estate must depend upon the facts and circumstances of the particular case and guidance alone is to be obtained in regard to the general scope of the doctrine of

the benefit of the estate from the illustrations which are found in the reported cases. It was held in that case that the sale of an old house which was not in a dilapidated condition but which required extensive repairs was neither a prudent transaction nor for the benefit of the estate.

9. In my view the petitioner Mohan Chand Singh is not entitled to any order in this petition. In this suit one of the parties have been appointed Receiver in an interlocutory application and usual order under Order 40, Rule 1 of the Code of Civil Procedure has been made, namely that, if the Receiver grants lease of any property exceeding three years, leave of the Court will be necessary. The properties over which Receiver was appointed are debutter properties. In (1937) 41 Cal WN 627 = ILR (1937) 2 Cal 133 (Sree Iswar Narain Jew v. Henry E. Soler) an application was made before Ameer Ali, J. by a shebaite asking for leave of the court to sell or mortgage certain debutter property but the learned Judge did not grant such leave stating, *inter alia* that the court should not give a certificate of necessity. Before me, one of the shebaite and trustee is also applying for leave to be given to the Receiver appointed in this suit to grant lease of debutter property for 99 years. The question is, would it make any difference because here a sebaite or trustee is applying for leave to be granted to the receiver to lease out debutter property for 99 years instead of themselves asking for leave to lease out debutter property as was the case before Ameer Ali, J.

10. Leave to lease out debutter property for 99 years by the Receiver would mean giving of certificate by court to the Receiver for legal necessity. The Learned Advocate General did not give me any authority in support of his proposition that because Receiver was appointed the court will give leave to the Receiver to grant lease for 99 years in respect of the debutter property pending the hearing of the suit. The Learned Counsel appearing for some of the respondents and supporting the Learned Advocate General referred to me a case in AIR 1929 Cal 828 = 50 Cal LJ 333. This decision relates to an appeal which has arisen out of a dispute as to the rights of parties in a debutter estate. One of the questions arising in this appeal is whether lease granted by a Receiver appointed by the Court was properly done. It was stated by the appellants that the decision of lower Appellate Court was not justified. The lease was cancelled on the ground that the Receiver concealed from the court the fact that the lessee was his own grand-

son and a brother of a previous sebaht. Reliance was placed before me of certain observations in this judgment:

"The Receiver has of course no power to lease the debutter property without the sanction of the court and the court below has quite rightly held that any misrepresentation or concealment of material facts from the court in connection with a proposed lease would vitiate the authority of the Receiver to grant the lease. In the present case there was such concealment and it is possible that the court might not have granted sanction to the lease or at least might have scrutinized the terms more closely had it known of the relationship."

11. I do not think this decision helps the contention of the parties supporting the Learned Advocate General's client, namely, the court should grant leave to receiver to grant lease for 99 years in respect of Debutter property pending the hearing of this suit. In every case if Receiver is appointed, the receiver cannot grant lease of property for three years unless there is leave from the court. This suit relates to debutter properties. In this suit one of the prayers in cancellation of the present scheme and framing of a scheme of management for the administration of the estate and for the worship of the plaintiff deity and the performance of the ceremonies. In the Deed of Endowment it is expressly stated by the donor that the debutter properties should not be leased out for any term exceeding three years. In the suit there is prayer for framing of another scheme. The admitted position of law is that a debutter property cannot be sold or leased out except on the ground of urgent need or legal necessity. The leasing out or sale of debutter property for such purpose can be made by the sebaits and trustees for the time being. Merely because a receiver has been appointed by this court, on the application of one of the sebaits and trustees the court should not grant a permanent lease for 99 years in respect of a valuable debutter property. Nor the court should grant a certificate for legal necessity. Again, this is not an application by the Receiver for directions pursuant to a Receiver's meeting. Even if there was such an application, either by the Receiver or by any of the parties who is directed to move in a Receiver's meeting, then a question would arise whether this court should grant long lease of 99 years in respect of debutter property. Granting of such lease by the Receiver for 99 years, would affect the scheme that might be framed under the decree in this suit. In any event, this is an application by one trustee, and although other trustees are supporting him but the plaintiff Prem Chand,

who is claiming to be a trustee is opposing. At the final hearing of the suit plaintiff may succeed and in that event lease for 99 years of the debutter property would be given by some of the trustees and sebaits and not all. I do not think that this court should grant a certificate of legal necessity or would grant leave to the Receiver of the debutter properties to make permanent lease of a valuable debutter property pending the hearing of the suit.

12. In view of the above matter, I cannot pass any order on this application. However, I am making it clear that this order of mine will not affect the rights and powers of the sebaits and trustees to act according to law. Neither this order will affect the receiver appointed in this suit to take such steps as may be necessary for carrying out his duties as Receiver. There will be no order on this application except as above. The petitioner must pay the costs of this application to the contesting respondents.

Order accordingly.

AIR 1972 CALCUTTA 494 (V 59 C 107)

S. K. HAZRA, J.

Babulal N. Shukla, Plaintiff v. Jeshankar N. Shukla, Defendant.

Suit No. 54 of 1963, D/- 15-3-1972.

Civil Procedure Code (1908), O. 22, R. 4 (1) — Plea open to legal representative of deceased defendant — Service of fresh writ of summons on him if necessary.

A legal representative substituted in place of a deceased defendant cannot be permitted to make out a new case afresh in another written statement at this stage. He has to take up the suit at the stage at which it was left when the original party died and to continue it. The only right he has is to make a defence appropriate to his character as a legal representative of the deceased defendant. His case is on a different footing than the addition of a new defendant which is governed by O. 1, R. 10 (iv). Therefore, only the order for substitution would be served on the substituted defendant and no fresh writ of summons could be issued for service on the substituted defendant. AIR 1924 Lah 45 and AIR 1944 Lah 473 and AIR 1930 Mad 593. Discussed. (Paras 6 & 7)

Cases Referred: Chronological Paras

AIR 1944 Lah 473 = 46 Pun LR 292,

Sadhu Singh v. Firm Kahan Singh

5

AIR 1930 Mad 593 = 127 Ind Cas

127, Muhammad Naina Maracair

v. Ummanaikani Ammal

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FP/FP/D513/72/MSR/KSB

AIR 1924 Lah 45 = 5 Lah LJ 482,

Gulli v. Sawan

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ORDER :— In this matter on January 14, 1972 an application was made by the plaintiff for recording the death of defendant No. 1 Harilal N. Shukla and for substitution of his heirs in his place. The defendant No. 2 appeared through his advocate before me. By consent, order was passed in terms of prayers in the petition. One of the prayers in the petition was prayer (f); wherein, the petitioner prayed that a fresh writ of summons be issued for service on the substituted defendants. By consent, order was passed in terms of prayer (f) of the writ of summons. Thereafter at the time of settlement of the draft, a question arose as to whether the fresh writ of summons should be served on the substituted defendants. The matter was mentioned before me on March 1, 1972, on behalf of the plaintiff, who contended that a fresh writ of summons need not be issued but only the above order may be served on the substituted defendants. Thereafter, I directed that the Registrar-in-Insolvency may submit a note on the point as to the practice followed in such matters.

2. Mr. S. K. Mitra, Registrar-in-Insolvency, has submitted before me a well-considered note on March 7, 1972. In the note prepared by the Registrar-in-Insolvency it is stated as follows:—

3. An order for substitution in place of a deceased defendant is made under Order XXII, Rule 4 (1) of the Code of Civil Procedure. Rule 4 (2) of the said Order XXII runs as follows:—

"Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant."

4. The substituted party has been given the right to make any defence appropriate to his character as legal representative of the deceased defendant. So, the substituted party is entitled to have notice of substitution, but the question arises as to the mode of giving such notice. Would it be by issue of fresh writ of summons or by serving its order and directing that its substituted defendant may make defence appropriate to his character as legal representative of the deceased defendant?

5. It is well settled that when a party to a suit dies, his legal representative is substituted in order that the suit might proceed and a decision be arrived at. It is the original parties' rights and disabilities that have to be considered and not those of the legal representative (See AIR 1924 Lah 45, Gulli v. Sawan). Defence not open to the defendant, if alive, cannot be raised by his

legal representative in that character (See AIR 1944 Lah 473, Sadhu Singh v. Firm Kahan Singh). A person substituted as legal representative of a deceased party must adopt the pleadings filed by the deceased party. He cannot raise a new point inconsistent with the pleadings of the deceased. The legal representative of a deceased cannot set up his own claims or rights in the case though he may do so in any other proceedings (See AIR 1930 Mad 593, Muhammad Naina Maracair v. Ummamia Kani Ammal). All that the legal representative can, therefore, do is to take up the suit at the stage at which it was left when the original party dies and to continue it. It follows, therefore, that if any defence to the suit was not open to the deceased defendant, his legal representative would not be at liberty to plead that defence.

6. If a writ of summons is served on the substituted party, the writ itself will give the party a right to enter appearance in the suit and to file his written statement within the time specified therein. In the instant case, the deceased defendant having already filed his written statement jointly with the defendant No. 1, his legal representative cannot be permitted to make out a new case afresh in another written statement at this stage. It is to be noted in this connection, that the case of addition of a defendant is different. Addition of defendant may be made under O. I. R. 10 (iv) which provides as follows:—

"Whether a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant."

This rule specifically provides for service of writ of summons on the parties added, but Order XXII, Rule 4 of the Code of Civil Procedure, provides for the procedure in case of death of one of the several defendants or of the sole defendant. Order XXII, Rule 4 is worded differently. This Order says, that any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. It is the only right that a substituted defendant has, namely, that he can make a defence appropriate to his character as a legal representative of the deceased defendant.

7. In the premises, I think that the prayer in paragraph (f) of the petition, namely, fresh writ of summons should be issued for service on the substituted defendant cannot be granted. I recall the said order for issue of fresh writ of summons for service on the sub-

stituted defendants and I order that this order for substitution may be served on the substituted defendants. Leave is given to the substituted defendants to enter appearance and to make any defence appropriate to their character as legal representatives of the deceased defendant. Leave is given to the substituted defendants to file additional written statement within 10 days from the date of the service of this order upon them. Service on the substituted defendants may be made by registered post. The order dated January 14, 1971 is modified as above.

Prayer not granted.

AIR 1972 CALCUTTA 496 (V 59 C 108)

R. N. DUTT, J.

Tempa Landu, Petitioner v. Ranjit Kundu, Respondent.

Civil Revn. Case No. 2470 of 1970, D/- 2-2-1972.

W. B. Premises Tenancy (Amendment) Ordinance (1967), S. 17-C — Benefit is not available to cases where decree for possession has been passed after 22-8-1967 when Ordinance came into force. (X-Ref:— W. B. Premises Tenancy (Amendment) Act (4 of 1968), S. 17-B.)

Ex parte decree for possession in ejectment suit passed on 1-9-1967 was not relieved against in the application filed on 22-9-1967 when the Ordinance was still in force. Tenant got the right only by virtue of the provision under Section 17-C of the Ordinance and since the decree was passed after the Ordinance came into force that provision did not apply. AIR 1969 Cal 67 and (1969) 73 Cal WN 736, Distinguished. Correctness Doubted. (Para 2)

Cases Referred: Chronological Paras

AIR 1969 Cal 67 = 73 Cal WN 10,
Benu Roy v. Manindra Nath Chatterjee 2
(1969) 73 Cal WN 736, Md. Yusuf v. Golam Jilani 2

M. L. Mehata, for Petitioner; Satyendra Prosad Sen, for Respondent; Sachindra Chandra Das Gupta, Amicus Curiae.

ORDER:— The petitioner is the tenant and the opposite party is the landlord of the disputed premises. The opposite party filed a suit for ejectment of the petitioner on the ground of default. The petitioner filed written statement. Subsequently the opposite party filed an application under Section 17 (3) of the West Bengal Premises Tenancy Act and the learned Judge allowed that application and struck out the petitioner's defence against delivery of possession. Thereafter, the suit was decreed ex parte

on September 1, 1967. On September 22, 1967 the petitioner filed an application under Section 17-C of the West Bengal Premises Tenancy Act as incorporated by the West Bengal Premises Tenancy (Amendment) Ordinance, 1967. The application was resisted by the opposite party and the learned Judge rejected the application. The petitioner has thereafter obtained this Rule.

2. Under Section 17-C as incorporated by the said Ordinance an application could be made in a proceeding where the decree for the recovery of possession was passed before the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1967. The application was made on September 22, 1967, that is, at a time when the Ordinance was still in force. The Ordinance came into effect on August 26, 1967. The right sought to be enforced by the petitioner by virtue of this application is a right conferred on him by Section 17-C as incorporated by the Ordinance. Section 17-C as it then stood said that it would be attracted where the decree was passed before the commencement of the Ordinance. Here, as I have said, the Ordinance commenced to have effect from August 26, 1967, but the decree was passed on September 1, 1967, that is, after the commencement of the Ordinance. So Section 17-C as incorporated by the Ordinance on the basis of which the petitioner claimed the right is not attracted to the instant case. It is no doubt true that when the learned Judge considered this matter the Ordinance was replaced by the West Bengal Premises Tenancy (Amendment) Act, 1968. Section 1 (2) of the Act specifically states that the Act shall be deemed to have come into force on 26th August, 1967. Mr. Mehata refers to the decisions of this Court in Benu Roy v. Manindra Nath Chatterjee, 73 Cal WN 10 = (AIR 1969 Cal 67) and Md. Yusuf v. Golam Jilani, (1969) 73 Cal WN 736. Firstly, those cases are distinguishable. In those cases the question involved was the right of a tenant to make an application after the Amendment Act was published in March 1968. But in the instant case the application under Section 17-C which has become Section 17-B under the Amendment Act was made within sixty days of the commencement of the Ordinance for enforcement of the right conferred by the Ordinance. Secondly, with all respects I am unable to agree with the reasonings in those cases. The decisions in those cases proceeded on the footing that a right to make an application under Section 17-B has been conferred by the Amendment Act of 1968. But that does not appear to me to be really so. The right was in fact conferred on the tenant for the first

time by the Ordinance of 1967 and that right was to be exercised within sixty days from the date the Ordinance came into force. Since the Ordinance remained valid only for six months, an Act was necessary to incorporate the rights conferred by the Ordinance as a permanent feature in the statute. No new right to make such an application was conferred by the Act of 1968 and so there was no question of any fresh application under Section 17-B which was formerly S. 17-C after the publication of the Amendment Act, 1968. I cannot therefore agree with the decisions in those two cases to the effect that to enable fresh applications to be filed the Amendment Act of 1968 should be held to have commenced on March 26, 1968. But since the instant case is distinguishable it is not necessary to refer the matter to a Division Bench. Here, as I have said, it is not a question of fresh application but the application was made when the Ordinance was still in force and the application was to enforce a right conferred by the Ordinance which specifically said that the decree must have been passed before the commencement of the Ordinance. Since in the instant case the decree was passed after that, Section 17-C which is now Section 17-B is not attracted.

3. The Rule is therefore discharged.

4. No order is made as to costs.
Petition dismissed.

AIR 1972 CALCUTTA 497 (V 59 C 109)

ANIL KUMAR SEN, J.

Debi Mata, Petitioner v. State of West Bengal and others, Opposite Parties
Civil Rule Nos. 565(W)-569(W) of 1964, D/- 14-12-1971.

Index Note:— (A) Constitution of India, Art. 226 — Powers of High Court — High Court has no authority to decide whether a legislature while enacting a law has or has not applied its mind.

Brief Note:— (A) High Court can go into the issue as to whether a particular legislation is within the legislative competence of the legislature on the provisions of the constitutional law, or determine whether a particular piece of legislation is a colourable exercise of its power or not. It can also decide whether a particular legislation or a part thereof suffers from the vice of excessive delegation of legislative powers. But apart from that, the powers of the legislature being plenary the High Court has no authority to adjudicate if the legislature has or has not applied its mind while enacting a law. AIR 1967 SC 295, Dist.

(Para 9)

Index Note: (B) West Bengal Estates Acquisition Act (1 of 1954), S. 61 (as introduced by Bengal Act (4 of 1963)) — There is no delegation of legislative power to executive — Assuming that there is delegation it is neither excessive nor unguided so as to amount to abdication of legislative powers. (Para 10)

Index Note:— (C) Constitution of India, Art. 245 — State legislature enacting legal provision whereby State Government could apply "mutatis mutandis" provisions of a State law with necessary changes to territories transferred to it — Such provision does not amount to excessive delegation — It is within competence of State Legislature to enact such provision.

Brief Note:— Where a State legislature enacts a provision of law whereby it authorises the State Government to apply a certain State law "mutatis mutandis" with such changes as are necessary to territories transferred to such State by issue of a notification and to repeal the law prevailing in the transferred territory, the State Legislature does not authorise the executive or those implementing that provision to make any subordinate legislation. Even if it amounts to delegation it is neither uncontrolled nor unguided. All that it delegates is power to make such changes as would be necessary due to lapse of time. Making of such changes is within the control of the substantive provisions of the statute itself and hence making of such provision is within the competence of the legislature.

(Para 10)

Index Note:— (D) Words and Phrases — "Mutatis Mutandis" implications of.

Phrase "Mutatis Mutandis" is often used in legislation in applying or extending legislative provisions to same or similar circumstances or to same or similar subjects. It is nothing but a rule of adaptation. By providing for application of a certain law or its provision "Mutatis Mutandis" the legislature neither abdicates nor delegates its legislative power. (1963) 67 Cal WN 129 & ILR (1966) 1 Cal 495, Dist.

(Para 10)

Index Note:— (E) Transfer of Territories Act (1956), S. 43 — Provision for extending existing law in transferred territories — Repeal of existing law need not be by Parliament.

Section 43 provided for extension of existing law in territories transferred from Bihar State to West Bengal State until otherwise provided by competent legislature or competent authority. When West Bengal Estates Acquisition Act (1953) by S. 61 provided that by notification under Section 60 the State Government of West Bengal could repeal the existing Bihar Land Reforms Act (30 of 1950) so far as it applied to transferred territories and such a notification was

issued the Bihar Land Reforms Act stood repealed. There was no need that Parliament itself should repeal it. (Para 11)

(F) West Bengal Estates Acquisition Act (1953) (as amended by West Bengal Act 40 of 1963), Section 61 (2) Provide (ii) — Provision neither vague nor unworkable.

There is no inherent vagueness in the provision. It is a provision providing the consequence to the extension of the West Bengal Act to the transferred territory. The legislative mandate is to the effect that the land or interest which an intermediary would have been entitled to retain under the provision of the West Bengal Estates Act but which had already vested under the different provision of the Bihar Land Reforms Act should, when possible, be restored back to the intermediary. The words "if possible" had to be incorporated because the Bihar Land Reforms Act came into effect more than 10 years ago and it might in certain cases practically be not possible for the authorities to restore back lands or interests which had vested under the provision of the Bihar Act. It leads to no uncertainty. It only gives sanction to the failure to restore possession which is otherwise directed as a consequence to the extension of the West Bengal Act to the transferred territory. (Para 14)

Cases Referred: Chronological Paras

(1968) 2 WLR 924 = (1968) 1 All ER 694, <i>Padfield v. Minister of Agriculture</i>	9
AIR 1967 SC 295 = (1966) Supp SCR 311, <i>Barium Chemicals v. Company Law Board</i>	9
AIR 1967 SC 1895 = (1967) 3 SCR 557, <i>Devidas v. State of Punjab</i>	10
ILR (1966) 1 Cal 495, <i>Ambujakshaya Mukherjee v. State</i>	10
(1964) C. R. No. 476(W) of 1964 (Cal), <i>Amar Nath Singh v. State of West Bengal</i>	6, 11
(1963) 67 Cal WN 129, <i>Haranath Ghosh v. State</i>	10
(1961) 3 All ER 641 = (1962) 1 QB 340, <i>Comms. of Customs v. Cure and Deeley</i>	10

Arun Kr. Datta (Jr.) and Nanda Lal Pal, for Petitioner; S. C. Das Gupta and Suproakash Banerjee, for Opposite Parties.

ORDER:— In these five Rules the petitioners are challenging three notifications and two proclamations issued by the State of West Bengal or its Authorities. As common questions have been raised in all these Rules they have been heard together and would be disposed of by one judgment.

2. It is not in dispute that facts relevant to the issues raised in these five Writ petitions are same or similar and as such I prefer to set out the facts in Civil

Rule 656 (W) of 1964. The petitioner in this Rule Sri Sri Devi Mata is the family Deity of Panchkote Raj Estate. The petitioner had been holding certain lands in intermediary interest in Purulia which was previously within the District of Manbhum in the State of Bihar. On September 1, 1956 the Bihar and West Bengal (Transfer of Territories) Act, 1956 (hereinafter referred to as the Transfer of Territories Act) came into force. By virtue of Section 3 of this Act major part of Purulia was transferred with effect from 1-11-1956 to West Bengal. Section 43 however provided that notwithstanding such transfer until otherwise provided by a competent legislature or other competent authority the laws then applicable to the transferred territories would continue to remain applicable to such territories. Section 44 provided that the appropriate Government may within a year from the date of transfer adapt the laws which continued to remain in force with necessary modifications and that such laws so adapted would remain in force until altered, repealed or amended by a competent authority or competent legislature. On the date of transfer Bihar Land Reforms Act 1950 which provided for vesting of certain categories of intermediary interest was in force in the territory so transferred to West Bengal and by virtue of Section 43 of the Transfer of Territories Act, 1956 the provisions of the said Act continued to remain in force in the transferred territory of Purulia. It is not in dispute that the provisions of the Bihar Land Reforms Act, 1950 are materially different from the provisions of the corresponding West Bengal Act viz., West Bengal Estates Acquisition Act, 1953.

3. On September 24, 1958 an Act passed by the West Bengal Legislature came into effect which is called the West Bengal Transferred Territories (Assimilation of Laws Act), 1958 (hereinafter referred to as the Assimilation of Laws Act). By the provisions of Section 3 of this Assimilation of Laws Act read with Schedule 2 thereof the provisions of the Bihar Land Reforms Act, 1950 was kept in force for the transferred territories including the transferred territory of Purulia. Applying the provisions of the said Bihar Land Reforms Act, 1950 the Government of West Bengal issued a proclamation under the Section 3-B of the said Act announcing its intention to take over the intermediary interest in the transferred territories to West Bengal. The said proclamation was challenged by the petitioner in a Writ petition in this Court which was registered as C. R. 589 (W) of 1963. It is, however, conceded on behalf of the petitioner that the petitioner's challenge failed and the said Rule was discharged sometime in 1966.

4. In the meantime by West Bengal Act 40 of 1963 the West Bengal Estates Acquisition Act, 1953 was amended by incorporating therein a new chapter being chapter 8 consisting of two sections being Sections 60 and 61. Section 60 provided that the provisions of the newly incorporated chapter shall come into force on such date and in such area of the transferred territory as the State Government may by notification appoint. Section 61 provides that on issue of a notification under Section 60 the Bihar Land Reforms Act, 1950 shall stand repealed and the provisions of the foregoing chapters of the West Bengal Estates Acquisition Act shall *mutatis mutandis* apply to the areas in respect of which notification under Section 60 is made. Section 61 also provides for certain adaptations and certain legal consequences which are to follow on the application of West Bengal Estates Acquisition Act.

5. On February 17, 1964 the State of West Bengal issued a notification under Section 60 of the West Bengal Estates Acquisition Act appointing 1st of March, 1964 to be the date on which the provisions of chapter 8 of the Act shall come into force in all the areas of the territories transferred from Bihar to the State of West Bengal. This notification is annexure 'A' to the Writ petition. Then followed two notifications both dated 10-3-1964 under Section 4 (1) read with Section 61 and read with Sections 52 and 61 respectively of the West Bengal Estates Acquisition Act whereby the State declared that with effect from 1st of Baisakh, 1371 B. S. corresponding to 14-4-1964 all the estates and rights of every intermediary as also the lands held by raiyats and under-raiyats together with their rights therein in the District of Purulia shall vest in the State. These are annexures 'B' and 'C' to the Writ petition. These notifications were followed by two proclamations issued by the Collector of Purulia respectively under Section 10 (1) of the Estates Acquisition Act and R. 6(1) of the West Bengal Estates Acquisition Rules, 1954. These proclamations are annexures 'D' and 'E' to the Writ petition. These three notifications and the two proclamations annexures 'A' to 'E' are the subject-matter of challenge in this Rule. Same or similar notifications and proclamations are the subject-matter of challenge in the other Rules.

6. Bereft of other details petitioners' substantial challenge is to the extension and application of the West Bengal Estates Acquisition Act to the territories transferred from Bihar to the State of West Bengal by S. 3 of the said Transfer of Territories Act, 1956. Similar challenge was thrown though not by the present petitioners to such extension and application of the West Bengal Estates

Acquisition Act to such transferred territories in C. R. No. 476 (W) of 1964 (Amar Nath Singh v. The State of West Bengal) Mr. Dutt who is appearing in support of these Rules before me argued the said case but unsuccessfully. Extension of the West Bengal Estates Acquisition Act to the transferred territories was upheld by my learned brother D. Basu, J., and his judgment was upheld both by the Appeal Court as also by the Supreme Court. Notwithstanding his failure in the said case Mr. Dutt has again disputed validity of extension and application of the provisions of the West Bengal Estates Acquisition Act to such transferred territories on grounds which according to him are totally new.

7. Mr. Dutt appearing in support of these Rules has raised three points which I set out hereunder as far as possible in his own language.

(1) in enacting chapter 8 of the West Bengal Estates Acquisition Act, 1953 and in applying Sections 60 and 61 to the transferred territories there has been no honest application of mind by the legislature and as such those two sections can have no application.

(2) Section 61 of the West Bengal Estates Acquisition Act seeks to extend the provisions of the foregoing chapter of that Act *mutatis mutandis*; but in so extending without legislative amendment of substantive provisions, the legislature has abdicated its function by leaving the matter uncontrolled by any guide line in favour of the executive; or in other words the said section suffers from the view of excessive delegation of legislative powers.

(3) in view of the provisions of Sections 3, 43 and 44 of the said Transfer of Territories Act, 1956 without specific repeal of the Bihar Land Reforms Act, 1950 by a competent legislature, the said Act cannot be construed to have been repealed in terms of Section 61 (1) of the West Bengal Estates Acquisition Act.

8. These Rules are being contested by the State of West Bengal and the Learned Government Pleader Mr. S. C. Dasgupta appearing on behalf of the State has contested each of these points raised by Mr. Dutt.

9. To take up the first point raised by Mr. Dutt I have felt great difficulty in appreciating the true import of his contention. Mr. Dutt to support his first point has placed strong reliance on the line of decisions by the Supreme Court starting from the case of *Barium Chemicals v. The Company Law Board*, AIR 1967 SC 295 and the case of *Padfield v. Minister of Agriculture*, (1968-2 WLR 924) the House of Lords held that where a statute conferring discretion on the Minister did not expressly limit or define the extent of his discretion his discre-

tion might nevertheless be limited to the extent that it must not be so exercised as to frustrate the object of the statute. In all these cases therefore what was laid down was that where any authority is vested with any power or discretion by a statute either with express or implied limitations, it is open to the Court to go into the question as to whether the power or the discretion has been exercised within the limits so specified or implied. None of these cases is concerned with exercise of legislative power by the legislature. It is really difficult for me to accept a proposition that this Court has the authority to adjudicate over the application or non-application of mind by the legislature in enacting laws. Undoubtedly this Court can go into an issue as to whether a particular legislation is within the legislative competence of the legislature on the provisions of the Constitutional Law. This Court may also consider whether a particular piece of legislation is really in colourable exercise of such legislative powers or not. Or this Court may even consider whether a particular enactment or any particular provision thereof suffers from the vice of unauthorised delegation of legislative powers. But apart from these issues the power of the legislature being otherwise plenary, the legislature is not answerable to this Court on a proposed issue as sought to be raised by Mr. Dutt in his first point. Mr. Dutt has neither contended that the provisions of the West Bengal Estates Acquisition Act, 1963 is ultra vires the powers of the State Legislature nor that it had been passed in colourable exercise of its powers. Of course, he has raised a separate point that it suffers the vice of excessive delegation of legislative powers but he is not pleading the same to support his first point. That apart, as a legislature competent to legislate for the territories of West Bengal on matters of acquisition of estates and rights of intermediaries or raiyats therein the State Legislature has passed the Amending Act to extend the West Bengal Estates Acquisition Act to the transferred territories by repealing the earlier applicable Bihar Land Reforms Act. Such being the position, it is difficult to find any substance in the suggestion made by Mr. Dutt that such legislation reflects any inapplication of mind by the legislature. In this view I must overrule the first point raised by Mr. Dutt.

10. The second point raised by Mr. Dutt is based on an assumption that Section 61 of the West Bengal Estates Acquisition Act as incorporated by the Amending Act really constitutes delegation of legislative powers by the legislature to the executive. In my view, however, there is nothing in Section 61 which indicates that there has been any

delegation of legislative powers. Secondly, I am also of the view that even if it be assumed that there is any such delegation, it cannot be said that such delegation is so excessive or unguided that it amounts to abdication of legislative powers. Mr. Dutt's grievance is with Section 61 (1) of the said Act which provides that on the issue of a notification under Section 60, the Bihar Land Reforms Act shall stand repealed and the provisions of the West Bengal Estates Acquisition Act, shall "mutatis mutandis" apply to the areas to which the said provision is extended. According to Mr. Dutt by leaving with the executive the right to apply the provisions mutatis mutandis, the legislature has delegated legislative powers. The term 'mutatis mutandis' means with necessary changes in points of details. Mr. Dutt has again relied on a number of decisions in the cases of *Devidas v. The State of Punjab*, AIR 1967 SC 1895 and *Comms. of Customs v. Cure and Deeley*, (1961) 3 All ER 641. But I am unable to find the real relevancy of these decisions to the point raised. In the former Supreme Court declared a provision of a taxing statute to be unconstitutional when it resulted in absolute abdication of legislative powers in favour of the delegatee while in the latter the Queens Bench Division held that regulation 12 framed in exercise of powers under Sec. 33 (1) of the Finance Act, 1940 was not within the powers conferred by the said section or in other words the regulation was ultra vires the Act. Here it is not the contention of Mr. Dutt that the Amending Act which brought in Section 61 is ultra vires the power of the State Legislature. What he contends, however, is that by incorporating the phrase "mutatis mutandis" the legislature has abdicated its legislative powers. There, however, Mr. Dutt is not correct. By the said phrase the legislature has neither abdicated nor delegated any of its legislative powers. The said phrase is used not only in Section 61 but also in the other provisions of the same statute as for example, Sections 15 (5), 38 and 52. Such a phrase is often used in legislation in applying or extending legislative provisions to same or similar circumstances or to same or similar subjects. It is nothing but a rule of adaptation. The decision of this Court in the case of *Haranath Ghosh v. The State*, (1963) 67 Cal WN 129 relied on by Mr. Dutt as also the decision of this Court in the case of *Ambujakhaya Mukherjee v. The State*, ILR (1966) 1 Cal 495 (at 525) relied on by Mr. Dasgupta explain the real implication of such a phrase. It is held "the words mutatis mutandis following the word modifications make it abundantly clear as to the modifications intended under Section 52 of the Act. In

other words the word modifications in Section 52 of the Act means contextual adaptation of these chapters of the Act to the case of raiyats and under-raiyats and not amendment of the substantive provisions and the effects of those chapters". It is explicit on the provisions of the West Bengal Estates Acquisition Act reference being made to Section 4 (2), Section 4 (6) and the like that such provisions could not have been appropriately made applicable to the transferred territories where such provisions are being made applicable nearly a decade after the promulgation of law except by appropriate adaptation. It is only to meet such exigencies that Section 61 provided that the earlier provisions would apply mutatis mutandis i.e. with necessary changes or adaptations. This in my view, does not authorise the executive or those implementing the provisions of the Act to make any subordinate legislation and as such it does not amount to delegation of legislative powers. Next even if I assume that it confers an authority to make subordinate legislation it can in no way be said that the power so vested is uncontrolled or unguided and as such amounts to total abdication of legislative powers. All the essential part of the legislation is there incorporated in the statute what has been delegated is the power to make such changes as would be necessary on the face of the provisions in their application to the transferred territory to which such provisions are being extended long after the promulgation of the law. Making the changes is fully within the control of the substantive provisions of the statute itself. In this view the second point raised by Mr. Dutt must also be overruled.

11. The third point raised by Mr. Dutt was in a way also raised by him in the case of C. R. No. 476 (W) of 1964 (Cal) and was overruled by my learned brother D. Basu, J. Question raised by Mr. Dutt is as to whether there has been any effective repeal of the Bihar Land Reforms Act, 1950 so far as the transferred territories are concerned. According to him because of the provisions of Sections 3 and 43 of the Transfer of Territories Act, 1956 it was necessary that the Bihar Land Reforms Act, 1950 should be repealed by a competent legislature and Section 61 of the West Bengal Estates Acquisition Act cannot fulfil this purpose. What Mr. Dutt suggests is that when the Parliament by Section 43 kept alive Bihar Land Reforms Act, 1950 it could not be repealed by the West Bengal Estates Acquisition Act. In my view this contention of Mr. Dutt is not sound. Section 43 of the Transfer of Territories Act, 1956 specifically provides for a transitional application of laws to the transferred territory pending the matter

being taken up by the competent legislature. It extended the existing laws but subject to an important reservation viz., "until otherwise provided by a competent legislature or other competent authority". In the present case after the transfer of the territory to the State of West Bengal, the legislature of West Bengal became the competent authority to legislate on matters involving acquisition of estates and rights of intermediaries therein in respect of the territories so transferred. Now the said West Bengal Legislature has enacted in Section 61 incorporated by the Amending Act of 1963 that on the issue of a notification under Section 60 in the area in respect of which such notification is issued, the Bihar Land Reforms Act shall stand repealed. The notification now having been made under Section 60 in respect of transferred territory the Bihar Act therefore stands repealed. It is not necessary in my view that when the Parliament made the transitional provision in Section 43 Acts kept alive by such provision must needs be repealed by the Parliament alone. In this view the third point raised by Mr. Dutt is also overruled.

12. Incidentally, Mr. Dutt contended that the impugned notifications and the proclamations were not made in compliance with the procedural law. He condemned the notifications on the ground that those are notional notifications. In my view he has not been able to point out non-fulfilment of any procedural prerequisite for the notifications or the proclamations. Secondly it is difficult to appreciate how the notifications are notional. Reference has been made by Mr. Dutt to the notifications made annexures 'B' and 'C' and it is suggested that such notifications could not have been issued under the joint provisions of Sections 4 and 61 and Sections 4 and 52 and 61. Section 4 authorises the State Government to issue the necessary notifications for taking over rights of the intermediaries. This provision is extended to the transferred territories by Section 61. Similarly provision of S. 4 is extended to rayats by S. 52 and that again to the transferred territories by Section 61. Such being the position, the authorities issuing the notifications had to recite all the provisions which together conferred the power to take over such interests. I find no irregularity in issuing the notifications in such manner. It is also difficult to accept the suggestion of Mr. Dutt that separate notifications under S. 61 and S. 4 in one case and separate notifications under Ss. 61 and 52 and S. 4 in the other was necessary in the present case. In this view I must overrule this incidental point raised by Mr. Dutt.

13. Lastly, Mr. Dutt has referred to Section 61 (2) proviso (ii) and has contended that such a provision is too vague and unworkable. This sub-section read with the relevant proviso reads as follows "estates or interests vested in the State Government under the provision of Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950), prior to the date of issue of the notification shall be deemed to have vested in the State Government under the provisions of this Act provided that (ii) any land or interest which is vested in the State Government under the provision of Bihar Land Reforms Act, 1950 but which the ex-intermediary shall be entitled to retain under the provision of this Act shall, if possible, be restored to him and no compensation shall be payable for any land or interest so restored."

14. Firstly in my view this provision takes effect only in respect of estates or interests which had earlier vested under appropriate notification under Section 3-A of the Bihar Land Reforms Act, 1950 prior to the extension of the West Bengal Act and there is no evidence in the present case that any of the estates of any of the present petitioners had so vested so that it may call for application of the above provision. Then in my opinion there is no inherent vagueness in the provision. It is a provision providing the consequence to the extension of the West Bengal Act to the transferred territory. The legislative mandate is to the effect that the land or interest which an intermediary would have been entitled to retain under the provision of the West Bengal Estates Acquisition Act but which had already vested under the different provision of the Bihar Land Reforms Act should when possible be restored back to the intermediary. The words "if possible" had to be incorporated because the Bihar Land Reforms Act came into effect more than ten years ago and it might in certain cases practically be not possible for the authorities to restore back lands or interests which had vested under the provision of the Bihar Act. It leads to no uncertainty. It only gives sanction to the failure to restore possession which is otherwise directed as a consequence to the extension of the West Bengal Act to the transferred territory. In this view I must overrule the last contention of Mr. Dutt.

15. As all the points raised in support of these Rules fail the applications fail and the Rules are discharged.

All interim orders are vacated forthwith.

There will be no order for costs.

Let the operation of this order remain stayed for four weeks.

Let a plain copy of this order be given to the learned Advocate for the petitioner.

Rules discharged.

AIR 1972 CALCUTTA 502 (V 59 C 110)

FULL BENCH

A. K. MUKHERJEA, Sabyasachi Mukharji and M. M. Dutt, JJ.

Madan Mohan Ghosh and others, Petitioners v. Sishu Bala Atta and others, Opposite Parties.

Full Bench Reference 1 of 1968 in C. R. No. 674 of 1958; C. R. Nos. 2275, 3410, 3764 and 3624 of 1961, 3465 of 1965, 2027 and 2362 of 1967, D/- 28-7-1972.

Index Note: (A) Bengal Tenancy Act (8 of 1885), Section 26-F — Right of pre-emption under Section 26-F whether survives W. B. Estates Acquisition Act, 1953 after Chapter VI thereof comes into force. (X-Ref:— W. B. Estates Acquisition Act, 1953 (1 of 1954), S. 6 and Chap. IV).

Brief Note: (A) After the enforcement of Chapter VI of the W. B. Estates Acquisition Act and the vesting of interest of raiyats and under-raiyats on and from April 14, 1956 corresponding to Baisakh 1, 1363 B. S. the co-sharer raiyats of a holding ceased to be co-sharers and each raiyat of the holding became a direct tenant under the State in respect of the land of that holding which he is entitled to retain under sub-section (1) of Section 6. As the co-sharer raiyats ceased to be co-sharers on and from the date of vesting, the question of exercise of the right of pre-emption under Section 26-F of the Bengal Tenancy Act cannot arise, for, the condition precedent to the exercise of the right of pre-emption under Section 26-F being that the person exercising that right must be a co-sharer of the person making the transfer. (Para 28)

When a raiyat having a separate holding or tenancy created by virtue of sub-section (2) of Section 6 relating to the land retained by him under sub-sec. (1) of Section 6, dies leaving more than one heir, such heirs will become co-sharers of such holding and will be entitled to the right of pre-emption under Sec. 26-F. Similarly, when the raiyat of such a holding transfers a portion of the holding to another person, that person will become a co-sharer of the raiyat and the right of pre-emption will also be available in such a case. (Para 28)

A transfer made by a co-sharer raiyat as contemplated by clause (2) above before the enforcement of Section 8 of the West Bengal Land Reforms Act, 1955,

IP/IP/F33/72/VBB

may be pre-empted by another co-sharer in the tenancy in accordance with Section 26-F, but a transfer made after the enforcement of Section 8, the right of pre-emption by a co-sharer can only be exercised in the manner laid down in Section 8 of the West Bengal Land Reforms Act. (Para 28)

The under-raiyats have been elevated to the status of raiyats on the enforcement of Chapter VI. There is no difference between the position of raiyats and that of under-raiyats and what has been stated above on the question as to the effect of the enforcement of Chapter VI on the right of pre-emption of raiyats will also apply to under raiyats. (Para 28)

The decisions in AIR 1964 Cal 460 and (1964) 68 Cal WN 1055 in so far as they proceeded on the footing that the raiyats of a holding continued to be co-sharers even after vesting, are erroneous; but they have correctly interpreted the expression 'terms and conditions' in Rule 4, W. B. Estates Acquisition Rules, 1954. (1958) 62 Cal WN 360 and (1961) 65 Cal WN 354 and (1961) 65 Cal WN 811; (1963) 67 Cal WN 633; (1963) 67 Cal WN 848 and Civil Revn. Case No. 3366 of 1961, D/- 21-9-1962 (Cal), Overruled. (Para 28)

According to that interpretation, the expression "terms and conditions" in R. 4 includes the right of pre-emption of an occupancy raiyat under S. 26-F. (Paras 10, 20)

On the date of vesting the raiyats of a holding ceased to be co-sharers and the holding is split up into different holdings. (Para 13)

The words 'an intermediary' cannot be read as intermediaries. (Para 14)

Where both the impugned transfer and the application for pre-emption were made before the enforcement of Chapter VI, which took place during the pendency of the pre-emption proceeding, but before any order was passed by the trial Court, as the raiyats of an occupancy holding who were co-sharers before the vesting ceased to be co-sharers, the application was no longer maintainable and the proceeding for pre-emption became infructuous. It is clear from the opening words of sub-section (7) of Section 26-F that the consequences of an order passed under sub-section (5) as contained in clauses (a), (b) & (c) of sub-section (7), will take effect from the date of the order. (Para 30)

Index Note: (B) Bengal Tenancy Act (1885), S. 26-F — Application by non-notified co-sharer — Limitation. (X-Ref:— Limitation Act (1908), S. 18, Art. 181).

Brief Note: (B) Article 181 of the Limitation Act, 1908 applies to the case

of an application under Section 26-F by a co-sharer tenant who has not been served with a notice under Section 26-C and his application would be in time if made within three years of the sale. In applying Art. 181, an application under Section 26-F is an application under the Code of Civil Procedure. AIR 1948 Cal 48 (SB) Foll.; AIR 1953 SC 98; AIR 1964 SC 752 and AIR 1965 SC 540. Disting. (Para 32)

Where the pre-emptor was kept by fraud from the knowledge of his right under Section 26-F he is entitled to the benefit of Sec. 18 of the Limitation Act. (Para 36)

Index Note: (C) Bengal Tenancy Act (1885), S. 26-F (2) — Applicant not required to deposit compensation for the improvement made by the transferee.

Brief Note: (C) Under sub-sec. (2) of Section 26-F all that is required is that at the time of making the application, the applicant is to deposit in Court the amount of the consideration money or the value of the transferred portion or share of the holding, as stated in the notice under Section 26-C, together with compensation at the rate of ten per centum of such amount. (Para 37)

Cases Referred: Chronological Paras.

- AIR 1965 SC 540 = (1964) 4 SCR 69,
Prativa Bose v. Rupendra Deb 34
AIR 1964 SC 752 = (1964) 3 SCR
709, Bombay Gas Co. Ltd. v.
Gopal Biva 34
AIR 1964 Cal 460 = 68 Cal WN
574, Abharan Chandra Saha v.
Sanat Kumar Sen 2, 10, 20, 28
(1964) 68 Cal WN 1055, Jyotish
Chandra Das v. Dhananjay Bag 2,
10, 20, 28
(1968) 67 Cal WN 633, Nitai Chan-
dra Das v. Sisir Kumar Das 25
(1963) 67 Cal WN 848, Dhananjoy
Senapati v. Debendra Nath Sena-
pati 25
(1962) Civil Revn. Case No. 3366 of
1961, D/- 21-9-1962 (Cal), Sudhir
Kumar Ghosh v. Sarat Chandra
Ghosh 25
AIR 1961 SC 1790 = 1962-2 SCR
441, Rana Sheo Ambar Singh v.
Allahabad Bank Ltd. 11
(1961) 65 Cal WN 354 = ILR (1961)
2 Cal 316, Panchu Sundari, Dasi
v. Haripada Biswas 25
(1961) 65 Cal WN 811, Shiba Pra-
sad Gerua v. Manmatha Nath
Gupta 25
(1958) 62 Cal WN 360 = ILR (1959)
1 Cal 250, Ganesh Chandra v.
Sudarshan Dey 25
AIR 1953 SC 98 = 1953 SCR 351,
Sha Mulchand & Co. Ltd. v. Jawa-
har Mills Ltd. 34
AIR 1948 Cal 48 = 52 Cal WN 64
(SB), Asmatoli v. Mujaharali 32-A,
34, 35

Lala Hemanta Kumar and H. K. Mitra (In C. R. No. 674 of 1958), P. B. Burman and Manan K. Ghose (In C. R. No. 2275 of 1961) Abinash Ch. Bhattacharjee (In C. R. No. 3410 of 1961), Ganganarayan Chandra (In C. R. No. 3764 of 1961), J. K. Sen Gupta, A. K. Sen Gupta (In C. R. No. 3465 of 1965), Mukti Maitra (In C. R. No. 3624 of 1961), Amal K. Ghoshal (In C. R. No. 2029 of 1967), Debatosh Khan (In C. R. No. 2362 of 1967), for Petitioner; N. K. Ganguli (In C. R. No. 674 of 1958), Sudhir K. Acharya (In C. R. No. 2275 of 1961), Amal Kr. Mukherjee and Bimalendu Mitra (In C. R. No. 3410 of 1961), Jnanendra Mohan De (In C. R. No. 3764 of 1961), Nirmal Ch. Choudhary (In C. R. No. 2624 of 1961), S. C. Das Gupta (In C. R. No. 3465 of 1965), Swadesh Bhusan Bhunia (In C. R. No. 2029 of 1967), Dharendra Nath Guha Thakurta (In C. R. No. 2362 of 1967), for Opposite Parties.

M. M. DUTT, J.:— These are eight out of twelve Revision Cases referred to the Full Bench by a Division Bench consisting of Laik and S. K. Mukherjee, JJ. by their Order of Reference dated April 30, 1968. The point which induced the learned Judges of the Division Bench to refer the Revision Cases to the Full Bench is, whether the right of pre-emption under Section 26-F of the Bengal Tenancy Act survives the West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954) after Chapter VI thereof comes into force. In all these cases the reference has been made under Chapter VII, Rules 1, 2 and 4 of the Appellate Side Rules and consequently the Full Bench has to dispose of these Revision Cases also on merits. The point is involved in all these cases, but some of these involve other points which arise out of their respective facts and circumstances.

2. Laik and S. K. Mukherjee, JJ. have differed from two earlier Division Bench decisions of B. N. Banerjee and D. Basu, JJ. — one in the case of Abharan Chandra Saha v. Sanat Kumar Sen, 68 Cal WN 574 = (AIR 1964 Cal 460) and the other in Jyotish Chandra Das v. Dhananjay Bag, (1964) 68 Cal WN 1055. In these two decisions B. N. Banerjee and D. Basu, JJ. have held that the right of pre-emption under Section 26-F survived after the passing of the West Bengal Estates Acquisition Act, 1953.

3. Section 26-F provides that except in the case of a transfer to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase, one or more co-sharer tenants of the holding, a portion or share of which is transferred, may within four months of the service of the notice under Section 26-C, apply to the Court for the

said portion or share to be transferred to himself or themselves. This section confers on a co-sharer tenant of an occupancy holding, a right to compel another co-sharer tenant to sell his share in the holding to him instead of selling it to a stranger. The use of the term 'co-sharer' in S. 26-F contemplates that the holding must be under the ownership of more than one person. The holding must be an occupancy holding, that is, it must be the holding of raiyats having occupancy rights. So long as division of the holding does not take place in accordance with Section 88 of the Bengal Tenancy Act, the holding remains a joint holding and each co-sharer will be entitled to pre-empt in case of transfer of a share or portion of the holding by a co-sharer to a stranger. The question is, whether after the coming into force of Chapter VI of the West Bengal Estates Acquisition Act, co-sharership is destroyed, or in other words, whether new tenancies are created by virtue of the provisions of the West Bengal Estates Acquisition Act in respect of each co-sharer.

4. The West Bengal Estates Acquisition Act, 1953, came into force on February 12, 1954. Sub-section (1) of Section 4 of the Act provides that the State Government may from time to time by notification declare that with effect from the date mentioned in the notification, all estates and the rights of every intermediary in each such estate situate in any district or part of a district specified in the notification, shall vest in the State free from all incumbrances. The date of vesting as mentioned in the notification which was published is Baisakh 1, 1362 B. S. corresponding to April 15, 1955. The term 'intermediary' as defined in the Act means a proprietor, tenure-holder, under tenure-holder or any other intermediary above a raiyat, or a non-agricultural tenant and includes a service tenure-holder, and in relation to mines and minerals, includes a lessee and a sub-lessee. Under the definition a raiyat was not an intermediary but anybody above a raiyat was an intermediary. Chapter VI contains provisions for acquisition of interests of raiyats and under-raiyats. Section 49 which is the first section of Chapter VI provides, that the provisions of Chapter VI shall come into force on such date and in such district or part of a district as the State Government may, by notification in the Official Gazette, appoint and for this purpose different dates may be appointed for different districts or parts of districts. The consequences of the issue of such a notification under Section 49 are provided for in Section 52 which runs as follows:—

"52. Application of Chapters II, III, V and VII to raiyats and under-raiyats. On the issue of a notification under Section 49 the provisions of Chapters II, III, V and VII shall, with such modifications as may be necessary, apply mutatis mutandis to raiyats and under-raiyats as if such raiyats and under-raiyats were intermediaries and the land held by them were estates and a person holding under a raiyat or an under-raiyat were a raiyat for the purposes of clauses (c) and (d) of Section 5:

Provided that where raiyat or an under-raiyat retains, under Section 6 read with this section, any land comprised in a holding, then notwithstanding anything to the contrary contained in sub-section (2) of Section 6, he shall pay,—

(a) in cases where he was paying rent for the lands comprised in the holding and held by him immediately before the date of vesting (hereafter in this proviso referred to as the holding lands),—

(i) if he retains all the holding lands, the same rent as he was paying therefor immediately before the date of vesting, and

(ii) if the land retained by him forms part of the holding lands, such rent as bears the same proportion to the rent which he was paying for the holding lands immediately before the date of vesting as the area of the land retained by him bears to the area of all the holding lands;

(b) in cases where he was liable to pay rent but was not paying any rent for the holding lands immediately before the date of vesting on the ground that the rent payable by him therefor was not assessed, such rent as may be assessed, mutatis mutandis in accordance with the provisions of Section 42;

(c) in cases where he was liable to pay rent wholly in kind or partly in kind and partly in cash, then notwithstanding anything contained in clause (c) of Section 5, such rent as may be assessed in accordance with the provisions of Section 40, and

(d) in cases where he was liable immediately before the date of vesting to pay for the holding lands a variable cash rent periodically assessed, such rent as may be assessed, mutatis mutandis in accordance with the provisions of S. 42."

5. The notification under S. 49 was published on April 9, 1956 and Chap. VI came into force in all the districts of West Bengal with effect from April 10, 1956. After Chapter VI came into force raiyats and under-raiyats who were not intermediaries till then, became intermediaries and by virtue of Section 52, the provisions of Chapters II, III, V and VII were with such modifications as may be, to apply mutatis mutandis to raiyats

and under-raiyats. Notifications were issued under Section 4 by the State Government and the interests of raiyats and under-raiyats vested in the State with effect from Baisakh 1, 1963 B. S. corresponding to April 14, 1956.

6. Section 6 provides for the right of intermediary to retain certain lands. It is necessary to refer to the following portions of sub-section (1) of Section 6 which are relevant for our present purpose—

"6. Right of intermediary to retain certain lands.—(1) Notwithstanding anything contained in the cases mentioned in the proviso to sub-section (2) but subject to the other provisions of that sub-section, be entitled to retain with effect from the date of vesting—

(a) land comprised in homesteads;

(b) land comprised in or appertaining to buildings and structures, owned by the intermediary or by any person, not being a tenant, holding under him by leave or license;

Explanation—For the purposes of this clause, 'tenant' shall not include a thika tenant as defined in the Calcutta Thika Tenancy Act, 1949 (West Bengal Act II of 1949):

(c) non-agricultural land in his khas possession, including land held under him by any person, not being a tenant, by leave or license, not exceeding fifteen acres in area, and excluding any land retained under clause (a);

Provided that the total area of land retained by an intermediary under clauses (a) and (c) shall not exceed twenty acres, as may be chosen by him;

Provided further that if the land retained by an intermediary under clause (c) or any part thereof is not utilised for a period of five consecutive years from the date of vesting for a gainful or productive purpose, the land or the part thereof may be resumed by the State Government subject to payment of compensation determined in accordance with the principles laid down in Sections 23 and 24 of the Land Acquisition Act, 1894 (Act 1 of 1894);

(d) agricultural land in his khas possession not exceeding twenty-five acres in area, as may be chosen by him;

Provided that in such portions of the District of Darjeeling as may be declared by notification by the State Government to be hilly portions, an intermediary shall be entitled to retain all agricultural land in his khas possession, or any part thereof as may be chosen by him;"

7. By a notification dated May 28, 1954, the Government of West Bengal framed rules called the West Bengal Estates Acquisition Rules, 1954. (hereinafter referred to as the Rules). Rule 4 provides that every intermediary who

retains possession of any land by virtue of the provisions of sub-section (1) of Section 6, shall, subject to the provisions of that Act, be deemed to hold such land from the date of vesting—

(a) If it is agricultural land, on the same terms and conditions as an occupancy raiyat under the Bengal Tenancy Act, 1885;

(b) If it is non-agricultural land, on the same terms and conditions as a tenant under the West Bengal Non-agricultural Tenancy Act, 1949, holding non-agricultural land for not less than 12 years without any lease in writing.

8. By a notification dated September 7, 1962, Rule 4 was substituted as follows—

4. Any land retained by an intermediary under the provisions of sub-section (1) of Section 6 shall, subject to the provisions of the Act, be held by him from the date of vesting on the terms and conditions specified below:—

(3) If the land held by the intermediary be agricultural land, then—

(i) he shall hold it, *mutatis mutandis*, on the terms and conditions mentioned in Sections 23, 23-A, clause (a) of S. 25, Ss. 26 to 26-G, 52 to 55, sub-sections (1) and (2) of Section 56, Sections 65, 67, sub-section (1) of Section 68, Sections 73, 86-A, sub-sections (1), (2) and (3) of Section 87, so much of Section 159 as does not relate to protected interests, Sections 161 to 163, 166, sub-sections (1), (2) and (3) of Section 167, Section 168, Sections 169 to 171 and Sections 173 to 177 of the Bengal Tenancy Act, 1885.

9. This Rule again was amended by a notification dated August 1, 1964 and for the words and figures "Sections 26 to 26-G, 52 to 55", "Sections 26, 26-B, 26-C, 26-G, Sections 52 to 55" were substituted. By this amendment Sec. 26-F was expressly excluded from Rule 4 (3).

10. In 68 Cal WN 574 = (AIR 1964 Cal 460) it was contended that the expression "same terms and conditions as an occupancy raiyat" was not wide enough to include the right of pre-emption of an occupancy raiyat against the purchaser because such a right was not a term or condition of the tenancy, but only an incident of occupancy right. It was further contended that "term" of a tenancy meant the period for which the tenancy was created and "condition" of a tenancy signified, firstly, some quality annexed to an estate by virtue of which the estate may be defeated, enlarged or re-created, e.g., a condition as to re-entry, or a condition containing an option for renewal of the lease, or a condition as to holding over and, secondly, condition governing the relationship of landlord and tenant in matters of user, succession, enhancement or reduction of rent, eviction

and the like. This contention was overruled by Banerjee and D. Basu, JJ. and it was held that the expression "terms and conditions" in Rule 4 of the Rules, was used in its general sense and included all the incidents of an occupancy raiyat holding. be the same as between the landlord and the occupancy tenant or between the occupancy tenant and his co-sharers and that the expression "terms and conditions" would include or was intended to include the right of pre-emption of an occupancy raiyat. The same view has been expressed by Banerjee and D. Basu, JJ. in (1964) 68 Cal WN 1055. The above two Bench decisions only considered whether the words "terms and conditions" in Rule 4 before it was amended would include the right of pre-emption. It has been already stated, that on September 7, 1962, R. 4 was substituted and in the substituted Rule 26-F was included. After the inclusion of 26-F in sub-rule (3) of Rule 4 it cannot be said that the expression "terms and conditions" in Rule 4 would not include the right of pre-emption under Sec. 26-F. Later, we shall consider the effect of the exclusion of 26-F from sub-rule (3) of Rule 4 by the subsequent notification dated August 1, 1964.

11. Laik and S. K. Mukherjee, JJ. have differed with the two aforesaid Bench decisions and have held that the right of pre-emption under Section 26-F did not subsist after Chapter VI of the West Bengal Estates Acquisition Act, 1953 had come into force. The reasons given by the learned Judges are contained in seven grounds which are as follows:—

"(1) The continuance of the right of pre-emption is against the General Scheme of the Estates Acquisition Act and the Rules framed thereunder. Each agricultural tenant (intermediary) becomes a separate tenant directly under the State Government after the vesting of the right of the intermediaries. Section 6 (2), Section 14 (3), Section 15 (5), Section 42 (1), proviso (b), and Section 52 proviso (a) (ii) of the Estates Acquisition Act and Rule 31-A (2) (i), (ia), (ii) and (iia) of the Rules support the said view. There remains no co-sharer on principle in the holding as defined in Section 3 (5) of the Bengal Tenancy Act or in the tenancy after the vesting.

(2) There is no express provision in the Estates Acquisition Act about the acquisition, retention or continuance of the right of pre-emption. Section 3 of the said Act has an overriding effect.

(3) After the vesting, each case is a case of a new engagement by the State with each intermediary (agricultural tenant included). It cannot be a case of recognition by the State Government of the old tenancy or holding with the

intermediaries, be he a proprietor or a tenure-holder or a raiyati or an under-raiyati. Clause (i) of sub-rule (3) of Rule 4 expressly provides that the intermediary shall hold the land *mutatis mutandis* on the terms and conditions mentioned in Section 23 and several other sections of the Bengal Tenancy Act but deliberately omits Section 26-F from the said provision, though Sections 26, 26-B, 26-C and 26-G are specifically mentioned. It is difficult to conceive of a position that they would still remain as co-sharers in the holding, even after the vesting. The principles laid down by the Supreme Court in the case of *Rana Sheo Ambar Singh v. Allahabad Bank Ltd.*, 1962 (2) SCR 441 = AIR 1961 SC 1790, were referred to. Their Lordships, undoubtedly considered a different Act, namely, the U. P. Zamindari Abolition Act, but held *inter alia* that the properties vested in the State Government under Section 6 of the said Act, were resettled with the intermediary 'on a new tenure' and not in the same right which they had in them before the vesting. It was further noticed in the said decision that there was no provision in the said U. P. Act that the said right 'shall continue to belong to the intermediary'. Accordingly, the existing right was held to be extinguished and the right created by Section 18 of the U. P. Act would be a new right. The principles laid down by the Supreme Court on the said similar statute are equally applicable here.

(4) Alternatively, the expression 'terms and conditions' in Rule 4 of the Rules cannot be equated with the expression 'incidents' which flow from the statute or the status of a person whereas "terms and conditions" are dependent on the acts of the parties such as contracts. There is a broad distinction between the two sets of expressions. Reference to Sections 18, 48-F and 158 of the Bengal Tenancy Act might be made in this connection.

(5) Sections 8 and 10 of the Land Reforms Act, 1955, have come into force on October 12, 1963 (notification No. 17998/L-Ref. of the same date). It is difficult to imagine as to how after the enforcement of the said sections, the right of pre-emption under Section 26-F of the Bengal Tenancy Act would still be operative in the same field.

(6) The right of pre-emption is a personal one resting with the claimant. It is not transferable apart from the ownership in the land.

(7) The whole of the Bengal Tenancy Act including Section 26-F thereof for pre-emption, has been expressly repealed (vide notification No. 14810-L-Ref. dated 25th September, 1965, published in the

"Calcutta Gazette, Extraordinary", dated September 27, 1965). By the said notification Cls. (1) to (6) of Section 59 of the Land Reforms Act, along with other provisions came into force from November 1, 1965. This section repeals several statutes. Clause (5) thereof repeals the whole of Bengal Tenancy Act, 1885".

12. In ground No. 3 Laik, J. refers to deliberate omission of 26-F from sub-rule (3) of Rule 4 as one of the grounds for the aforesaid conclusion, but the effect of the inclusion of 26-F in that sub-rule by the notification dated September 7, 1962 has not been considered.

12-A. Mr. Lala, learned Advocate appearing on behalf of the petitioner in Civil Revision Case No. 674 of 1958 supported the order of reference. Mr. Lala submitted that in view of sub-section (2) of S. 6 of the West Bengal Estates Acquisition Act, there cannot be any scope for the argument that the right of pre-emption under Section 26-F was allowed to continue. In order to appreciate the said contention of Mr. Lala on sub-section (2) of S. 6, it is necessary to refer to sub-section (2) which runs as follows:—

"(2) An intermediary who is entitled to retain possession of any land under sub-s. (1) shall be deemed to hold such land directly under the State from the date of vesting as a tenant, subject to such terms and conditions as may be prescribed and subject to payment of such rent as may be determined under the provisions of this Act, and as entered in the record-of-rights finally published under Chapter V except that no rent shall be payable for land referred to in clause (h) or (i):

Provided that if any tank fishery or any land comprised in tea-garden, orchard, mill, factory or workshop was held immediately before the date of vesting under a lease, such lease shall be deemed to have been given by the State Government on the same terms and conditions as immediately before such date, subject to such modification therein as the State Government may think fit to make".

13. By virtue of Section 52, each raiyat becomes under sub-section (2) a direct tenant under the State with effect from the date of vesting in respect of the land which he is entitled to retain, no such terms and conditions as may be prescribed and subject to payment of such rent as may be determined under the provisions of the Act. The proviso to Section 52 contains provisions as to the amount of rent that would be payable by the raiyat or the under raiyat in respect of the land of the holding retained by him. Sub-clause (ii) of clause (a) to the proviso lays down that the raiyat or the under-raiyat shall pay, if the land retained by him forms part of the holding lands, such rent as bears the same

proportion to the rent which he was paying for the holding lands immediately before the date of vesting as the area of the land retained by him bears to the area of all the holding lands. Under clause (b) where the raiyat or the under-raiyat though liable to pay rent, was not paying any rent, the rent will be assessed under Section 42. Clause (i) of sub-section (1) of S. 42 provides that if the land which the intermediary is entitled to retain under sub-section (1) of S. 6, be agricultural land, the Revenue Officer shall determine the rent payable by the intermediary on the basis of the rate of rent paid by raiyats or other persons holding land of similar description, and with similar advantages in the vicinity. It is, therefore, clear that exhaustive provisions have been made for the amount of rent payable by a raiyat or an under-raiyat in respect of the land of the holding retained by him. Land retained by a raiyat of holding becomes the subject-matter of a separate tenancy and the raiyats who were his co-sharers immediately before the date of vesting, will have no interest in the land retained by him. We may take a hypothetical case where, immediately before the date of vesting, there were four raiyats of a holding. On the date of vesting each raiyat will be entitled to retain a portion of the land comprised in the holding and in respect of the respective portions each becomes a direct tenant under the State on payment of such rent as indicated in the proviso to Section 52 read with S. 42 of the Act. By virtue of sub-section (2) of S. 6 four tenancies are created in respect of the land comprised in the holding which was the subject-matter of the joint tenancy before the vesting. After the vesting, one raiyat cannot claim to have any interest in the land of the holding which the other is entitled to retain or has retained. Before vesting each of the raiyats of the holding had an interest or share in every part of the land comprised in the holding and each was a co-sharer of the other, but this is not the position after the vesting when each of the raiyats of the holding becomes a direct tenant under the State in respect of the land of the holding which he is entitled to retain under the provisions of sub-s. (1) of S. 6. There is, therefore, considerable substance in the argument of Mr. Lala that on the date of vesting, the raiyats of a holding ceased to be co-sharers and the holding is split up into different holdings.

14. Mr. Burman, learned Advocate appearing for the pre-emptor petitioner in C. R. 2275 of 1961, however, submitted that the raiyats of the holding who were co-sharers in respect of that holding before vesting, remained co-sharers even after vesting. It was con-

tended by him that the words "an intermediary" in sub-sections (1), (2) and (5) of S. 6 should be read in the plural, that is, should be read as "intermediaries" and so read, all the raiyats of a holding jointly become tenants under the State under sub-section (2) of S. 6. Mr. Burman relied on Section 14 of the Bengal General Clauses Act which says:—

"Gender and number— In all Bengal Acts, and West Bengal Acts unless there is anything repugnant in the subject or context.—

(2) words in the singular shall include the plural and vice versa". This contention of Mr. Burman cannot be accepted. Section 14 would be given effect to unless there is anything repugnant in the subject or context. Sub-sections (2) and (5) of Sec. 6 refer to sub-section (1) under which an intermediary is entitled to retain possession of certain lands. Unless it is possible to read 'intermediaries' in place of the words 'an intermediary' in sub-section (1) of S. 6, the contention of Mr. Burman cannot be accepted. We are, however, unable to read 'intermediaries' in place of the words 'an intermediary' in sub-section (1) without doing violence to the sub-section. Under clause (d) of sub-section (1), an intermediary shall be entitled to retain agricultural land in his khas possession not exceeding 25 acres in area, as may be chosen by him. If we read the word 'intermediaries' in place of the words 'an intermediary', in that case, all the intermediaries, namely, the raiyats, shall be jointly entitled to retain 25 acres. But, under clause (d) each intermediary is entitled to retain 25 acres of agricultural land in his khas possession. Under sub-section (5) of S. 6 an intermediary shall exercise his choice of retention of land under sub-section (1) within such time and in such manner as may be prescribed. The choice has to be exercised by filing a return in Form 'B'. Schedule 'B' framed under Rule 25 of the Rules prescribes Form 'B' in which the return has to be filed. The Form contains certain foot notes which are as follows—

(i) The statement relates to all interests which an intermediary has in the whole of West Bengal.

(ii) This statement shall be filed before the Settlement Officer in whose jurisdiction the major portion of the lands which the intermediary wishes to retain is situated or before a Revenue Officer authorised by the Settlement Officer in this behalf.

(iii) Each of the co-sharers of the same interest shall submit the statement separately for his own share.

(iv) Total area of lands shown in column 7 shall not exceed 15 acres in the

whole of West Bengal. If this total area is found to be in excess of 15 acres, the excess will be excluded by the Revenue Officer from any of the Khatians shown in column 2.

(vii) The statement shall be prepared in two parts. In the first part, detailed description of lands in the whole of West Bengal which will be retained by the intermediary are to be shown in one consolidated statement in this form. In the second part, the lands retained in each mouza are to be shown in separate statement for each mouza also in this form.

The foot notes (i), (iii), (iv), (v) and (vi) lead to the irresistible conclusion that each intermediary separately and not intermediaries jointly, will have to exercise their choice of retention. It is, therefore, difficult to uphold the contention of Mr. Burman that the words 'an intermediary' should be read as 'intermediaries' in the provisions of sub-sections (1), (2) and (5) of S. 6.

15. Mr. Burman strenuously urged that in view of the foot note (iii) in the Form 'B' which says that each of the co-sharers of the same interest shall submit the statement separately for his own share, it should be held that the raiyats of a holding remained co-sharers of each other even after vesting. Mr. Burman laid emphasis on the word 'co-sharers' in foot note (iii). It is true that foot note (iii) has used the word 'co-sharers', but in our view, the term has been used with reference to the position before vesting for the sake of convenience. The other provisions which have been referred to above, clearly show that each intermediary, that is, each raiyat becomes a direct tenant under the State in respect of the land which he is entitled to retain. It does not follow from any of the provisions of the Act that the raiyats of the holding will continue to hold the land comprised in the holding as co-sharers.

16. Again, this proposition may be scrutinised from another point of view. The quantity of land which an intermediary is entitled to retain under Section 6 (1) is the maximum quantity that can be retained by the intermediary out of the total area of land belonging to him in the whole of West Bengal. The foot notes under Form 'B' clearly lay down the same in unequivocal term. Before vesting, a co-sharer raiyat of a holding may own and possess other lands, apart from the land comprised in the holding in respect of which he is a co-sharer. Suppose a holding consists of 25 acres belonging to two co-sharer raiyats. One of the co-sharer raiyats may possess other lands. Such a co-sharer has to exercise his choice in respect of the land to be retained by him in accordance with the

ceiling prescribed by the Act. He may choose to retain half share which comes to $12\frac{1}{2}$ acres of land in the holding of which he is a co-sharer and also retain his other lands provided the total quantity of the land does not exceed 25 acres. In case the total area of the land exceeds 25 acres, in that case, he may not retain $12\frac{1}{2}$ acres of land in the holding of which he is a raiyat. But he may retain a lesser quantity of land out of that holding and the balance quantity out of other lands. The other co-sharer may not possess other lands and he may choose to retain the whole of $12\frac{1}{2}$ acres. Two different amounts of rent will be fixed for the land respectively retained by the two co-sharer raiyats under the proviso to Section 52 read with Section 42 of the Act. In such circumstances, it cannot be said that one remained a co-sharer of the other even after the date of vesting.

17. Sub-paragraph (2) of paragraph 7 of Sch. 'B' to the Rules provides, that in preparing or revising the record-of-rights under Chapter V the Revenue Officer shall take into consideration any statement furnished by an intermediary having regard to the provisions of Section 6 of the Act. Sub-paragraph (2) refers to the statement of the intermediary in the 'B' Form return whereby he exercises his choice of retention under Section 6. Sub-paragraph (4) of paragraph 7 provides, that the Revenue Officer shall, wherever necessary, partition the lands for the purpose of making allotment under sub-section (5) of S. 6 of the Act and demarcate the lands so partitioned by assigning such separate plot numbers as may be needed for the purpose. Under sub-paragraph (4), the Revenue Officer, therefore, partitions and demarcates the land retained by an intermediary from the rest of the holding. The land so partitioned and demarcated, belongs to the intermediary or the raiyat as the tenant holding directly under the State. The erstwhile co-sharer raiyats will have no interest whatsoever in the land retained by one of them and partitioned and demarcated by the Revenue Officer. This also clearly indicates that the intermediaries or raiyats who were co-sharers in respect of the land before vesting ceased to be so after vesting. To hold otherwise, will be contrary to the different provisions of the Act and the clear intention of the legislature in this regard.

18. Mr. Burman next argued that at least so long such a partition is not effected by the Revenue Officer and separate khatians showing separate rents in respect of the lands so partitioned and demarcated are not made, it cannot be said that one raiyat ceased to be the co-sharer of the other in respect of the

holding. Mr. Burman submitted that on the date of vesting it is not possible for any intermediary to say which portion of the land he will retain and that so long as the land comprised in the holding is not actually partitioned by metes and bounds, it cannot be said that the holding is split up and the jointness of the tenancy has come to an end. Further, it was contended by him that under sub-section (2) of S. 6 an intermediary may become a direct tenant in respect of the land he is entitled to retain, but he does not exercise his choice of retention on the date of vesting and he may wait till the last date fixed for the exercise of such choice of retention. During this period the holding would remain undivided and there could be no question of any separate tenancy coming into being on the date of vesting. Attractive though the argument is, we regret, we are unable to accept the same. Sub-section (2) of Section 6 lays down that the intermediary becomes a direct tenant in respect of the land which he is entitled to retain under sub-section (1) with effect from the date of vesting. On the date of vesting an intermediary is entitled to retain an undivided share in the holding where the holding was held by more than one intermediary. In exercising his choice of retention by the submission of a return in Form 'B', the intermediary does not specify by boundaries the land which he is entitled to retain. He is only required to retain the quantity of land proportionate to his share in the land. It is the Revenue Officer who partitions and demarcates the land retained by the intermediary. It is true that so far as the holding is concerned it remains undivided for the time being. The question necessarily arises whether a separate tenancy can be created in respect of an undivided share of the holding. The term 'holding' has not been defined in the Act, but clause (p) of Section 2 *inter alia* provides that expression used in the Act and not otherwise defined have in relation to the areas to which the Bengal Tenancy Act, 1885, applies, the same meaning as in that Act. Under sub-section (5) of S. 3 of the Bengal Tenancy Act, 'holding' means a parcel or parcels of land or an undivided share thereof, held by a raiyat or an under raiyat and forming the subject of a separate tenancy whether the raiyat or under raiyat has held the land before or after the commencement of the Bengal Tenancy (Amendment) Act 1928. The definition of 'holding' in the Bengal Tenancy Act, as stated above, clearly indicates that an undivided share in land can be the subject-matter of a separate tenancy and can constitute a holding of a raiyat or an under raiyat. It comes to this, therefore, that even though the land remains undivided till it

is demarcated by metes and bounds by the Revenue Officer under sub-paragraph (4) of paragraph 7 of Sch. 'B' to the Rules, the undivided share of the raiyat in the land which he is entitled to retain as an intermediary, becomes the subject-matter of a separate tenancy directly under the State on and from the date of vesting.

19. Lastly, it has been contended by Mr. Burman that in many cases and, at least in the case in which he appears, the Revisional record-of-rights shows the same holding and records the names of all the raiyats of the holding. The entry as regards rent is also the same which the co-sharers were liable to pay for the holding before vesting. Mr. Burman submits that in view of sub-section (4) of S. 44 of the Act the entries raise a presumption that the holding is a joint holding held by the raiyats jointly. This contention of Mr. Burman is highly fallacious. The presumption which arises under sub-section (4) of S. 44 cannot be held to have the effect of nullifying the provisions of the Act. In this connection we may refer to the provisions of Section 47 of the Act and Rule 31-A of the Rules. Section 47 is as follows:—

"47. Modification of the finally published record-of-rights. — The record-of-rights prepared and finally published under the provisions of this Chapter or deemed to have been so prepared and finally published, for any district or part of a district in respect of which a notification under Section 4 has been duly published, shall as soon as may be after the date of vesting be modified by eliminating therefrom all the interests of the intermediaries which have vested in the State and showing therein only the tenants who hold directly under the State as a result of vesting of such interest in the State. One or more numbers to be borne on the revenue roll of the district shall be assigned by the Collector in respect of the areas to which such record-of-rights relates in accordance with such rules as the State Government may make in this behalf and the Revenue Officer shall make a certificate that the record-of-rights has been so modified and shall date and subscribe the same under his name and official designation;

Provided that entries in record-of-rights eliminated under the foregoing paragraph shall be deemed to be in force for the purpose of the preparation of the Compensation Assessment Roll and for all proceedings connected therewith or arising therefrom".

Section 47 provides for modification of the finally published record-of-rights. The proviso to Section 47 lays down that the finally published record-of-rights before it is modified, shall be deemed to be in force for the purpose of the prepara-

tion of the Compensation Assessment Roll and for all proceedings connected therewith or arising therefrom. It is therefore, clear that the record-of-rights has to be prepared with reference to the incidents before vesting and has to be finally published as such. After the final publication it has to be modified in accordance with Section 47 and Rule 31-A of the Rules. Rule 31-A is as follows:

"31-A. Modification of the finally published record-of-rights under S. 47.—

(1) The record-of-rights, finally published under sub-rule (3) of R. 30, shall then be modified in accordance with the provisions of Section 47 and paragraph 7 of Sch. B appended to these rules.

(2) Such modification shall be made by—

(i) eliminating from the record-of-rights as finally published, all entries relating to the interests of the intermediaries which have vested in the State and the revenue or rent payable by them and recording in their stead the State as entitled to receive the rent payable by the raiyats and the non-agricultural tenants;

(ia) eliminating from the record-of-rights, as finally published, all entries relating to the interests of the raiyats and under-raiyats which have since the enforcement of Chapter VI of the Act, vested in the State and the rent payable by them, and recording in their stead the 'State' as entitled to receive the rents from the persons holding under such raiyats or under-raiyats;

(ii) recording the names of the intermediaries who have been allowed to retain lands as tenants or lessees holding directly under the State, together with the particulars of the lands they have been allowed to so retain and the rents payable therefor to the State, being rents determined under Section 42 or otherwise;

(iia) recording the names of the raiyats and under-raiyats who have been, since the enforcement of Chapter VI of the Act, allowed to retain lands as tenants or lessees holding directly under the State, together with the particulars of the lands they have been allowed to so retain and the rents payable therefor to the State, being rents determined under Section 42 or otherwise;

(iii) recording in respect of each mouza, the particulars of the Khas lands of the intermediaries which have vested in the State excluding the lands which such intermediaries have been allowed to retain under sub-section (1) of Section 6; and

(iiia) recording in respect of each mouza, the particulars of the Khas lands of the raiyats and under-raiyats which have, since the enforcement of Chapter VI of the Act, vested in the State excluding

the lands that such raiyats and under-raiyats have been allowed to retain under sub-section (1) of S. 6.

x x x x x"

Clause (iia) of sub-rule (2) shows the modifications to be made in the finally published record-of-rights in respect of the holdings of raiyats and under-raiyats. It is apparent from Rule 31-A, particularly clause (iia) of sub-rule (2), that by way of modifications a separate khatian which is usually known as 'Khanda Khatian' has to be prepared relating to the land retained by each raiyat or under raiyat, containing the particulars mentioned therein. It may be that in some cases modifications have not been made, but that fact cannot be taken into consideration in interpreting the provisions of the Act. We are, therefore, unable to accept the contention of Mr. Burman that because the finally published record-of-rights have not yet been modified in accordance with Section 47 read with Rule 31-A of the Rules, the holding continued to be joint holding and the raiyats continued to be co-sharers of each other.

20. It has been argued by Mr. Lala that the right of pre-emption as conferred by Section 26-F on co-sharer raiyats of an occupancy holding, has been altogether abrogated by the West Bengal Estates Acquisition Act. It has been already stated that the Division Bench consisting of Banerjee and D. Basu, JJ., in 68 Cal WN 574 = (AIR 1964 Cal 460) and in (1964) 68 Cal WN 1055 repelled the contention that the words 'terms and conditions' in Rule 4 did not include the rights of pre-emption under S. 26-F. Although the same argument as was made before the Division Bench was also repeated before us by Mr. Lala and other learned Advocates appearing on behalf of the transferees, we do not see any reason to differ with the decisions of the Division Bench in so far as it was held therein that the words 'terms and conditions' in Rule 4 also included the right of pre-emption under Section 26-F. It has been earlier stated that the Rule 4 was substituted on September 7, 1962. In sub-rule (3) of R. 4, Section 26-F was included as one of the terms and conditions on which an intermediary shall hold the land retained by him. This removes any doubt as to whether the words 'terms and conditions' in Rule 4 included the right of pre-emption under S. 26-F.

21. It is argued that in view of the definite inclusion of Section 26-F in sub-rule (3) of R. 4 by the amendment effected on September 7, 1962, it cannot be said that by the enforcement of Chapter VI relating to raiyats and under-raiyats, the right of pre-emption has been totally abrogated by the legislature. It has been contended that to hold that each raiyat has become a direct tenant:

under the State in respect of the land which he is entitled to retain or which has been retained by him, will lead to an irreconcilable position between such an interpretation of the Act and the provisions of sub-rule (3) of Rule 4. Further it has been submitted that in view of sub-rule (3) which was inserted in Rule 4, it should be held that the right of pre-emption is kept alive even after the enforcement of Chapter VI. This argument cannot be accepted for the reasons stated hereafter.

22. Anybody making an application before the Court in exercise of his right of pre-emption under Section 26-F must show that he is a co-sharer tenant of the holding a portion or share of which has been transferred to a non-co-sharer. If he fails to prove that he is a co-sharer tenant of the holding in question, he cannot claim to have any right of pre-emption under Section 26-F. The primary question which has to be decided in connection with an application for pre-emption under Section 26-F is, whether the applicant is a co-sharer in the tenancy or not. In case it is found that he is a co-sharer his application will be held maintainable and he will be entitled to exercise his right of pre-emption, but if he fails to prove the same his application will be dismissed on the ground that he has no such right under Section 26-F. After the date of vesting, each raiyat of a holding ceases to be a co-sharer in respect of that holding, as found by us on an interpretation of the different provisions of the Act and the Rules. A raiyat who was a co-sharer in respect of the holding in question cannot, after the date of vesting, claim to be a co-sharer of another raiyat in respect of the land which he is entitled to retain or retained by him under sub-section (1) of S. 6. Such a raiyat is not entitled to make an application for pre-emption under S. 26-F in respect of a transfer made by another raiyat out of the land which he is entitled to retain or which has been retained by him under sub-section (1) of S. 6. As the raiyat is not a co-sharer and as the holding prior to vesting is no longer in existence, since in its place and stead separate holdings or tenancies have come into existence by virtue of sub-sec. (2) of S. 6, there will be no scope for an application under Section 26-F.

23. At the same time, it cannot be said that co-sharership of a raiyati holding has been altogether abolished by the legislature particularly in view of sub-rule (3) of Rule 4 wherein Section 26-F had been specifically included. On the date of vesting there may not be any co-sharer of the raiyati holding but after the date of vesting co-sharers may come into being by devolution of interest of

a raiyat relating to the land retained by him. Only in such cases, Section 26-F will apply. To take a concrete illustration, a raiyat who was a co-sharer of a particular holding retains land of the holding under sub-section (1) of S. 6 of the Act. He becomes a direct tenant in respect of the land retained by him and ceases to be a co-sharer in respect of the remaining land of the holding not retained by him or retained by other raiyats. The land which he is entitled to retain or retained by him, forms a separate holding or a separate tenancy directly under the State. If the raiyat dies after the date of vesting leaving a number of heirs, the heirs will be co-sharer-raiyats of each other. One heir being a co-sharer of the other will be entitled to invoke the provisions of S. 26-F and exercise his right of pre-emption in case any other co-sharer transfers a portion of such separate holding to any other person who is not a co-sharer. Similarly a raiyat of a separate holding created after the date of vesting, may transfer a portion of the holding to another person. That person becomes a co-sharer of the holding along with his vendor. If one of these two co-sharers transfers a portion of the holding to another person, Section 26-F will apply. On the happening of such events, namely, the death of the raiyat leaving more than one heir and transfer by the raiyat of a portion of the separate holding after the date of vesting and in similar such cases, Section 26-F will apply. It is thus found that there is no force in the argument that sub-rule (3) of Rule 4 cannot be reconciled in case it is held that on the date of vesting each raiyat becomes a direct tenant of the land which he is entitled to retain under sub-section (1) of S. 6 of the Act. But in the absence of any such events taking place, Section 26-F will not apply between the erstwhile co-sharers.

24. Sub-rule (3) of R. 4 was further amended on August 1, 1964, whereby Section 26-F was deleted from sub-rule (3). This deletion of Section 26-F from sub-rule (3) does not mean that the right of pre-emption has been taken away, but it has some other objective in view which will be stated presently. After the enactment of the Act, West Bengal Land Reforms Act, 1955, was enacted. By Section 8 of the West Bengal Land Reforms Act, a right of pre-emption similar to the right conferred by S. 26-F has been provided for. Section 8 came into force on October 22, 1963. Under Section 26-F the forum for making the application for pre-emption was the Court, but under Section 8 the application has to be made to the Revenue Officer. After the enforcement of Section 8 it became wholly unnecessary to allow Section 26-F to remain in sub-rule (3)

of R. 4. The amendment of sub-rule (3) was made on August 1, 1964, that is, a considerable time after the enforcement of Section 8, but in our view that does not make any difference for the right of pre-emption will have to be exercised in accordance with Section 8 regarding transfers taking place after the enforcement of Section 8. As regards transfers made before Section 8 had been enforced, Section 26-F and not Section 8 will apply. In this connection it may be stated that on the enforcement of clause (5) of Section 59 of the West Bengal Land Reforms Act, 1955, on November 1, 1965, Bengal Tenancy Act stands repealed with effect from that date. Section 26-F was, therefore, deleted from sub-rule (3) of Rule 4 in view of the enforcement of Section 8 of the West Bengal Land Reforms Act, 1955, although it should have been deleted simultaneously with the enforcement of Section 8.

25. We may now consider some other decisions of this Court cited at the Bar during the hearing. These decisions are (I) Ganesh Chandra v. Sudarshan Dey, (1958) 62 Cal WN 360; (II) Panchu Sundari Dasi v. Haripada Biswas, (1961) 65 Cal WN 354; (III) Shiba Prosad Gerua v. Manmatha Nath Gupta, (1961) 65 Cal WN 811; (IV) Nitai Chandra Das v. Sisir Kumar Das, (1964) 67 Cal WN 633 and (V) Dhananjay Senapati v. Debendra Nath Senapati, (1964) 67 Cal WN 848. These are all Single Bench decisions of this Court. Apart from these decisions, reference was made to one unreported Bench decision in Sudhir Kumar Ghosh v. Sarat Chandra Ghosh, Civil Revn. Case No. 3366 of 1961 disposed of on 21-9-1962 (Cal). All these decisions proceeded on the footing that on and from the date of vesting the raiyats of a holding continued to be co-sharers by retaining the land comprised in the holding. In (1964) 67 Cal WN 648 referred to above, Chatterjee, J. has taken the view that as a result of vesting persons who were deemed to be intermediaries, would still be entitled to retain the land and if they retained, they would become tenants of a new tenancy under the State on such terms as the State may prescribe. So according to Chatterjee, J. a single tenancy comes into being and not separate tenancies. Chatterjee, J. concluded that if the former co-sharers retained their interests in the holding, they became co-sharers by virtue of the Act and the Rules and that they would be entitled to the right of pre-emption. For the reasons which we have already set out in detail, we are unable to subscribe to the view expressed by Chatterjee, J. We also disagree with the view expressed in the other decisions referred to above including the unreported Bench decision.

26. Now we are to consider the position of under-raiyats before and after vesting. Section 26-F does not in terms apply to under-raiyati holdings, though an under-raiyat may have occupancy right by local customs under Section 48-G of the Bengal Tenancy Act. Mr. Sudhir Kumar Acharjee, learned Advocate appearing on behalf of the opposite parties including the purchaser in C. R. No. 2275 of 1961 urged that the holding being an under-raiyati holding, the petitioner had no right of pre-emption under S. 26-F and that the application for pre-emption should also fail on that ground. Mr. Acharjee submitted that although under-raiyats were elevated to the position of raiyats having occupancy right, such elevation was for certain specific purposes. Our attention was drawn to Section 52 of the West Bengal Estates Acquisition Act, particularly to the words 'and a person holding under a raiyat or an under-raiyat were a raiyat for the purposes of clauses (c) and (d) of Section 5'. Clauses (c) and (d) of sub-section (1) of S. 5 are as follows:—

5. Effect of Notification.— (1) Upon the due publication of a notification under Section 4, on and from the date of vesting—

(c) Subject to the provisions of sub-section (3) of S. 6, every non-agricultural tenant holding any land under an intermediary, and until the provisions of Chapter VI are given effect to, every raiyat holding any land under an intermediary, shall hold the same directly under the State, as if the State had been the intermediary and on the same terms and conditions as immediately before the date of vesting.

(The provisos not being relevant for our purpose are omitted).

(d) every non-agricultural tenant holding under an intermediary and until the provisions of Chapter VI are given effect to, every raiyat holding under an intermediary, shall be bound to pay to the State his rent and other dues in respect of his land, accruing on and from the date of vesting, and every payment made in contravention of this clause shall be void and of no effect.

27. After Chapter VI came into force, the interests of raiyats and under-raiyats vested in the State as if they were intermediaries and the land held by them were estates. Clauses (c) and (d) of Section 5 (1) read with Section 52 and its proviso imply that the purposes referred to in the first part of Section 52 as quoted above are that the under-raiyats will hold the land under the State and pay rent to the State in accordance with the proviso to Section 52, the amount of rent depending on the land retained by the under-raiyats. In our view, the under-

raiylats having been elevated to the position of raiylats, there is no difference between a raiyat and an under-raiyat so far as the right of pre-emption under Section 26-F is concerned, and our decision on the question as to the effect of the enforcement of Chapter VI on the right of pre-emption of raiylats having occupancy rights under Section 26-F, will equally apply to under-raiyats.

28. For the reasons aforesaid, we hold as follows—

(1) After the enforcement of Chapter VI of the Act and the vesting of interest of raiylats and under-raiyats on and from April 14, 1956 corresponding to Baisakh 1, 1363 B. S. the co-sharer raiylats of a holding ceased to be co-sharers and each raiyat of the holding became a direct tenant under the State in respect of the land of that holding which he is entitled to retain under sub-section (1) of S. 6. As the co-sharer raiylats ceased to be co-sharers on and from the date of vesting, the question of exercise of the right of pre-emption under S. 26-F cannot arise, for, the condition precedent to the exercise of the right of pre-emption under Section 26-F being that the person exercising that right must be a co-sharer of the person making the transfer.

(2) When a raiyat having a separate holding or tenancy created by virtue of sub-section (2) of S. 6 relating to the land retained by him under sub-section (1) of S. 6, dies leaving more than one heir, such heirs will become co-sharers of such holding and will be entitled to the right of pre-emption under Section 26-F. Similarly, when the raiyat of such a holding transfers a portion of the holding to another person, that person will become a co-sharer of the raiyat and the right of pre-emption will also be available in such a case.

(3) A transfer made by a co-sharer raiyat as contemplated by Cl. (2) above before the enforcement of Section 8 of the West Bengal Land Reforms Act, 1955, may be pre-empted by another co-sharer in the tenancy in accordance with Section 26-F, but a transfer made after the enforcement of Section 8, the right of pre-emption by a co-sharer can only be exercised in the manner laid down in Section 8 of the West Bengal Land Reforms Act.

(4) The under-raiyats have been elevated to the status of raiylats on the enforcement of Chapter VI. There is no difference between the position of raiylats and that of under-raiyats and our decision on the question as to the effect of the enforcement of Chapter VI on the right of pre-emption of raiylats will also apply to under-raiyats.

(5) The decisions in 68 Cal WN 574 = (AIR 1964 Cal 460) and Jyotish Chandra Das v. Dhananjay Bag. (1964) 68

Cal WN 1055 in so far as they proceeded on the footing that the raiylats of a holding continued to be co-sharers even after vesting, are erroneous but they have correctly interpreted the expression 'terms and conditions' in Rule 4.

29. We have disposed of the main point referred to the Full Bench and all points ancillary thereto, but as some other points arising out of the respective facts and circumstances of some of these revision cases have been argued, we propose to consider the same. In C. R. 674 of 1958, the impugned transfer was made on January 22, 1955 and the application for pre-emption was made on June 11, 1955, that is, both took place before the enforcement of Chapter VI. It was during the pendency of the proceeding in the trial Court that Chapter VI was enforced by the issue of the notification under Section 49 and the interests of raiylats vested in the State. It has been contended by Mr. Nirmal Kumar Ganguly, learned Advocate appearing on behalf of the pre-emptors opposite parties that in view of sub-section (7) of S. 26-F, the enforcement of Chapter VI during the pendency of the pre-emption proceeding will not affect the proceeding. Under sub-section (5) of S. 26-F, the Court makes an order allowing an application and under sub-section (6), the Court making an order in favour of more than one co-sharer tenant apportions the property comprised in the portion or share transferred among the applicants in accordance with the manner provided in that sub-section. Sub-section (7) is as follows:

(7) From the date of the making of the order under sub-section (5)—

(a) the right, title and interest in the portion or share of the holding, accruing to the transferee from the transfer shall, subject to the provisions of Section 22 and to any orders passed under sub-section (6), be deemed to have vested, jointly and free from all incumbrances which have been annulled or created after the date of transfer, in the co-sharer tenants, whose applications to purchase have been allowed under this section.

(b) the liability of the transferee for the rent due from him on account of the transfer shall cease, and

(c) the Court on further application of such applicant or applicants may place him or them, as the case may be, in possession of the property vested in them.

30. It is manifestly clear from the opening words of sub-section (7) that the consequences of an order passed under sub-section (5) as contained in clauses (a), (b) and (c) of sub-section (7), will take effect from the date of the order. In the instant case, before any order was passed by the trial Court, Chapter VI had come into force. In view of our

decision that the raiyats of an occupancy holding who were co-sharers before the vesting ceased to be co-sharers, the application was no longer maintainable and the proceeding for pre-emption became infructuous. The contention of Mr. Ganguly is accordingly, rejected.

31. In connection with this case, we may dispose of two other points raised by Mr. Lala, namely, (1) that occupancy right as contemplated by the un-amended Rule 4 (a) is not the same occupancy right under the Bengal Tenancy Act and (2) that Rule 4 (a) having used the term 'occupancy raiyat', not mentioned in any of the provisions of the West Bengal Estates Acquisition Act, Rule 4 (a) is ultra vires the Act.

32. So far as the first point is concerned, in view of the clear language of Rule 4 (a) entitling the intermediary who has retained possession of agricultural land, to hold the same on the same terms and conditions as an occupancy raiyat under the Bengal Tenancy Act, it cannot but be held that the contention of Mr. Lala is without any substance. The second point raised by Mr. Lala cannot be entertained, for the simple reason that no notice has been given to the Advocate-General as required under O. 27-A of the Code of Civil Procedure.

32-A. The next point that we have to consider is about the period of limitation for filing an application under Section 26-F. That point has been raised in C. R. No. 3465 of 1965 and C. R. No. 2097 of 1967. Section 26-F prescribes a period of four months from the service of notice under Section 26-C. The question is when the notice is not served, what should be the period of limitation for filing an application by a non-notified co-sharer. The question has been decided by a Special Bench of this Court presided over by Mukherjea, J. (as his Lordship then was) in *Asmatiali v. Mujaharali*, 52 Cal WN 64 = (AIR 1948 Cal 48) (SB). It has been held by Mukherjea, J., Ormond and Dass JJ. concurring with him, that Art. 181 of the Indian Limitation Act, 1908 applies to the case of an application under Section 26-F by a co-sharer tenant who has not been served with a notice under Section 26-C and his application would be in time if made within three years of the sale. In applying Art. 181, it has been held by his Lordship that an application under sec. 26F is an application under the Code of Civil Procedure.

33. In C. R. No. 3465 of 1965, the date of the impugned sale is March 20, 1960 and the application for pre-emption was made on June 18, 1962, that is, within three years of the date of sale. In view of the aforesaid Special Bench decision, the application was filed quite within the period of limitation.

34. In the other case, the date of the impugned transfer is January 29, 1963 and the application for pre-emption was filed on August 13, 1966, that is beyond three years of the sale. The application is, therefore, barred by limitation. Mr. Bhunia, learned Advocate appearing on behalf of the pre-emptor-opposite party has strenuously urged that in view of the decisions of the Supreme Court which will be referred to presently, the finding of the Special Bench in *Asmatiali's case*, 52 Cal WN 64 = (AIR 1948 Cal 48) (SB) that an application under Section 26-F is an application under the Code of Civil Procedure which is the basis of the Special Bench decision in applying Article 181, is erroneous. In *Sha Mulchand & Co. Ltd. v. Jawahar Mills Ltd.*, 1953 SCR 351 = (AIR 1953 SC 98); *Bombay Gas Co. v. Gopal Biva*, AIR 1964 SC 752 and *Smt. Prativa Bose v. Rupendra Deb*, AIR 1965 SC 540, the Supreme Court has held that Art. 181 applies only to applications under the Code of Civil Procedure and the Article is inapplicable to applications under other enactments.

35. In our view, the aforesaid Supreme Court decisions do not at all help Mr. Bhunia. The Special Bench in *Asmatiali's case*, 52 Cal WN 64 = (AIR 1948 Cal 48 SB) also noticed that Article 181 would only apply to applications under the Code of Civil Procedure, but it held that an application under S. 26-F was an application under the Code of Civil Procedure. The question whether an application under Section 26-F is an application under the Code of Civil Procedure, was not involved in any of the Supreme Court decisions referred to above and no other decision of the Supreme Court has been cited at the Bar in which the question has been decided by the Supreme Court. Accordingly, the law laid down by the Special Bench in *Asmatiali's case*, 52 Cal WN 64 = (AIR 1948 Cal 48 SB) still stands as good law. The contention of Mr. Bhunia that the decision of the Special Bench, that an application under Section 26-F is an application under the Code of Civil Procedure, is erroneous, is rejected.

36. Mr. Bhunia, however, contended that as the pre-emptor-opposite party was, by means of the fraud of the petitioner, kept from the knowledge of his right under Section 26-F, the opposite party was entitled to the benefit of Section 18 of the Indian Limitation Act, 1908. It appears that the trial Court found that the petitioner fraudulently suppressed the notice under Sec. 26-C. Applying the provisions of Section 18, the trial Court held that the application having been filed on August 13, 1966, that is, within three years after the opposite party came to know of the trans-

fer for the first time on August 8, 1965, the application was not barred by limitation. The lower appellate Court has affirmed the said findings of the trial Court and the findings of the Courts below have not been challenged before us by Mr. Ghosal, learned Advocate for the petitioner. In view of the said findings of the Courts below we do not see any reason why Section 18 would not apply. The application for pre-emption was not, therefore, barred by limitation. But, in spite of our finding that the application was not barred, the Rule must succeed, for, according to the view which we have taken the opposite party ceased to be a co-sharer after Chapter VI came into force and consequently the application for pre-emption became non-maintainable.

37. Before we conclude we may dispose of a short point raised by Mr. Sen Gupta, learned Advocate appearing for the purchaser-petitioner in C. R. No. 3465 of 1965. Mr. Sen Gupta contended that after his purchase the petitioner made certain improvements in the land purchased by him by erecting a building thereon; that the pre-emptor opposite party No. 1 was bound to deposit in Court along with his application for pre-emption the compensation for the building erected by the petitioner and that for non-deposit of such costs the application of the opposite party No. 1 was not maintainable. In our opinion, this contention of Mr. Sen Gupta is without any substance, for the simple reason that the provisions of Section 26-F do not require the applicant to deposit compensation for the improvement made by the transferee. Under sub-section (2) of S. 26-F all that is required is that at the time of making the application, the applicant shall deposit in Court the amount of the consideration money or the value of the transferred portion or share of the holding, as stated in the notice under Section 26-C, together with compensation at the rate of ten per centum of such amount. The contention of Mr. Sen Gupta is accordingly, overruled.

38. In view of the discussions aforesaid, Civil Rules Nos. 674 of 1958, 3410 of 1961, 3624 of 1961, 3465 of 1965, 2029 of 1967 and 2362 of 1967 in which the applications for pre-emption were allowed by the Courts below in favour of raiyats who ceased to be co-sharers after the date of vesting, are made absolute and the orders of the Courts below allowing pre-emption under S. 26-F are set aside. In Civil Rules Nos. 2275 of 1961 and 3764 of 1961, the orders of the Courts below disallowing the applications for pre-emption under Section 26-F are affirmed and these two rules are discharged. In each of these rules, there will be no order for costs in this Court.

ARUN K. MUKHERJEE, J.:— 39.

I agree.

SABYASACHI MUKHARJI, J.:—

40. I agree.

Order accordingly.

AIR 1972 CALCUTTA 516 (V 59 C 111)

SPECIAL BENCH

A. K. MUKHERJEE, SABYASACHI
MUKHARJI AND M. M. DUTT, JJ.

Sm. Sabitri Devi Saraf, Petitioner v.
M/s. Ramgopal Motilal Kajoria, Opposite
Party.

C. R. 1249 of 1969, D/- 28-7-1972.

Index Note:— (A) West Bengal Premises Tenancy Act (12 of 1956), S. 10 — Application for standardization of rent by tenant—Application does not cease to be maintainable merely because subsequently, the tenancy is determined by notice of ejectment or that the premises are requisitioned by Government — (Case law discussed) — (X-Ref:— Section 2 (h)).

(Para 5)

Brief Note:— (A) There is nothing in the scheme of the Act or in the definition of the tenant, which defeats an application, if it was valid and properly made, at the time when it was made by the subsequent notice of ejectment or by the subsequent dispossession of the tenant. Furthermore, the definition of tenant, if it be relevant, would be relevant only for the determination of the rights of the parties at the time of the institution of the proceeding, a proceeding validly instituted must be determined, in accordance with law, unless there is an indication either express or implied in the Act that such proceedings become infructuous by subsequent events. There is no such indication either express or implied in the West Bengal Premises Tenancy Act (1956).

(Para 5)

Cases Referred: Chronological Paras

AIR 1968 SC 471 = (1968) 2 SCR

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Ltd. v. Happy Homes Ltd. 4

(1963) Civil Revn. No. 42 of 1961,

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Gupta 4

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v. Nripen Bhattacharjee 3

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Gupta 3

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WN 30, F. D. Bellow v. T. Elke 3

C. C. Ganguli and Miss Nirmala
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Deb, S. K. Ray, A. K. Banerjee and Uday
Sankar Chatterjee, for Opposite Party.

S. MUKHARJI, J.:— On 7-3-1966 there was an agreement for tenancy between the petitioner and the respondent, herein in respect of suit No. 2 in the ground-floor of premises No. 6, Russel Street regarding four rooms, three baths, one pantry and one verandah at a monthly rental of Rs. 2,000/- according to the English calendar month. It is stated that the petitioner wanted to start a Nursing Home in the said premises in question. The petitioner's case is that the contract rent was fixed high because the landlord had agreed to renovate the rooms and to make certain additions and alterations, which, however, the landlord did not do. Shortly before the tenancy was created, it has been further stated, the premises in question had a monthly rental of Rs. 500/-, the previous tenant being National and Grindlay's Bank Ltd. On the 29th of June, 1966, the petitioner made an application to the Controller for fixation of fair rent. On the 14th October, 1966, notice for ejectment of the petitioner was given by the respondent expiring with the month of November. In the meantime after inspection by the Rent Controller's Inspector and personal inspection by the Rent Controller, evidence was taken on behalf of both sides between 11th May, 1967 to 14th July, 1967. The petitioner's argument in that case was also heard. The respondent argued in part. Thereafter on 7th of June, 1967 an ejectment suit was filed by the respondent against the petitioner being suit No. 1284 of 1967 in the Original Side of this High Court, the grounds being default and subletting. On the 25th November, 1967 written statement was filed by the petitioner and rent deposited in accordance with the provisions of the West Bengal Premises Tenancy Act, 1956. On the 23rd October, 1967 the premises in question was requisitioned by the Government under the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947. On the 24th of October, 1967 possession was taken by the Government of the said premises and the petitioner was dispossessed. On the 19th January, 1968 the Rent Controller dismissed the application made by the petitioner for fixation of fair rent as not maintainable.

The said case was numbered as 435B of 1966. On the 6th of June, 1968 the petitioner applied to the Land Acquisition Collector for fixation of rent. On the 13th January, 1969 the appeal preferred by the petitioner against the order of the Controller in case No. 435B of 1966 was dismissed in Rent Appeal No. 15 of 1969 by the Court of Small Causes, Calcutta and the order of the Rent Controller dismissing the application of the petitioner for fixation of the fair rent on the ground that it was not maintainable was affirmed. On the 6th of February, 1969 the Land Acquisition Collector rejected the claim of the petitioner for compensation for requisition of the premises. On the 22nd of April, 1969 the petitioner moved under Article 227 of the Constitution this Civil revision application against the aforesaid order of the Court of Small Causes dated 13th of January, 1969 in Rent Appeal No. 15 of 1968 and the order of the Rent Controller in case No. 435B of 1966 dated 19th January, 1968. This rule originally came up for hearing before a Division Bench consisting of P. N. Mookherjee and Amiya Kumar Mukherjee, JJ., and by order dated 30th of April, 1970 the case has been referred to the Special Bench under Chapter VII, Rule 4 read with Rule 9 of the Appellate Side Rules of this Court. The main question that their Lordships felt arose in this case was whether during the pendency of a proceeding for fixation of fair rent under the West Bengal Premises Tenancy Act, 1956, at the instance of a tenant if the tenanted premises was requisitioned and taken possession of by the State Government under the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947, the said proceeding ceased to be maintainable as a matter of law and whether it would fail in limine on that preliminary ground. Their Lordships of the Division Bench felt that the question was an important one and it necessitated reference to the Special Bench and accordingly the whole case has been referred to us.

2. The application for fixation of fair rent in this case had been made under the provisions of West Bengal Premises Tenancy Act, 1956. Therefore, it is necessary to refer to the relevant statutory provisions under the said Act in order to determine the controversy in this case. Section 2 (h) of the said Act provides the definition of "tenant" as follows:—

"(h) "tenant" includes any person by whom or on whose account or behalf, the rent of any premises is, or but for a special contract would be, payable and also any person continuing in possession after the termination of his tenancy but shall not include any person against

whom any decree or order for eviction has been made by a Court of competent jurisdiction." Section 4 provides the excess over fair rent to be irrecoverable. It stipulates that the tenant shall pay to the landlord fair rent where it has been fixed for any premises, such rent and in other cases the rent agreed upon until fair rent is fixed. It further provides, *inter alia*, that any sum in excess of the rent referred to in sub-section (1) shall not be recoverable by the landlord. Section 7 provides that where any sum or any other consideration has been paid, by or on behalf of any tenant to a landlord in contravention of any of the provisions of the Act, the Controller may, on application made to him, within a period of six months from the date of such payment, order the landlord to refund such sum or the value of such consideration against the rent payable by the tenant. Sub-section (2) of the said section further provides that the provisions of sub-section (1) mentioned hereinbefore, shall not apply to any case of decrease of rent to which Section 12 applies. Section 8 provides how fair rent would be determined. Section 10 imposes upon the Controller the obligation of disposing of the applications made to him either by landlord or tenant in the prescribed manner to fix fair rent in respect of any premises. Clause (a) of Section 12 provides that where fair rent has been fixed by the Controller by decreasing the rent agreed, the excess amount paid shall be recoverable under the order of the Controller by instalments or otherwise. Clause (b) of Section 12 provides where rent has been increased it would be recoverable by the landlord by instalments or otherwise as the Controller might order with certain limitations. Section 13 gives protection to the tenant against the eviction in certain cases. Section 21 deals with the deposit of rent. Section 22 deals with the time-limit for making deposit and consequences of incorrect particulars in application for deposit and Section 23 provides for saving as to acceptance of rent in certain cases. The West Bengal Premises Rent Control Act of 1950 provided a slightly different definition of the tenant. It provided—

"11 "tenant" means any person by whom rent is, or but for a special contract would be, payable for any premises, and includes—

(i) any person who is liable to be sued by the landlord for rent; and

(ii) any person whose interest in the premises has been *ipso facto* determined under sub-section (3) of Section 12 of the West Bengal Premises Rent Control (Temporary Provisions) Act 1948."

In view of the certain decisions it may be mentioned that the definition under

the 1950 Act was more or less similar to the definition provided in the Rent Act, 1920.

3. The case of *F. D. Bellow v. T. Elke*, 29 Cal WN 30 = (AIR 1924 Cal 715) was a case under the Calcutta Rent Act of 1920. There a tenant applied for standardisation of his rent, but before the application came on for hearing he was ejected from the premises in pursuance of a decree of the Calcutta Small Cause Court. Subsequently the Rent Controller dismissed the application for fixation of standard rent on the ground that the applicant was no longer a tenant of the premises. It was held that there was nothing in the Act which provided that the application would become inoperative, although properly made in the first instance, because subsequent to the making of the application but before the rent was standardised a change of tenant took place. The words "tenant, if any" in Section 15, clause (4) indicated that it was possible that when the time came for the Rent Controller to give notice of his intention under the Act one of the parties might have ceased to be either a landlord or a tenant. The case *Deoki Prosad v. Dulichand*, AIR 1954 Cal 532, the Division Bench of this Court was concerned with the case under West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. It was held that the definition of "tenant" included ex-tenant in possession, whose tenancy had been determined, by an ejectment decree. An application for standardisation of rent, validly made by a tenant, did not cease to be maintainable, merely because, during the pendency of the said proceedings, a decree for ejectment was passed against him. Reliance was placed before the learned Judges on the case of *Sukhdeoas Ram Prosad v. Jaintilal Jamunadas*, AIR 1926 Cal 697, a decision upon which reliance was also placed before us at the instant reference. It was held by the Division Bench in the case of AIR 1954 Cal 532 (*supra*) that in view of the decision of the Judicial Committee in the case of *Karanani Industrial Bank Ltd. v. Satya Niranjan Shaw*, AIR 1928 PC 227 the said decision reported in AIR 1926 Cal 697 must be held to have been overruled. We will refer to this decision later. The case of *Srikaur Mohta v. Nripen Bhattacharjee*, 61 Cal WN 547, was also a case under the West Bengal Premises Rent Control Act, 1950. It was held by the Division Bench that where at the time of the application for standardisation of rent there was a subsisting relationship of landlord and tenant between the parties, the cessation of tenancy during the pendency of the said application did not make the same incompetent or disentitle the applicant from maintaining or proceeding with the

same. It was further held that the standardisation of rent was within the exclusive jurisdiction and competence of the Rent Controller. In the case of *Ahamuddin v. Banku Behary Dutt*, 31 Cal WN 308 = (AIR 1927 Cal 305) it was held by a Division Bench of this Court that a decision fixing the standard rent attached to the premises and not to the persons or parties to that suit and therefore such a decision was a judgment in rem and not in personam. 32 Cal WN 1093 = (AIR 1928 PC 227) is the decision of the Privy Council which has already been referred to. That was a case under the Calcutta Rent Act of 1920. It was held by the Judicial Committee that the words "landlord" and "tenant" in Section 15 (1) of the Rent Act one must include an ex-landlord and an ex-tenant. The word "tenant" in Section 11 must include a person whose term under the contract of tenancy had come to an end. The Act therefore, applied in appropriate cases to an ex-tenant and it made no difference whether the tenancy came to an end by effluxion of time or act of the landlord or act or default of the tenant. It was held even under the strict words of the definition of "tenant" given in clause 2 (g), persons by whom arrears of rent were payable at the date of their applications to the Controller, would be "tenants". It was further held that the Controller had power to fix the standard rent so as to operate retrospectively. In the case of *Tarabai Jivanlal v. Kadamchand*, AIR 1950 Bom 89, a learned single Judge of the Bombay High Court held that an order under the Defence of India Rules requisitioning a flat was essentially of a temporary nature and did not create in the government any vested interest in the tenancy. It also did not operate as a surrender so as to terminate the tenancy. It has further held that a monthly tenant, therefore, from whose occupation the flat was requisitioned continued to be a monthly tenant as before. Possession of government of the flat under requisition under the Defence of India Rules, did not amount either to an eviction by title paramount or as frustration of adventure. In the case of *State of West Bengal v. Benode Behari Gupta*, (1956) 60 Cal WN 253 it was held that an order fixing the standardized rent in respect of a premises governed not only the tenant who was in occupation at the relevant date but also those who might be coming thereafter. Such an order attached to the premises and was a relevant piece of evidence which had to be taken into consideration while fixing the compensation payable by the State to the owner when the premises were requisitioned.

4. Counsel for the respondent, however, contended that after notice for ejectment had been given in this case, the contractual tenancy came to an end, and the petitioner at best became a statutory tenant. It was urged that a statutory tenant had only a right to hold on to the property. But the moment the property was requisitioned and a statutory tenant was dispossessed by the order of the Government the statutory tenant had no further right under the Act. Reliance was placed on the observations of the Supreme Court in the case of *Calcutta Credit Corporation Ltd. v. Happy Homes (P.) Ltd.*, AIR 1968 SC 471. Counsel for the respondent further contended that in view of the facts and circumstances of this case the applicant for standardisation of fair rent had lost his rights, if any, to any relief after eviction by the order of requisition. Reliance was also placed on the Division Bench decision in the case of AIR 1926 Cal 697 which was a case under the Calcutta Rent Act of 1920 and wherein it was held that an application for standardization of rent to Rent Controller, after a decree in suit for ejectment had been passed ejecting the tenant, was not competent as there was no tenancy in existence thereafter. We are of the opinion that in view of the decision of the Judicial Committee in the case of 32 Cal WN 1093 = (AIR 1928 PC 227) this decision must be held to have been overruled. On this question we are in respectful agreement with the views of the division bench in the case of AIR 1954 Cal 532 (supra). Furthermore, the facts of the instant case are materially different from the facts of the case of AIR 1926 Cal 697 (supra). Our attention was also drawn to the judgment of Chatterjee, J. in the case of *Bhutanath Mukherjee v. Pranesh Chandra Gupta*, Civil Revn. No. 42 of 1961 (judgment delivered on 18-7-1963 (Cal)). The learned Judge was of the opinion that as according to the definition of a tenant in the West Bengal Premises Tenancy Act, after a decree for ejectment the person who had applied for fixation of rent was not a tenant, the proceeding became infructuous.

5. It appears to us that in view of the statutory position, it is apparent that in this case when the tenant applied for standardisation of rent he was undoubtedly entitled to do so, the tenancy had not been determined then by any notice for ejectment. Furthermore the tenant was at that time in occupation of the premises. As mentioned hereinbefore the application for standardisation of rent was made on the 29th of June, 1966 and the possession of the premises was taken from the tenant on the 24th October, 1967. Therefore from the afore-

said facts, it is apparent that not only was the application, when made, was a proper application, but furthermore the tenant has a valid right to ask for determination of his liability for rent upto 24th October, 1967. In view of the provisions of Section 12 the tenant would be entitled to any sum of money in such a manner as the Controller might order if the rent is decreased. Equally the landlord would be entitled to recover any sum of money pursuant to the order of the Controller under Section 12 of the Act if the fair rent is determined for an amount which is in excess of the amount agreed. There is nothing in the scheme of the Act or in the definition of the tenant, in our opinion, which defeats an application, if it was valid and properly made, at the time when it was made by the subsequent notice of ejectment or by the subsequent dispossession of the tenant. The definition of a tenant in this case excludes any person against whom a decree or order for eviction has been passed by a court of competent jurisdiction, in this case as yet no decree has been passed by any Court of competent jurisdiction. Therefore, the fact that the definition provided in the 1950 Act or in 1920 Act is not material on this aspect of the matter. The alteration of the definition in the facts of this case does not affect the position. Furthermore, the definition of the tenant, if it be relevant, would be relevant only for the determination of the rights of the parties at the time of the institution of the proceeding, a proceeding validly instituted must be determined, in accordance with law, unless there is an indication either express or implied in the Act that such proceeding becomes infructuous by subsequent events. We have not been able to find any such indication either express or implied in the West Bengal Premises Tenancy Act, 1956. Therefore, we are unable to accept the position that after service of a notice of ejectment a statutory tenant has no right to proceed or prosecute an application for standardization of fair rent. We are also unable to accept the position that if an application for standardization for fair rent had been properly made by a competent person subsequent dispossession of the premises by one of the parties, in any way effects the continuance of the said proceeding. We are not concerned in this application with the questions as what would be the effect of the determination of the fair rent on the future rights of the parties or whether a determination of fair rent is a judgment in rem or a judgment in personam nor are we concerned with the question whether an order for requisition puts an end to the tenancy or not. We, therefore, express no opinion on

these questions. For purpose of this application we hold that the application for the standardization of rent in the instant case was validly made at the time when the said application had been made and the same application did not become not maintainable or was liable to be dismissed in limine, in view of the subsequent requisition of the premises by the government. The Controller, will have jurisdiction therefore to determine the fair rent and order the recovery of any increase or decrease of the rent as the case may be, in the manner indicated under Section 12 of the Act.

6. In the aforesaid view of the matter it must be held that the decisions of the Rent Controller in Case No. 435B of 1966 dated 19th January, 1968 and the judgment of the Court of Small Causes in Rent Appeal 15 of 1968, in so far as those held that the application in the instant case by the tenant for fixation of rent was not maintainable any longer were incorrect. We accordingly set aside the said order passed by the Rent Controller dated 19th of January, 1968 in case No. 435B of 1968 as well as the order dated 13th of January, 1969 in Rent Appeal No. 15 of 1968 passed by the 4th Bench of the Court of Small Causes, Calcutta and direct the Rent Controller to hear and determine the said application of the tenant in case of 435B of 1966 in accordance with law. The rule is made absolute to the extent indicated above. In the facts and circumstances of this case, we make no order as to costs of this application.

ARUN K. MUKHERJEA, J.:— 7. I agree.

M. M. DUTT, J.:— 8. I agree.
Rule made absolute.

**AIR 1972 CALCUTTA 520 (V 59 C 112)
FULL BENCH**

**A. K. MUKHERJEA, SABYASACHI
MUKHARJI AND MURARI MOHAN
DUTT, JJ.**

Chaitanya Charan Nayak, Petitioner
v. Manik Chandra Nandy and others.
Opposite Parties.

Reference No. 1 of 1968, in C. R. No. 246 of 1961, D/- 28-7-1972.

Index Note: (A) Bengal Tenancy Act (8 of 1885), S. 26-F—West Bengal Estates Acquisition Act (1 of 1954), S. 6 (1) — Occupancy raiyat — Occupancy tenancy can only be created under Tenancy Act — Landlord leasing land to tenant as "occupancy tenant" — Relationship between landlord and his tenant is only contractual and not statutory — Such tenant cannot claim right of pre-emption when a part of his cosharer's land is sold to

IP/IP/F32/72/BDB

stranger — However, since vesting of raiyati interest in State by virtue of West Bengal Estate Acquisition Act (1 of 1954) a cosharer ceases to be cosharer and is not entitled to pre-empt under Section 26-F.

Brief Note: (A) When a statute prescribes that occupancy rights could be acquired only in a certain manner laid down in the statute, such rights cannot be created in any manner not contemplated by the statute. When a landlord by a contract of lease confers occupancy rights on his tenant, he is bound by it and the tenant can exercise the same but that does not imply that the tenant becomes an occupancy raiyat so that he can exercise the right of pre-emption under Section 26-F. A purchaser who purchases a share from a cosharer will not be bound by the contract of lease, even though occupancy rights including the right of pre-emption were granted under the terms of the contract by the landlord. AIR 1937 Cal 27. Explained.

(Para 8)

However since Chapter VI of the West Bengal Estates Acquisition Act 1953 (1 of 1954) came into force all raiyati interests in land vested in the State and cosharer raiyats of a holding ceased to be a cosharer under Section 6 (1) of 1954 Act and has lost right of pre-emption under Section 26-F.

(Para 14)

Index Note: (B) Evidence Act (1872), Section 115 — Bengal Tenancy Act (8 of 1885), S. 26-C — Landlord serving notice under S. 26-C on cosharer about sale of holding to stranger — Notice describing cosharer as occupancy tenant — Kobala under which stranger purchased holding describing it as occupancy holding — Cosharer seeking pre-emption of land sold in his capacity as occupancy tenant — Purchaser, held, was estopped from challenging capacity of pre-emptor as occupancy tenant. AIR 1944 Cal 253 and AIR 1948 Cal 144, Rel. on; (1954) 58 Cal WN 612, Distinguished.

(Para 13)

Cases Referred: Chronological Paras

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|---|------------|
| (1954) 58 Cal WN 612, Shiromani Prasad Bhakat v. Raghunandan Prasad Shaw | 11, 12, 13 |
| AIR 1948 Cal 144 = ILR (1948) 1 Cal 353, Nural Hossain, Malik v. Mihilal Sheikh | 10 |
| AIR 1945 Cal 474 = 49 Cal WN 580, Sankaracharja Mullick v. Sk. Sademani | 10 |
| AIR 1944 Cal 253 = 48 Cal WN 269, Malati Bala Deb Gupta v. Narendra Chandra Bhattacharjee | 10 |
| AIR 1937 Cal 27 = ILR (1937) 1 Cal 455, Jogendra Narayan v. Askarulla | 6, 9 |
| AIR 1931 Cal 483 = 53 Cal LJ 414, Surendra Narayan v. Notan Behari | 10 |

AIR 1926 PC 79 = (1927) 31 Cal WN 74, Bindeshwari Prasad Singh v. Kesho Prasad Singh

5

S. C. Mitter, for Petitioner; A. D. Mukherjee and Hrishikesh Chatterjee, for Opposite Parties.

M. M. DUTT, J.:— This Revision Case is one of the group of Revision Cases numbered as Full Bench Reference No. 1 of 1968 referred to the Full Bench by Laik and S. K. Mukherjee, JJ. under Chapter VII, Rules 1, 2 and 4 of the Appellate Side Rules. The point which induced the learned Judges of the Division Bench to refer these cases to the Full Bench is, whether the right of pre-emption under Section 26-F of the Bengal Tenancy Act survived the West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954) after Chapter VI thereof came into force. That point has been decided by us in our judgment delivered to-day in some other Revision Cases included in the Full Bench Reference No. 1 of 1968. The present Revision Case with which we are concerned, involves some other points and as such it is being disposed of separately.

2. This Rule has been obtained by the petitioner whose application for pre-emption under Section 26-F was dismissed by the Munsif, First Court, Arambagh by his order dated June 24, 1960. On appeal by the petitioner, the learned Subordinate Judge, Additional Court, Hooghly, affirmed the order of the learned Munsif and dismissed the appeal.

3. One Satish Chandra Singha settled certain land of which the disputed land forms part, by a Patta dated April 13, 1954 in favour of one Ajit Kumar Mondal in occupancy right. Ajit Kumar Mondal sold half share in the land to the petitioner on July 18, 1958. The petitioner, therefore, became a co-sharer of Ajit in respect of the holding. On May 10, 1959 Ajit sold the remaining half share to the opposite parties who are strangers. The petitioner made an application for pre-emption under S. 26-F in respect of the said half share of the holding transferred by Ajit in favour of the opposite parties. The application was opposed by the opposite parties who contended inter alia that neither the petitioner nor the said Ajit Kumar Mondal had any right of occupancy in the holding concerned and as such the application for pre-emption under S. 26-F was not maintainable.

4. Both the courts below have taken the view that the right of pre-emption under Section 26-F is not available in respect of an occupancy holding created by a grant from the landlord.

5. In this case, there is no dispute that the predecessor-in-interest of the petitioner and the opposite parties,

namely, the said Ajit Kumar Mondal was not a settled raiyat of the village in which the holding is situate. By the Patta dated April 13, 1954 occupancy right was conferred by the landlord Satish Chandra Singha in favour of Ajit. The question necessarily arises whether right of occupancy can be created by a grant and whether the holder of such a right is entitled to avail of the statutory right of pre-emption under Section 26-F. In *Bindeshwari Prasad Singh v. Kesho Prasad Singh*, 31 Cal WN 74 = (AIR 1926 PC 79), it has been observed by the Privy Council that "a right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor." This observation suggests that a right of occupancy cannot be conferred by a grant from the landlord. The right has to be acquired in accordance with the provisions of the Bengal Tenancy Act.

6. Mr. Mitter, however, strongly relied on a decision of R. C. Mitter, J. in *Jogendra Narayan v. Askar Ulla*, ILR (1937) 1 Cal 455 = (AIR 1937 Cal 27) which has been affirmed in the Letters Patent Appeal from that decision by Guha and Bartley, JJ. It has been held by Mitter, J. that a right similar to occupancy right under the Bengal Tenancy Act may be conferred by a landlord upon his tenant by an express grant. Mitter, J. observed as follows:—

"Occupancy rights are creatures of statutes, or to be more precise the creatures of custom adopted by statute, which by defining the nature of the evidence, which a person claiming such rights is required to adduce, have extended such rights to a larger class of raiyats. * * *

They are creatures of customs or of statute only in the sense that acquisition of such rights by raiyats does not depend upon the bounty or gift of the landlord, but they can be acquired against his will. This in my judgment does not imply that the landlord cannot by grant confer on his tenant, rights, exactly similar to rights of occupancy. He can in his grant define rights which he is granting to his tenant, by mentioning in detail in the different clauses of the Patta the exact incidents of the rights he is granting. If he does so the raiyat or tenant would get these rights, and I can conceive of no principle of law which would prevent the raiyat or tenant from successfully asserting those rights given to him by his Patta against his landlord. * * *

It, may be that in one respect only there may be a difficulty namely, about the right of pre-emption of the landlord, by virtue of rule against perpetui-

ties, but I do not see any difficulty so far as the right of occupation of such a person is concerned."

7. Mitter, J. distinguished the aforesaid Privy Council decision by observing that the Privy Council did not definitely decide the point nor did it decide it finally.

8. The Bengal Tenancy Act lays down the manner whereby occupancy right can be acquired by a raiyat. The right of pre-emption as provided for in Section 26-F is one of the rights which is available to an occupancy raiyat under the Bengal Tenancy Act, when a statute prescribes that under certain circumstances a particular right can be acquired by a person, it is difficult to see how that right can be created in a manner not contemplated by the statute. When by a contract of lease a tenancy is created, the landlord may confer certain rights and impose certain obligations on the tenant. Such rights may be similar to the rights of an occupancy raiyat under the Bengal Tenancy Act, but it cannot be said that an occupancy raiyat-holding is created. The landlord who confers such rights on the tenant will be bound to recognise the same and the tenant would be entitled to assert those rights against the landlord. This does not, however, imply that the tenant becomes an occupancy raiyat so that he may exercise the right of pre-emption under Section 26-F. The right of pre-emption under Section 26-F is available to an occupancy raiyat against a stranger purchaser of a share or portion of the occupancy holding from the co-sharer of the occupancy raiyat. Such a purchaser, in our opinion, will not be bound by any term in the contract of lease whereby occupancy rights including the right of pre-emption have been granted by the landlord.

9. In *Jogendra Narayan's* case referred to above, ILR (1937) 1 Cal 455 = (AIR 1937 Cal 27) under the terms of the Patta the tenant was granted the right to remain on the land permanently and he could be ejected on two grounds only, namely, for using the land in a manner which would render it unfit for the purpose of the tenancy, or for breaking a condition in the lease which is consistent with the provisions of the Bengal Tenancy Act. It was held that the tenants could not be ejected simply by the service of a notice to quit as the landlord had by the Patta conferred on the tenants a right to remain on the land permanently and had contracted himself out of the right to terminate the tenancy by a six months' notice to quit. As we have already observed that the landlord would be bound by the terms and conditions of the lease, the tenants

in Jogendra Narayan's case could not be ejected excepting on either of the two grounds as provided in the Patta. This right of the tenants in that case may be similar to the right of an occupancy raiyat under the Bengal Tenancy Act, but simply because the tenants were conferred with that right and other rights similar to occupancy rights under the Bengal Tenancy Act, the tenants, in our opinion, did not acquire the status of an occupancy raiyat under the Bengal Tenancy Act. Nowhere in the decision in Jogendra Narayan's case it has been laid down that the person who is conferred with rights similar to occupancy rights, acquired the status of an occupancy raiyat under the Bengal Tenancy Act. All that has been laid down in that decision is that a right similar to occupancy right under the Bengal Tenancy Act may be conferred by a landlord upon his tenant by express grant and that the tenant shall be entitled to assert such a right against the landlord like any other contractual right. The decision in Jogendra Narayan's case does not militate against the view taken by us.

10. Mr. Mitter, however, submitted that the opposite parties were estopped from challenging the status of the petitioner as an occupancy raiyat. The question of estoppel arises in this way. In the notice under Section 26-C which has been served upon the petitioner relating to the transfer made in favour of the opposite parties, the petitioner has been described as an occupancy raiyat and the holding has been described as an occupancy holding. In the Kobala by which the opposite parties purchased the half share of the holding, the holding has been described as an occupancy holding. After the said notice was served, the petitioner made an application for pre-emption by making the requisite deposit. Mr. Mitter contended that in view of the fact that the petitioner was described in the notice under Section 26-C as an occupancy raiyat, the opposite parties were estopped from challenging the nature of the tenancy or the status of the petitioner. In support of his contention Mr. Mitter relied on a number of Bench decisions of this Court of which reference may be made to Malati Bala Deb Gupta v. Narendra Chandra Bhat-tacharjee, AIR 1944 Cal 253 and Nural Hossain Mallik v. Mihlal Sheikh, AIR 1948 Cal 144. In Malati Bala's case B.K. Mukherjee, J. (as his Lordship then was) has held that when a purchaser purchased a property which is specifically described as an occupancy holding and gives notice to the co-sharer tenants under Section 26-C and on the faith of the representation contained in the notice that the property purchased is an occupancy holding, the co-sharer tenants apply for

pre-emption under Section 26-F and deposit money which is required to be deposited under that section, a plea of estoppel may be legitimately taken by the pre-emptor against the purchaser and unless it is shown that the applicant for pre-emption had previous knowledge as to the real character of the tenancy, the purchaser would be precluded from alleging or proving that the tenancy was of a nature different from what it was represented to be. The same view has been expressed by Chakravarti, J. (as his Lordship then was) in the aforesaid Bench decision in Nural Hossain's case. In an earlier Bench decision in Surendra Narayan v. Notan Behari, 53 Cal LJ 414 = (AIR 1931 Cal 483) the principle of estoppel was applied in such a case. In a subsequent Bench decision in Sankaracharja Mullick v. Sk. Sademani, AIR 1945 Cal 474, Mukherjee, J. reiterated the same principles as laid down in Malati Bala's case.

11. In a later Bench decision in Shiromani Prasad Bhakat v. Raghu-nandan Prasad Shaw, (1954) 58 Cal WN 612, G. N. Das, J. has agreed with the decisions in Malati Bala's case and Sankaracharja's case referred to above, that the plea of estoppel may be available to a pre-emptor against the purchaser. Das, J. has, however, held that in order to found an estoppel against a purchaser it must be proved that a representation was made by the purchaser sought to be estopped and that the pre-emptor seeking to raise the plea acted on the faith of the representation and did so to his prejudice. Das, J., has taken the view that neither Section 26-C nor Rule 25 of the Rules framed under the Bengal Tenancy Act require that it is the transferee who has to file the notice and that the cases on the point do not lay down the proposition that a plea of estoppel arises if the pre-emptor makes a deposit on receipt of a notice under Section 26-C merely reciting that the property transferred is an occupancy holding. According to Das J. the decision in Malati Bala's case and Sankaracharja's case proceeded on the assumption that it was the purchaser who gave the notice. It therefore, follows from the decision in Shiromani Prasad's case that before the purchaser is held to be estopped from challenging the nature of the tenancy, the pre-emptor must prove that the notice under Section 26-C describing the holding as an occupancy holding, was served by the purchaser and that the pre-emptor acted to his detriment on the representation made in the notice.

12. Relying on the decision in Shiromani Prasad's case, (1954) 58 Cal WN 612 the courts below negatived the plea of estoppel raised by the petitioner.

13. The decision in Shiromani Prasad's case (1954) 58 Cal WN 612 rests mainly on the ground that under S. 26-C and R. 25 of the Rules framed under the Bengal Tenancy Act, there is no indication as to who will serve the notice upon the co-sharer tenants. It is true that there is no specific indication, but at the same time it cannot be lost sight of that the purchaser is vitally interested in getting the document of transfer registered and he will take all steps in that regard. It can, therefore, be reasonably presumed that the notice under Section 26-C is served at the instance of the purchaser. We respectfully agree with the view expressed in the decisions in Malati Bala's case and Sankaracharja's case referred to above and also the decision expressing similar view. In the instant case, the notice under Section 26-C which was served upon the petitioner contains a statement that the holding is an occupancy holding. No explanation has been given by the opposite parties why such a statement has been made and there is no evidence that the petitioner was aware of the true nature of the tenancy. The petitioner relying upon the statement in the notice, made the application and made the requisite deposit under Section 26-F. In our view, therefore, the opposite parties are estopped from challenging the nature of the tenancy of the petitioner.

14. Although the petitioner succeeds on this point, the petitioner cannot ultimately succeed in the Rule in view of our decision in the Full Bench Reference No. 1 of 1968 to the effect that on the date of vesting of raiyati interests in the State under the West Bengal Estates Acquisition Act, the co-sharer raiyats of a holding ceased to be co-sharers in respect of the land of the holding which each of the raiyats was entitled to retain under sub-sec. (1) of Section 6. The petitioner was no doubt a co-sharer raiyat before vesting, but after vesting he ceased to be a co-sharer and he was not entitled to make an application for pre-emption under S. 26-F.

15. For the reasons aforesaid, the Rule is discharged, but there will be no order for costs in this Rule.

ARUN K. MUKHERJEA, J.:— 16.
I agree.

SABYASACHI MUKHARJI, J.:— 17.
I agree.

Rule discharged.

AIR 1972 CALCUTTA 524 (V 59 C 113)

SPECIAL BENCH

A. K. MUKHERJEA, SABYASACHI
MUKHARJI AND M. M. DUTT, JJ.

Sanjib Kumar Mukherjee and others,
Appellants v. Nathmal Rampuria and
others, Respondents.

A. F. O. D. Nos. 550, 136 and 138 of
1962, 1038 of 1964 and 198 of 1965. D/-
28-7-1972.

**Index Note:— (A) Interpretation of
Statutes — Reference to objects and rea-
sons — When can be made.**

**Brief Note:— (A) Reference to the
Objects and Reasons can be justified for
the limited purpose of finding out the
conditions which obtained at the time of
the introduction of the statutes and which
led to the introduction of the legislation
and, in particular, for ascertaining the
extent and urgency of the evil which is
sought to be remedied by a particular
statute. (Para 15)**

**Index Note:— (B) Constitution of
India, Art. 19 (1) (f) (5) — W. B. Premises
Tenancy Act (12 of 1956), S. 17 (4) Proviso
(as amended by Act IV of 1968 or Act
XXX of 1969) — Validity — Provisions
are reasonable — Not invalid.**

**Brief Note:— (B) The legislature
thought that a tenant should be given
more than one opportunity for avoiding
ejectment on the ground of default in
the payment of rent by making deposits
or payments in respect of arrear dues
as well as by continuing to pay the cur-
rent dues in terms of sub-section (1) or
sub-section (2) of S. 17. The second op-
portunity is however not given to a ten-
ant against whom an ejectment decree is
passed or is going to be passed on any
other grounds mentioned in Section 13.
The basis for the landlord's complaint is
removed by providing for payment of his
dues before any relief is given to the
tenant. The protection to the tenant is
counterbalanced by an equal protection
for the landlord. In such circumstances
this extra protection given to the tenant
by the amended proviso to sub-sec. (4)
cannot be regarded as an unreasonable
restriction on the landlord's right to hold
and enjoy the property. The provisions
in Act IV of 1968 or Act XXX of 1969
which have amended the proviso to sub-
section (4) are not unreasonable and con-
sequently not unconstitutional. AIR 1968
SC 303 & AIR 1968 SC 457, Distinguish-
ed. (Para 16)**

If the provision of giving a double
opportunity to defaulting tenant is not
by itself unreasonable it should not be-
come unreasonable merely because re-
trospective effect has been given to the
legislative provision introducing this
double opportunity by Section 5 of Act

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XXX of 1969. There is no bar against retroactive legislation in our Constitution except in regard to criminal legislation.

(Paras 21, 22)

Cases Referred: Chronological Paras

AIR 1970 SC 169 = 1970-1 SCR 268, Asst. Commr. of Urban Land Tax, Madras v. B. & C. Co. Carnatic 21

AIR 1968 SC 303 = (1968) 1 SCR 674, K. L. Gupta v. Corporation of Greater Bombay 18

AIR 1968 SC 457 = (1968) 1 SCR 497, N. S. Gujral v. Custodian of Evacuee Property 19

(1965) F. A. No. 565 of 1965 (Cal), Jamuna Prasad Chowrasia v. Kishorilal Poddar 24

AIR 1963 SC 1687 = (1964) 1 SCR 897, Ramkrishna v. State of Bihar 21

AIR 1958 SC 578 = 1959 SCR 12, Express Newspapers v. Union of India 22

AIR 1954 SC 92 = 1955 SCR 587, State of West Bengal v. Subodh Gopal 21

A. D. Mukherjee, Bimal Bhusan Banerjee in F. A. No. 550 of 1962, Chandidas Roy Chowdhury in F. As. Nos. 136 and 138 of 1962, Hemanta Krishna Mitra in F. A. No. 1038 of 1964, Saktinath Mukherjee in F. A. No. 198 of 1965, for Appellants; P. N. Chandra in F. A. No. 550 of 1962, S. C. Das Gupta, Malay Kumar Basu for Advocate General in F. A. No. 550 of 1962, Asoke Kumar Sen Gupta in F. As. Nos. 136 and 138 of 1962, S. C. Das Gupta, N. G. Das for Advocate General in F. As. Nos. 136 and 138 of 1962, Mukul Gopal Mukherjee in F. A. No. 1038 of 1964, Satya Priya Ghose, Kamallesh Banerjee for Official Receiver in F. A. No. 198 of 1965, S. C. Das Gupta, N. G. Das for Advocate General in F. A. No. 198 of 1965, for Respondents.

ARUN KUMAR MUKHERJEE, J.:

These appeals make a group of altogether six appeals involving more or less the same questions. They were referred to a Special Division Bench under Rule 1, Sub-rule (ii) of Chapter II of the Appellate Side Rules by a Bench consisting of the late Chief Justice D. N. Sinha and myself on 19th June 1968. The reference was made on the ground that they raise one or two common questions of law which are of great public importance. The Hon'ble the Chief Justice thereafter constituted the present Special Bench to dispose of these appeals. Since we have to dispose of the entire appeals we shall have to deal with them separately resolving the questions of law as they arise. This is what we propose to do as hereunder.—

Appeal No. 550 of 1962

2. The original defendant Satish Chandra Mukherjee was a tenant under

the plaintiffs in respect of a shop room on the ground floor of premises No. 8-A, Lal Bazar Street, Calcutta at a monthly rental of Rs. 30.94 np. payable according to the English Calendar Month. The entire premises at 8A, Lal Bazar Street, Calcutta was transferred to the plaintiffs by Srimati Sushila Devi Rampuria and Shri Joychand Lal Rampuria who were the liquidators of Rampuria Properties Ltd., by a registered deed of conveyance dated 13 July 1958. Prior to this transfer, the tenant, namely, Satish Chandra Mukherjee had defaulted in payment of rents since September 1957. He, however, deposited the rents for September 1957 to April 1958 on 29 May 1958. After the transfer, the plaintiffs as the new landlord served through their lawyers a notice of ejectment dated 13 September 1958 on the said tenant-defendant. By the said notice the plaintiffs determined the defendant's tenancy and called upon him to quit and vacate the aforesaid shop-room No. 5 on the expiry of the last day of October 1958. The defendant having failed or neglected to do so the plaintiffs filed a suit against the said defendant-tenant for eviction. In the plaint it is claimed that the defendant would not be entitled to any protection from eviction under the provisions of the West Bengal Premises Tenancy Act of 1956 (hereinafter referred to as the said Act) by reason of the fact that the tenant had defaulted in the payment of rent to his previous landlords as well as to the plaintiffs who were the successors-in-interest of those landlords "since September 1957 and also for four months within a period of 12 months". Before the suit had been filed on 2 January 1958 the tenant had deposited rents for August, September and October 1958 on 1 December 1958. The defendant contested the suit and filed a written statement. Sometime later the original defendant having died, his heirs, namely, Sanjib Mukherjee, Ranjit Mukherjee, Manindra Nath Mukherjee, Samita Mukherjee and Mrs. Satish Chandra Mukherjee were substituted as defendants in lieu and place of the original defendant. I shall hereinafter refer to the substituted defendants merely as defendants. Defendants Manindra Nath Mukherjee and Samita Mukherjee filed a written statement on 12 November 1960 and an additional written statement on 24 March 1961.

3. Certain issues and additional issues were framed for determination at the time of trial upon the pleadings of the parties. They are as follows:

(1) Is there any relationship of landlord and tenant between the parties in respect of the suit premises, i.e. the shop room No. 5 on the ground floor of premises No. 8-A, Lal Bazar Street, Calcutta?

(2) Is the defendant a defaulter in the payment of rent for four months during the period of 12 months before the institution of the suit?

(3) Was the notice of ejectment served on the defendant? If so, is the notice legal, valid and sufficient?

(4) To what relief, if any, are the plaintiffs entitled?

ADDITIONAL ISSUES

(1) Are the defaults in the payment of rent committed by late Satish Chandra Mukherjee, the predecessor-in-interest of the substituted defendants and/or the substituted defendants prior to 13 July 1958, the date of purchase of the suit premises by the plaintiff to be tacked to the defaults committed by the said late Satish Chandra Mukherjee and/or the substituted defendants from 13 July 1958 onwards?

(2) Can the plaintiffs take advantage of the defaults in the payment of rent committed by Satish Chandra Mukherjee and/or the substituted defendants when the plaintiffs' predecessor-in-interest were the landlord and/or the owners of the suit premises?

4. After evidence had been adduced on behalf of both sides the learned trial Judge came to the following decisions:—

(1) There was a relationship of landlord and tenant between the parties.

(2) (a) It is not a fact that there had been non-payment of rent for all months since September 1957 to date of judgment.

(b) Defendants were defaulters in payment of rent for the months of August, September and October 1958 because of paying them after the due date.

(c) Further the defendants having deposited the rents from September 1957 to April 1958 on 29 May were defaulters in the payment of rent within the meaning of the Act for the months of September 1957 to March 1958 and as such the defendants were not entitled to claim any protection from eviction under the Act.

(3) The plaintiffs as transferee-landlords could take advantage of the defaults made by the tenant before the transfer of the property. In short, the defendants were not entitled to protection from eviction under the Act for having made defaults in the payment of rent for four months within a period of 12 months from the commencement of the Act to the date of the suit.

(4) The ejectment notice had been properly served and was proper and valid.

5. On these findings the learned trial Judge decreed the suit against the defendants and ordered that the plaintiffs would get khas possession of the suit premises by removing the defendants therefrom.

6. The defendants came on appeal to this Court. After the appeal had been filed in 1962 the said Act of 1956 was amended. On 26th August 1967, West Bengal Ordinance VI of 1967 was promulgated. The hearing of the appeals commenced four days later, i.e. to say on 30 August 1967. During the hearing of the appeal the appellant-tenants made an application on 13 September 1967 praying for orders extending the time for deposit of the amount of rents in arrear together with interests and also for fixation of the number of instalments by which the payments were to be made. The appellants contended that they were entitled to make this application by reason of Section 2 of the West Bengal Ordinance No. VI of 1967 by which a new sub-section (2-A) had been inserted after the original sub-section (2) of S. 17 of the said Act. The Division Bench which was hearing the appeal dismissed the application by an order passed on 7 May 1968. This decision was based mainly on the ground that an application for extension of time under Section (2-A) of Section 17 could not be made without complying with the provisions of sub-section (2-B) which required that an application for extension of time was to be made before the expiry of the time specified in sub-section (1) or sub-s. (2) of S. 17 and since this time had expired long before the application was made, the protection given under sub-section (2-A) was not available to the appellants. A copy of the order of the Division Bench is to be found at page 16 of the Second Part of the Special Paper Book prepared for the Special Bench. After dismissing the application the Division Bench again proceeded to hear the appeal. As I have stated already the Division Bench after hearing the appeal on 19 February 1968 referred it to a Special Division Bench.

7. It will be remembered in this connection that Section 17 had been extensively amended at first by West Bengal Ordinance VI of 1967 and then on the expiry of the Ordinance by Act IV of 1968 the provisions of which in turn were re-enacted by Act XXX of 1969.

8. The principal question of law that induced the Division Bench on 19 February 1968 to make a reference of the case to a Special Bench was the question as to whether the amendment of the proviso to sub-section (4) of S. 17 of the Act of 1956 introduced by the West Bengal Premises Tenancy (Amendment) Ordinance, 1967 and later re-enacted in Act IV of 1968 and Act XXX of 1969 were ultra vires the provisions of the Constitution of India and, in particular, Art. 19 (1) (f) of the Constitution of India.

9. When the appeal came up for hearing before the Special Bench Mr.

Chandra appearing for the respondents-landlords challenged the vires of the new proviso to sub-section (4) of S. 17 of the said Act. Since for all practical purposes and particularly in the matter of amendment of sub-section (4) of S. 17, Act XXX of 1969 is a re-enactment of Act IV of 1968 it would be enough for us to confine our attention to Act XXX of 1969. In order to appreciate the challenge of the respondents to the vires of the Act of 1969 it is necessary to know the context in which the challenge arises. I am, therefore, indicating below this context.

10. It will be remembered that Section 17 of the Act of 1956 gives an opportunity to defaulting tenants to avoid eviction by paying up all arrears of rent and by making payments of current rents during the pendency of the suit. Sub-sections (1) and (2) of S. 17 contain these provisions. Sub-section (3) of the same section provides that if a tenant fails to pay up the arrears or to deposit current rents in terms of sub-section (1) or sub-section (2) within the time specified therein, the Court shall have the defence against delivery of possession struck down and shall proceed with the hearing of the suit. In other words all the protection given to the tenant under Section 13 of the Act of 1956 would be withdrawn if the defaulting tenant does not pay rents, arrear and current, in the manner laid down in sub-section (1) or sub-section (2) of S. 17. Sub-section (4) as it originally stood, provided, however, that if a defaulting tenant makes those payments required by sub-section (1) or sub-section (2), no decree or order for delivery of possession will be made against the defaulting tenant. This was in the nature of a last minute reprieve for the tenant. But even this reprieve was denied to the tenant under certain circumstances. The circumstances were mentioned in the proviso to sub-sec. (4). The original proviso ran in the following manner:—

"Provided that a tenant shall not be entitled to any relief under this sub-section if he has made default in payment of rent for four months within a period of 12 months".

The net effect of the amended proviso seems to be this that even a tenant who would under the original proviso have been deprived of the benefit of sub-section (4) if he had committed defaults in respect of four months within a period of 12 months would again be entitled to protection from eviction if it appears that he has done this only once. In other words, it is only a tenant who has obtained once before the relief provided for in sub-section (4) and then again commits default for four months

within a period of 12 months who would be disentitled to this relief.

11. Taking advantage of this amended proviso the appellants in the instant appeal sought the protection of sub-section (4) of S. 17. On the facts of this case, since the appellants have not admittedly obtained the relief envisaged in sub-section (4) of S. 17 once before in another suit, they would in the view that we take of this amended proviso be automatically entitled to succeed in this appeal. It will be remembered that the original decree of eviction was passed against the appellants by virtue of the proviso to sub-section (4) as it stood before the amendment. Now however, the amended proviso would prevent the passing of any decree or any order for delivery of possession against them. It is this aspect of the amendment introduced by Act XXX of 1969 which the respondents challenge as ultra vires the provisions of Art. 19 (1) (f) of the Constitution of India.

12. The argument advanced by the respondents was mainly as follows. The right of the landlord to evict a tenant and to recover possession of his property is a fundamental right within the meaning of Art. 19 (1) (f) of the Constitution. Therefore, this is a fundamental right which cannot be abrogated, curtailed or restricted unreasonably. Tenants have been given all kinds of protection in the Act of 1956. The amendment Acts of 1968 and 1969 have considerably expanded the protection that had been originally given to the tenants by the Act of 1956. Even so of all the measures of protection given by the latest amendments the protection that is now given to the tenant by the amended proviso to sub-section (4) is so wide and of such a sweeping nature that from the point of view of the landlord it has become extremely unreasonable. A suit against a tenant is usually concluded after quite a number of years. It is not at all unusual for 10 or 12 years to elapse before even a successful landlord can throw out his tenant and recover possession of his premises. That has been the position even without the new amendment introduced by Act XXX of 1969. On top of this, now, as a result of the amendment of the proviso to sub-section (4) of S. 17 even a defaulting tenant who would not ordinarily get the protection of sub-section (4) of S. 17 would be entitled to claim the same protection if he can show that he has not on an earlier occasion invoked sub-section (4) and obtained relief under that sub-section. This protection, it was argued, is far beyond reasonable limits: it would only encourage the defaulting tenants to act or make defaults in the assurance that the landlord is bound to fail in his attempt to evict the

tenant in the first suit. The contention of the respondents has been formulated in paragraph 4 of the petition in the following words:—

"The impugned provisions of Ss. 2 and 5 of the Amending Act 1969 are also ultra vires the provisions of Art. 19 (1) (f) of the Constitution. The restrictions created and/or imposed on a landlord by the said sections in enjoyment of his right granted under Art. 19 (1) (f) are arbitrary or of an excessive nature beyond what is required in the interest of general public and/or are not in the interest of general public, and amount to unreasonable restrictions of the landlord's rights guaranteed under Art. 19 (1) (f) of the Constitution".

It was argued that the provision that the landlord can succeed against a defaulting tenant only after filing two suits constitutes an unreasonable restriction on the landlord's right to enjoy his property rights. It was urged that these provisions "completely ignore the hardship of landlord of poor financial position" and "do not even attempt to strike a proper balance between the freedom guaranteed in Art. 19 (1) (f) of the Constitution and reasonable restriction in the interest of general public".

13. Mr. Chandra arguing in support of the appellants-tenants sought to make out the following points:—

(1) It is impossible to deny that the amendment to the proviso has added a very substantial measure of protection to the tenants which is far in advance of the protection that had been so far available under sub-section (4). The amendment makes it impossible for a landlord to get rid of defaulting tenants without succeeding in 2 suits. This itself is an unreasonable restriction on the landlord's right to hold and enjoy their right to property.

(2) Even if the prospective operation of the amendment can be justified, the retrospective character given to the amendment makes the amending proviso very unreasonable.

14. We shall deal with these points one by one.

15. We have no doubt in our mind that the protection that has now been given to the tenant is very substantial. The reasonableness of such provisions should, however, be judged with reference to the social philosophy of the time. It may not be out of place in this context to refer to the Statement of Objects and Reasons with which Act IV of 1968 was introduced in the legislature. It will be remembered that the amendment was introduced by Act IV of 1968 and continued under Act XXX of 1969. There are

various Supreme Court Authorities which justify a reference to the Objects and Reasons for the limited purpose of finding out the conditions which obtained at the time of the introduction of the statutes and which led to the introduction of the legislation and, in particular, for ascertaining the extent and urgency of the evil which is sought to be remedied by a particular statute. The Statement of Reasons for the enactment of Act IV of 1968 contains the following passages—

"Under Section 17 of the West Bengal Premises Tenancy Act, 1956 as it stood before the amendment by the West Bengal Premises Tenancy (Amendment) Ordinance, 1967 (West Bengal Ordinance No. VI of 1967) a tenant who has defaulted in payment of rent for four months within a period of 12 months was debarred from avoiding ejectment by making a deposit or payment as required by sub-section (1) or sub-section (2) of S. 17. The Court had no powers, even in cases of real hardship, of extending the time for making the deposit since the provisions of the Act were causing severe hardship to the tenants in some cases. It was considered necessary by the Government of West Bengal to give the tenants some relief by amendment of the Act. Accordingly, the West Bengal Premises (Amendment) Ordinance, 1967, was promulgated by the Governor of West Bengal. The main provisions of the Ordinance were as follows:—

- (a) * * * * *
- (b) * * * * *

(c) the tenant had the opportunity for once only to avoid ejectment on the ground of default in payment of rent, irrespective of the period of default by making deposit or payment of all arrear dues. On any subsequent occasion, however, default in payment of rent for four months within a period of twelve months debarred him from getting any relief.

The West Bengal Premises Tenancy (Amendment) Second Ordinance was promulgated by the Governor of West Bengal to continue with certain modifications the provisions of the First Ordinance.

The proposed measure seeks to replace the Ordinance No. II of 1968".

16. It is perfectly clear that the legislature thought that a tenant should be given more than one opportunity for avoiding ejectment on the ground of default in the payment of rent by making deposits or payments in respect of arrear dues as well as by continuing to pay the current dues in terms of sub-section (1) or sub-section (2) of S. 17 of the Act. If the sponsors of the statutes think that even a defaulting tenant deserves a second opportunity so long as he is prepared to pay up all arrear dues prescribed by law I do not see why it would be

unreasonable to give that opportunity to the defaulting tenant. It is important to remember that the second opportunity is not given to a tenant against whom an ejectment decree is passed or is going to be passed on any other grounds mentioned in Section 13 of the Act. Thus, if a landlord requires it for his own use there is no reprieve provided for the tenant. It is only when the landlord's complaint is based on the tenant's failure to pay the rents that a tenant is given a second opportunity provided, however, that he pays up all the arrear dues. Therefore, the basis for the landlord's complaint is removed by providing for payment of his dues before any relief is given to the tenant. The protection to the tenant is counter-balanced by an equal protection for the landlord. We cannot in such circumstances persuade ourselves to regard this extra protection given to the tenant by the amended proviso to sub-section (4) as an unreasonable restriction on the landlord's right to hold and enjoy the property. It would have been unreasonable only on the assumption that the landlord wanted the house at any costs. But this is not the case where a landlord seeks to evict the tenant on the ground of default in payment of rent. If the defaults are wiped out and the current rents are paid, no reasonable hardship is caused to the landlord. In our opinion, the whole matter would appear in a different light if we remember that tenants do not always default in payment of rent out of sheer wickedness or malice towards the landlord. More often than not tenants default because they have not got the means to make the payment. In the social conditions that obtain in our country it is hardly just and proper to consider poverty as a sin which is beyond redemption. Even if the widest latitude is given to the poor and indigent tenant it would be hard to describe the provision which gives such latitude as unreasonable. This must be specially so when the latitude is not given at the cost of the landlord. The very essence of Section 17 is to protect defaulting tenants by giving them an opportunity to pay up the arrear dues. Under sub-section (4) and the proviso as it originally stood this protection was denied to the tenant who was a habitual defaulter to the extent that he would not pay his dues for four months in a period of 12 months. Under the new proviso this severity has been relaxed further in favour of the tenant. Even such a defaulting tenant is no longer considered beyond the pale of redemption and has been given an extra opportunity, but, in providing for this extra opportunity the landlord's interests have not been overlooked. Looking at the whole matter from this point of view we are not pre-

pared to consider the provisions in Act IV of 1968 or Act XXX of 1969 which have amended the proviso to sub-sec. (4) as unreasonable and consequently unconstitutional.

17. At the time of hearing of this appeal Mr. Chandra referred us to certain observations of the Supreme Court in various decisions. We do not think that those observations have any bearing on the peculiar features of the instant case. The reasonableness of a legislative provision has to be judged on the merits of each individual case separately. We confess we have not found the observations placed before us to be very helpful.

18. We were referred to the decision of the Supreme Court in *K. L. Gupta v. Corporation, Greater Bombay*, AIR 1968 SC 303 where Mitter, J. delivering the judgment of the Supreme Court observes as follows:—

"In all such cases, where large powers are given to certain authorities the exercise whereof may make serious inroads into the rights of property of private individuals, we have to see whether there is any guidance to be collected from the Act itself, its object and its provisions, in the light of the surrounding circumstances which made the legislation necessary taken in conjunction with well-known facts of which the Court might take judicial notice".

These observations, if we may say with respect, are absolutely unexceptionable and completely binding on us. But the present case is not a case where any large powers have been given to any authority. Therefore, these observations are not, in our opinion, helpful at all.

19. We were next referred to the case of *N. S. Gujral v. Custodian of Evacuee Property*, AIR 1968 SC 457. In that case Section 12 of the Displaced Persons (Compensation and Rehabilitation) Act, 1958 was challenged and in dealing with that question the Supreme Court regarded "decree" as a property. Mr. Chandra apparently sought to argue that in the instant case since a landlord is being deprived of a decree which he has already secured or is sure to obtain in the first Court, the legislative provision depriving the landlord of that decree amounts to unreasonable deprivation of property. In our opinion, it is not a correct analogy. What has actually happened here is that the new amendment to the proviso to sub-section (4) has made it impossible for a landlord to get a decree of eviction or an order for possession of his property unless the tenant has been guilty of the default specified in the sub-section (4) on two occasions and the tenant has obtained the relief under sub-section (4) on an earlier occasion. The conditions which will enable

a landlord to get a decree for eviction have been made a little more onerous. If Section 13 of the Act of 1956 can be accepted as regulatory and reasonable and if that section is not regarded as taking away of any property right, we do not see how the amended proviso to sub-section (4) can be condemned as unreasonable and as making an inroad on one's property right.

20. Now we come to the second contention of Mr. Chandra who argued that even if the prospective operation of Section 2 (3) of Act XXX of 1969 which amended the proviso is found justified, it is impossible to escape the conclusion that the retrospective character given to the same amendment by Section 5 of Act XXX of 1969 makes it an unreasonable restriction on the right to hold property. We do not think this contention is correct either.

21. It is well known that the Supreme Court has been very cautious in treating the retroactive operation of legislation as an element of unreasonableness while dealing with the question of infringement of fundamental rights. The retrospective character of a statute is only one of the elements which have to be taken into consideration in determining the reasonableness of the restrictions introduced by a statute. In this connection reference may be made to the following Supreme Court decisions: *State of West Bengal v. Subodh Gopal*, 1954 SCR 587 = (AIR 1954 SC 92); *Express Newspapers v. Union of India*, 1959 SCR 12 = (AIR 1958 SC 578); *Ramkrishna v. State of Bihar*, AIR 1963 SC 1667 and *Asst. Commr. Urban Land Tax, Madras v. B. & C. Co.*, AIR 1970 SC 169. Though the question of retrospectivity enters as an element to be considered while dealing with the concept of reasonableness under Art. 19, we must remember that there is no bar against retroactive legislation in our Constitution except in regard to criminal legislation.

22. In our opinion, if the proposition (sic-provision) of giving a double opportunity to defaulting tenant is not by itself unreasonable it should not become unreasonable merely because retrospective effect has been given to the legislative provision introducing this double opportunity. We must make it clear that we say this because of the special considerations involved in the case of defaulting tenants. As we have already indicated, the legislative provision contains a kind of poise and counter-poise protecting the interest of the tenant as well as the reasonable interest of the landlord; it must, therefore, be regarded as reasonable in its impact on the fundamental rights guaranteed by the Constitution. In coming to this decision we remember

the important fact that the landlord in such cases is anxious to get his rents and is not anxious to get back possession of the premises. Had it been otherwise we might have come to a different conclusion. In fact, in the case of *Kalyani Datta v. Pramila Bala Dassi* my learned brother Mr. Justice Dutt gave a judgment to which I was a party and in which he held that sub-section (3-A) of S. 13 in so far as it has been made applicable to pending suits and appeals is ultra vires the provisions of Art. 19 (1) (f) of the Constitution for having placed unreasonable restrictions on the rights of landlords whose suits or appeals for eviction on the ground of reasonable requirement are pending. I refer to this case to indicate the essential qualitative distinction between a case where a landlord requires a house for his own use and a case where the landlord wants to get rid of a tenant because he does not pay rents regularly.

23. Both the contentions of Mr. Chandra, therefore, fail. In the facts and circumstances aforesaid we must hold that since in the instant case the tenant has admittedly never before obtained relief under sub-section (4) he will be entitled to the protection provided by the amended proviso of that sub-section.

24. It remains for me to mention that there was some argument regarding the exact effect of the amended proviso. We have, however, sitting in the same Special Bench delivered a judgment today in another appeal, namely *Jamuna Prasad Chowrasia v. Kishorilal Poddar*, (F. A. No. 565 of 1965 (Cal)) in which we have held that under the amended proviso, no decree or order for delivery of possession can be made against a tenant who has not committed a default in payment of rent for four months within a period of 12 months after having once before obtained relief in an earlier suit for a similar default. It is not necessary for us to deal with this aspect of the matter in this case again.

25. In the result since it is nobody's case that the appellant had obtained any relief under sub-section (4) of S. 17 in an earlier suit and since we have found the amended proviso to be perfectly constitutional we must hold that in the facts and circumstances of the case the appellant will be entitled to the protection given by the amended proviso. In the result, we allow the appeal and set aside the decree passed by the learned Subordinate Judge. We order, however, that the respondent will get the costs of both the suit and the appeal.

First Appeals Nos. 136, 137 and 138 of 1962

26. All these three appeals are directed against decrees of ejectment.

given in favour of the landlord and against the tenants in the corresponding suits, namely, Suit No. 1877 of 1959, 1874 of 1959 and 1886 of 1959 respectively of the City Civil Court Calcutta. The tenants were found guilty in each case of having committed defaults in the payment of rent for four months in a period of 12 months so that the original proviso to sub-section (4) of S. 17 of the Act made it impossible for the tenants in any of these cases to invoke the protective provisions of Section 13 of the Act of 1956. The tenants, however, applied during the pendency of the appeals for relief under the amended proviso to sub-section (4). Confronted with this situation it was argued on behalf of the landlords that the provisions of Sections 2 (3) and 5 of Act XXX of 1969 which introduced the relevant amendments in the proviso and also made it retrospective are ultra vires the Constitution of India.

27. Of these three appeals Appeal No. 137 of 1962 was not pressed before us by the learned Advocate for the appellants on the ground that the landlord has already taken possession of the suit premises. Appeal No. 137 of 1962 is, therefore, dismissed for non-prosecution. No order in respect of costs is made in this appeal.

28. We have just now held that the contention that the amended proviso is invalid on the ground of unconstitutionality cannot be sustained. Therefore, there is no doubt that the tenants in Appeals Nos. 136 and 138 of 1962 will be entitled to get relief under the amended proviso to sub-section (4) of S. 17. No other point was urged on behalf of the respondents-landlords. The defence of the tenants-appellants was also confined to the question of getting relief under the amended proviso to sub-section (4) of S. 17.

29. In the result, these two appeals viz. Appeal Nos. 136 and 138 of 1962 succeed and the relevant suits in these three appeals are dismissed: the judgments of the trial Judge though correct at the time of delivery cannot be sustained any longer and are, therefore, set aside. We order, however, that in each case, the respective respondent will get the costs of the suit as well as the costs of the appeal.

First Appeal No. 1038 of 1964:

30. This appeal is from a decree of ejectment given on the ground of default in payment of rent for four months within a period of 12 months. The defendant was a tenant in respect of the second floor and one bath room on the ground floor of premises No. 10-A, Krishnaram Bose Street, Calcutta, at a monthly rental of Rs. 40/- per month payable according to the English Calendar

month. The landlord complained that the tenant had not paid rent for September to December 1961 and had also sublet a portion of the premises to one Subal Chandra Das without the consent of the landlord. A notice to quit was served on the tenant and the tenant having failed or neglected to quit the premises the landlord filed a suit for ejectment. The tenant contested the suit and filed a written statement. An issue as to valid service of notice though raised in the beginning was abandoned by the tenant at the time of trial. In any event, the learned trial Judge deals with the merits of this point and finds that the notice satisfies the requirements of Section 106 of the Transfer of Property Act, as well as of Section 13 (6) of the Act of 1956. The learned trial Judge dismissed the landlord's contention that the defendant had sublet a portion of the premises in suit. On the question of default, however, the learned trial Judge found that the tenant-defendant was guilty of default in payment of rents for September to December 1961 and had on that ground forfeited his claim to protection under the Act of 1956. Before the filing of the written statement, however, the tenant had filed an application under S. 17 (2) and had made deposits in terms of sub-section (2) of S. 17 in pursuance of an order of the learned trial Judge. The learned trial Judge granted a decree of ejectment in favour of the landlord on the ground of default. At the hearing of the appeal the tenant-appellant took the point that since he had made the deposits required under sub-section (2) of S. 17 and since he had not on any earlier occasion obtained relief in terms of sub-section (4) of S. 17, he was entitled to protection in the present appeal under the amended proviso to sub-section (4). In answer to that, the landlord contended as in the other appeals which we are hearing analogously, that the provisions of Act XXX of 1969 which made the amendment to the proviso are ultra vires the Constitution. We have already held that there is no substance in this argument. We hold, therefore, that the tenant will be entitled to relief in terms of sub-section (4). The appeal is, therefore, allowed and the decree of the learned trial Judge which was correct at the time when it was passed, is set aside. We order, however, that the tenant should pay to the landlord the costs of the suit as well as of the appeal. I should, however, record that as I was delivering this judgment Mr. H. K. Mitra, learned Advocate for the appellant told us that Kamal Kumar Nag, the appellant has died on 1 July 1972. Since however, this death took place between the conclusion of the hearing of the appeal and the delivery of the judgment this makes

no difference by reason of the provisions of Order 22, Rule 6 of the Code of Civil Procedure.

First Appeal No. 198 of 1965.

31. This appeal is also from, an order of ejectment passed against a tenant appellant on the ground of default in payment of rent. It is not necessary for us to recount all the facts for, it is the admitted position that the defendant tenant had neither paid nor deposited rents to the landlord since Pous Badi S. Y. 2017. No attempt was made before us on the part of the tenant to press any point other than the point that the tenant-appellant is entitled to the additional relief granted by the amended proviso to sub-section (4) of S. 17. It is nobody's case that the tenant-appellant has obtained relief in an earlier suit under the provisions of sub-section (4) of S. 17. Therefore, it is clear that the tenant-appellant must succeed in his appeal if he can come within the ambit of sub-s. (4) read with the amended proviso.

32. Mr. Ghosh appearing for the landlord-respondent made two contentions. First, he argued that the tenant-appellant has not complied with the provisions of sub-sections (1) and (2) of S. 17 of the Act of 1956. Secondly he argued that the provisions of the Act XXX of 1969 which amended the proviso to sub-section (4) are ultra vires Arts. 14 and 19 (1) (f) of the Constitution of India. On this question of ultra vires he adopted Mr. Chandra's argument as advanced in F. A. No. 550 of 1962.

33. We shall deal with these two arguments one by one. As regards the argument regarding non-compliance with the requirement of sub-section (2) of S. 17, the contention of Mr. Ghosh must be rejected. The order passed by the learned trial Judge under sub-section (2) of S. 17 was an order passed by consent. On 25 April 1964 the learned trial Judge dealt with the landlord's written objection to the application under sub-section (2) of S. 17. Issues were framed and lawyers of both parties were heard. The learned trial Judge observes:—

"It is an admitted position that the defendant has been in possession of the suit premises as a tenant on a rental of Rs. 57.19 np. according to Hindi Calendar months and that the defendant has neither paid nor deposited rents accruing due at least since 1st Pous Badi, S. Y. 2017. The defendant has raised contentions to the effect that the plaintiff is not the landlord and that the previous landlords did not accept the rent etc. Be that as it may, both parties agree that without prejudice to the respective contentions of either party as to the subsistence of the relationship of landlord and

tenant between the parties the defendant will deposit the arrears of rent at the rate of Rs. 57.19 np. according to Hindi Calendar within the 15th of each succeeding month and that the amount will not be withdrawn by the plaintiff without getting further orders from this Court. This agreement is accepted. The amount of arrears of rent due upto 2nd Chitra Sudi 15, 2017 S. Y. from the 1st Pous Badi S. Y. 2017 amounts to Rs. 2401.98 np. The defendant do deposit this sum within one month from date and continue depositing the rents accruing due henceforth at the rate of Rs. 57.19 np. within the 15th of each succeeding month according to Hindi Calendar. In default, the defence against delivery of possession shall be struck out. The amounts if deposited, will not be withdrawn by the plaintiff without getting specific orders from this Court".

34. It is apparent that only a preliminary order had been passed and the final order could not be passed because the question as to whether there was any relationship of landlord and tenant between them had not been decided at that stage. Even if there had been an irregularity, since the order was passed by consent the landlord cannot take exception to it now. It is true that the learned trial Judge did not include within his order any direction as to interests and costs. But the details of calculation of arrear of rents are not available from the order. In any event since both parties had accepted the order it is not now open to the landlord to make a grievance of it. The fact remains that whatever order was passed by the learned trial Judge under sub-section (2) of S. 17 has been complied with by the tenant. Whether the order is final or preliminary, since it is a consent order we must proceed on the basis that the tenant has complied with the provisions of sub-section (2). In these circumstances this objection of the landlord fails. As for the second objection as to the vires of the provisions of Act XXX of 1969 which amended the proviso to sub-section (4) of S. 17 we have already found that this objection cannot be sustained. In this view of the matter both the contentions made out by the learned Advocate for the landlord-respondent are found to be of no substance. The tenant-appellant, therefore, must succeed and we order as follows:

The appeal is allowed. The decree of eviction passed by the learned trial Judge even though it was correct at the time of the passing of the decree can no longer be sustained and is set aside. The tenant, however, must pay to the landlord-respondent the costs of this appeal as well as the costs of the suit.

SABYASACHI MUKHARJI, J.:—

35. I agree.

M. M. DUTT, J.:— 36. I agree.
Order accordingly.

AIR 1972 CALCUTTA 533 (V 59 C 114)

HAZRA, J.

Satsang and another, Petitioners v. Kiron Chandra Mukhopadhyay and others. Respondents.

Suit No. 160 of 1972, D/- 18-7-1972.

Index Note: Copyright Act (1957), Ss. 2 (o), 13 (1) (a), 14 (1) (a), 45 — 'Literary Work' — Works of a religious preacher or compilations of his discourses or teaching are 'literary work' within Section 2 (o) and are entitled to 'copyright' under the Act — Registration of 'works' not a condition precedent for acquisition of copyright in works.

Brief Note:— The right which a person acquires in a work, which is the result of his intellectual labour is called his copyright. The primary function of copyright law is to protect from annexation by other people the fruits of a man's work, labour, skill or test. It is works that are protected and not ideas; if ideas can be taken without copying a work, the copyright owner cannot interfere. The words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high, and are used in the sense of written or printed matter.

Having regard to the law on the subject, writings of a religious preacher, or his sermons and sayings which are compiled by Satsang Society on his behalf would prima facie, come within the meaning of 'literary works' and would in any view, be protected under the Copyright Act. In the instant case the works as well the compilations of speeches, discourses etc. in which copyright is claimed are the result of the knowledge, labour, judgment, learning, skill, test, realisation and understanding of the founder of the Satsanga sect and as such they are protected under the Copyright Act. (1914) 2 Ch 566 and (1916) 2 Ch 601 (608) and 1925 Ch 383 and (1872) 14 Eq 431: Halsbury's Laws of England VIII Ed. Art. 690, Rel. on. (Para 13)

There is no section in the Copyright Act, 1957, to the effect that the author of a literary work etc. can have no right or remedy unless the work is registered. A person has an inherent copyright in an original composition or compilation without the necessity of its registration. AIR 1970 Madh Pra 261 and AIR 1960 Andh Pra 415. Distinguished. Dictum in

AIR 1970 Madh Pra 261 about registration requirement held obiter. (Para 14)

Cases Referred: Chronological Paras

AIR 1970 Madh Pra 261 = 1970

MPLJ 475, M/s. Mishra Bandhu

Karyalaya v. Shivratanlal Koshal

9, 14

AIR 1960 Andh Pra 415 = 1960

Andh LT 219, V. Errabhadrarao

v. B. N. Sarma

9, 17

1925 Ch. 383 = 95 LJ Ch 81, Bri-

tish Oxygen Co. v. Liquid Air Ltd.

10

1916-2 Ch 601 = 86 LJ Ch 107,

University of London Press Ltd.

v. University Tutorial Press Ltd.

2, 10

1914-2 Ch 566 = 111 LT 269, E. W.

Savory Ltd. v. The World of Golf

15

(1872) 14 Eq 431 = 41 LJ Ch 781,

Mack v. Petter

12

ORDER:— The plaintiffs Satsang, a registered society under the Societies Registration Act and Nani Gopal Chakrabarty, the Secretary, Satsang have made this application for interlocutory injunction restraining the defendants, Kiron Chandra Mukhopadhyaya and Kumud Bandhu Bal and others from making any further reproduction or printing or publication of the works entitled "Satyanusaran" "Chhande-Surey-Sabar-Jibon" and "Path-O-Patheo" or any of them or making any other or further copies or colourable imitation of the publications of the plaintiff No. 1 entitled "Satyanusaran" "Anusruti" and "Alochona Prasangey" and from selling or disposing of by way of trade or offering for sale any copies of the said works or any other copies or colourable imitations of the said publications of the plaintiff No. 1 Satsang till the disposal of this suit and for appointment of a receiver in respect of all manuscripts, proofs, and other originals of the said works in their possession till the disposal of the suit.

2. An interesting question of copyright law has been raised in this application. Are the works of a religious preacher himself in his own handwriting and the compilations of the discussions and sermons of a religious preacher made by the Society founded by him "literary works" within the meaning of the word "work" under the Copyright Act, 1957?

The religious preacher in this case is Anukul Chandra Chakrabarty known by his followers and disciples as "Sri Sri Thakur Anukul". He himself wrote a book "Satyanusaran" in his own hand as early as 1316 B. S. corresponding to 1910 A. D. recording some of his religious teaching and precepts. The said book "Satyanusaran" was printed and published for the first time in the year 1919 and thereafter the same ran into several editions. Sri Sri Thakur Anukul

also known as "Sri Sri Thakur" founded a society of religious brotherhood and charitable organisation consisting of his followers and disciples known as Satsang, sometime in the year 1925. This society was originally registered at Pabna but on 4th April 1951 (when Pabna was a part of the then East Pakistan) it was registered at Calcutta under the Societies Registration Act, 1860.

The object of the society is to propagate and to give practical shape to the ideals and activities of Sri Sri Anukul Thakur. It owns and runs a publishing unit known as Satsang Publishing House at Deoghar.

3. During the lifetime of Sri Sri Thakur the discussions with the sermons given by the Thakur were compiled and the said compilations were published by a member of the said society Satsang on its behalf in the year 1949 under the name "Anusruti." Since 1949 the said book Anusruti was printed and published and further volumes of the said compilation Anusruti was published from time to time.

A volume, which was produced before me being the second volume shows that these are poetry or poetical expressions of Sri Sri Thakur. In the preface it is written that Sri Sri Thakur started delivering "Chhara" or "poetry" in the year 1940 and continuously uttered those Charra or poetry or poetical expressions. There are numerous such expressions and some of them had been compiled in the second volume.

Similarly, during the lifetime of Sri Sri Thakur the religious teachings and precepts of the Thakur were recorded by his followers who were members of Satsang. The same was printed and published by the Satsang through its press and publishing house. The name of this magazine is "Alochana". Thereafter, these writings were compiled in a book "Alochona Prosangey". This was printed and published by the Satsang and the last volume was printed and published in the year 1969.

The petitioner's case is that Satsang is the owner and/or the exclusive licensee of the copyright in the said publication viz., "Satyanusaran" "Anusruti" and "Alochona Prosangey". The petitioners state that the respondents are infringing the copyright of the said works.

4. The defendant No. 1 Kiron Chandra Mukhopadhyaya and the defendant No. 2 Kumud Bandhu Bal very recently published the book "Satyanusaran" written by Sri Sri Thakur Anukul Chandra. They also published two other books in the name of "Path-O-Patheo-Prosangey" which are mere quotations from some of the volumes of the books "Alochona Prosangey" and similarly they

also published another book "Chhanda Surey Sabar Jiban" reproducing in verbatim a substantial part of the publication "Anusruti".

The petitioners say that the defendants have infringed the copy-right of the petitioner "Satsang" in respect of the said works. There was an exclusive licence given by Sri Sri Thakur to Sri Amarendra Nath Chakrabarty his eldest son to publish his works, viz., all books written by him and all books containing his teachings collected and compiled by his followers and his disciples being members of Satsang for the benefit of the said Satsang.

5. On November 13, 1971 notice was given by Mr. B. K. Sinha, Advocate, on behalf of the petitioners to the defendants Nos. 1 and 2 to refrain from infringement of copyright of the books of the plaintiff. On December 4, 1971, Mr. H. P. Ghosh, Advocate, for the defendants Nos. 1 and 2, replied to the said letter denying the statements contained in the said letter, but did not deal with the allegations contained in the said letter. It was further stated in the said letter that the defendants Nos. 1 and 2 are trying to procure materials on receipt of which they will send a reply dealing with allegations in the said letter of Mr. B. K. Sinha. Thereafter on December 15, 1971 there was another reminder given by Mr. B. K. Sinha to Mr. H. P. Ghosh but on January 6, 1972 Mr. H. P. Ghosh stated that they have already filed a suit in the second Court of Munsif at Sealdah.

6. Mr. Gouri Mitter, Advocate-General of West Bengal, Mr. A. K. Sen and Mr. Dipak Sen appeared before me for the plaintiffs, and, by consent Mr. A. K. Sen argued the matter for the plaintiffs. Mr. Sen submitted that these are literary works and original works of Sri Anukul Thakur. Literary works include also compilations. Copyright subsists in respect of these classes of works. Sri Sri Thakur himself was publishing these works for a long time. Satsang was a society established by Thakur himself. Originally it was a society at Pabna (which subsequently formed part of the then East Pakistan) and since 1951 it is a registered society in India. Sri Sri Thakur himself in writing on November 15, 1957 gave exclusive licence to his son Amarendra Nath Chakrabarty to publish his works for and on behalf of and for the benefit of the Satsang, and Satsang is the exclusive licensee. A photostat copy of the licence by Sri Anukul Chandra Chakrabarty (Sri Sri Thakur) was produced before me.

7. Mr. A. K. Sen placed before me a copy of the plaint in title suit No. 360 of 1971 filed by the defendants Kiron Chandra Mukhopadhyaya and Kumud

Bandhu Bal in the Second Court of Munsif at Sealdah, on December 20, 1971, that is, after receipt of the two letters dated November 13, 1971, and December 4, 1971 on behalf of the plaintiff. The case of defendants Nos. 1 and 2 will appear from the plaint filed in Sealdah Court. In the plaint in the Sealdah Court the defendants stated as follows:

(a) Sri Sri Anukul Thakur was a great religious teacher. He is the founder of the famous religious organisation, known as "Satsang Pabna" which has its branches and offices in different parts of India and in many places of the world. Sri Sri Thakur passed away on January 27, 1967 at the age of 81.

(b) Sri Sri Thakur is worshipped by his millions of disciples as a prophet. Sri Sri Thakur made utterances which sounded like the holy sermons. Sri Thakur always opined that his sayings and the books containing them as also the properties of Satsang Pabna did not belong to any particular group. At the early age of 22 he put into writing in his own hand some of his sayings in a book in Bengali which he himself named as "Satyanusaran". This book, because of the universal nature of the truth contained in it, came to be read by his countless disciples and had undergone several editions.

(c) There was injunction by Sri Sri Thakur against any change in his sayings. But as the book "Satyanusaran" underwent editions, there appeared changes, deviations and even distortions. There is one edition of the book, namely, seventh edition, published by Satsang Publishing House in the year 1345 B. S. This edition was specially characterised by the words "Parishodhita and Paribarjita".

(d) The sayings of Sri Sri Thakur cannot be the personal property or asset of any group or any individual "either by inheritance or by assignments or otherwise."

(e) The defendant No. 1 is the eldest son of Sri Sri Thakur Anukul Chandra. There are other sons and daughters of Sri Sri Thakur. The defendant No. 1 first published the above named book "Satyanusaran" in the year 1352 B. S. and marked it as 8th edition. The defendant No. 1 subsequently published other books where he described himself as publisher. The last edition of "Satyanusaran" was published in the year 1971. In this edition there are certain distortions. It is claimed that the defendant No. 1 and defendant No. 2 have no right or claim on the book "Satyanusaran" or any other book containing the sermon of Sri Sri Thakur as their own either by inheritance or by assignment or otherwise, nor can they lay any claim on any

of the assets or properties left by Sri Sri Thakur or belonging to Satsang, Pabna.

(f) Even if defendants Nos. 1 and 2 produced any document showing assignment or transfer of copyright to him by Sri Sri Thakur or anybody, such document is challenged by the plaintiff as not lawful or real.

(g) The plaintiff No. 1 Kiron Chandra Mukhopadhaya and plaintiff No. 2, Kumud Bandhu Bal were initiated by the Thakur in the prime of their youth and have dedicated their lives to the cause of the Thakur. They are shocked by the acts and conduct of the defendant No. 1. So they have published an edition of "Satyanusarna" in Bengali for the first time in 1378 B. S.

(h) The plaintiffs Nos. 1 and 2 begged money from the disciples of Sri Sri Thakur for the publication of the afore-said book and defendant No. 3 Messrs. Eastern Printing Press published it at a minimum remuneration. As a result, it has been possible for the plaintiffs to distribute the copies of this book free of cost among the masses and to acquaint themselves with the preachings and sermons of Sri Sri Thakur.

(i) In publishing this edition the plaintiffs solely depended on the seventh edition of "Satyanusaran" because it was the only genuine edition.

(j) The case of the plaintiff is that the defendant No. 1 in publishing a mutilated and distorted edition of the original "Satyanusaran" written by Sri Sri Thakur and in introducing metaphors therein according to his own whims and convenience, has profaned a sacred work of a great prophet and has caused anguish agony to his numberless disciples.

It is stated that for the above reasons the suit was filed and in the suit it is claimed that the editions "Satyanusaran" published by defendant Nos. 1 and 2 including the 20th edition have deviated from the original writing of Sri Sri Thakur.

In the prayers in the said plaint the plaintiffs Nos. 1 and 2 (defendants Nos. 1 and 2 herein) prayed, inter alia,

(i) for declaration that the book named "Satyanusaran" of Sri Sri Thakur Anukul Chandra, now published by the plaintiffs Nos. 1 (Kiron Chandra Mukherjee) and 2 (Kumud Bandhu Bal) and printed by defendant No. 3 (Eastern Publishing House) has been reprinted from the seventh edition of the same book that was published by Satsang Publishing House in 1345 B. S. and this edition by the Plaintiffs has not been copied or reprinted in part or in full from any of the editions published by the defendant No. 1 (Amarendra Nath Chakraborty).

(ii) that the defendant No. 1 (Amarendra Nath Chakraborty) has no right

to print and publish an edition of "Satyanusaran" reserving the copyright to himself in the way he has done in the editions published by him and that plaintiffs have right to print and publish the editions referred to above.

(iii) for a declaration that the editions of "Satyanusaran" published by the defendant No. 1 (Amarendra Nath Chakraborty) and/or defendant No. 2 (Satsangha Publishing House) including the 20th edition have deviated from the original written by Sri Sri Thakur Anukul Chandra.

(iv) for an injunction restraining the defendants (Amarendra Nath Chakraborty, Satsangha and Eastern Press) from circulating or selling the copies of the 20th edition of "Satyanusaran" published by the defendant No. 1 (Amarendra Nath Chakraborty).

8. Mr. A. K. Sen cited (1916) 2 Ch 601 at p. 608. (University of London Press Ltd. v. University Tutorial Press Ltd.) and submitted that these works are literary works within the meaning of the words literary works in its Copyright Act 1957.

9. Mr. M. B. Sarkar appearing for the defendant Nos. 1 and 2 Kiron Chandra Mukhopadhyaya and Kumud Bandhu Bal submitted that these works do not come within Section 13 of the Copyright Act. According to him these works are not original literary works. He submitted that Section 13 cannot be read independently of Sections 16 and 17 of the Copyright Act. His case is that these books are religious precepts of a "Guru" and any disciple of the "Guru" can publish these works, and as such Satsang has no right of publication. According to him, the religious teachings and precepts of a religious preacher are not "literary works" and the author has no copyright in respect of such works. He also submitted that there was no exclusive licence. He disputed the genuineness of the writing dated 15-11-1957, the photostat copy of which has been shown to me.

Mr. Sarkar, further submitted that the suit is not maintainable because copyright is not registered and as such no suit lies. In support of this contention he relied upon a decision of the Madhya Pradesh High Court reported in AIR 1970 Madh Pra 261, (M/s. Mishra Bandhu Karyalaya v. Shivratanlal Koshal). He relied upon an observation by the learned Judge in this case, at page 267 which is as follows:

"The Indian Copyright Act 1914 had nowhere made any provision for the registration of the copyrights. Under the Copyright Act, 1957, it appears that under Sections 13 and 45 the registration of book with the Registrar of Copyrights is a condition for acquiring copyright with respect to it. A plain reading of several

provisions of the Act leaves no doubt in my mind that copyright in book now is only secured if it is an original compilation and has been duly registered according to the provisions of the 1957 Act. Once it is so registered the author is deemed to acquire the property rights in the book. The right arising from the registration of the book can be the subject-matter of civil or criminal remedy so that without it the author can have no rights nor remedies in spite of the fact that the work is an original one".

Mr. Sarkar next cited another decision reported in AIR 1960 Andh Pra 415, (V. Errabhadrarao v. B. N. Sarma). This is a suit under Hyderabad Copyright Act (2 of 1334 F). In the Hyderabad Act there is a clear provision that copyright in a book or drawing is only secured if it is an original compilation and has been duly registered according to the provisions of the Act.

Lastly, Mr. Sarkar contended that the nature of the document dated November 15, 1957 is not a licence because it is not addressed to anybody. In any event, it grants to Shri Amarendra Nath Chakraborty, the exclusive right by way of licence to print and publish the books and compilations thereof for the benefit of Satsang and, therefore, Amarendra Nath Chakravarty should have been made a party.

10. The question is whether these works come within the meaning of "original literary works" under Section 13 of the Copyright Act, 1957? Under Section 2 (y) of the said Act "work" means any of the following works, namely: (i) a literary, dramatic, musical or artistic work. The word "literary" has not been defined, but under Section 2 (c) 'literary work' includes tables and compilations.

In (1916) 2 Ch 601, (University of London Press Ltd. v. University Tutorial Press Ltd.) it was held that papers set by examiners are 'literary works' within the meaning of Copyright Act, 1911. At page 608 of the judgment, Paterson, J. says "in my view, the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature and refers to written or printed matter. Papers set by examiners are, in my opinion, 'literary work' within the meaning of the present Act".

This judgment has been followed by Romer, J. in 1925 Ch 383 (British Oxygen Co. v. Liquid Air Ltd.). In this case a letter written by manufacturers to a trade-customer offering their goods at a low price if the customer agrees to take

such goods exclusively from them, is an 'original literary work' within the meaning of Section 1, sub-section (1) of the Copyright Act, 1911 and the writers are entitled to copyright therein.

11. In Halsbury's Laws of England Third Edition Volume VIII, Art. 690, page 376 it appears as follows: "Whereas the Copyright Act, 1842 gave protection to 'books' an expression which was defined as including a volume, part of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published, copyright under the Copyright Act, 1911, extends to all literary works, and the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high, and are used in the sense of written or printed matter. The expression 'literary work' also includes maps, charts, plans, tables, and compilations. The change of description of the works to be protected brought about by the Copyright Act, 1911, from 'books' to 'literary works' has not cut down, or altered to his detriment, the rights of a person claiming copyright.

The right which a person acquires in a work, which is the result of his intellectual labours is called his copyright. The primary function of copyright law is to protect from annexation by other people the fruits of a man's work, labour, skill or taste. It is works that are protected and not ideas; if ideas can be taken without copying a work, the copyright owner cannot interfere. The Copyright Act mentions as among the subjects of copyright, novels and other 'literary works' maps, charts, plans, tables and compilations, all of which count as 'literary works', lectures, including addresses, speeches and sermons, plays, cinema films, pieces for recitation and so forth. Novels, plays, poems, paintings are absolutely protected. They must be original in the sense not being entirely copies of another similar works. In other words, they must originate from their authors. They must also be substantial enough to deserve the name of "works".

12. Mr. Sen cited (1872) 14 Eq 431, (Mack v. Pether). In this case, the plaintiff, the publisher of a work which he claimed to have originated, called "The Birthday Scripture Text Book", consisting of a printed diary interleaved, with a blank space opposite each day with a text of scripture appended, and which was designed as a record of the birthdays of friends".

Lord Romilly, M. R. said at page 437 as follows:

"I am of opinion that the plaintiff is entitled to an injunction. The defendants would be at liberty to publish a daily text book and so far to adopt the scheme of the plaintiff's work; but it was the

plaintiff's own idea to have a text book associated with a birthday, and so to adopt it to those sentiments of religion with which most persons regard a day which marks the completion of another year of their lives. The plaintiff is entitled to a copyright in the use of the title, "Birth-day Text Book". whatever other words may be associated with it, and the defendants must be restrained from the publication of their work, and they are not entitled to publish a work with such a title, or in such a form as to binding or general appearances, as to be a colourable imitation of that of the plaintiff".

13. Having regard to the law on the subject, writings of a religious preacher, Sri Sri Thakur Anukul Chandra, or his sermons and sayings which are compiled by Satsang on his behalf would prima facie, come within the meaning of 'literary works' and would in my view, be protected under the Copyright Act.

In the instant case, before me, the defendants did not claim to have any right as licensee. Admittedly these works are original works of Sri Sri Thakur Anukul Chandra. It is the result of the knowledge, labour, judgment, learning, skill, test, realisation and understanding of Sri Sri Thakur Anukul Chandra. The compilations are also compilations of his teachings and his works. From the year 1910, these works were either published by Sri Sri Thakur Anukul Chandra himself or by Satsang at the wishes of Sri Sri Thakur Anukul Chandra. Before me, a writing from the Thakur was produced by which he gave exclusive licence to publish these books for the benefit of the society founded by him. The eldest son of Sri Sri Thakur, Shri Amarendra Nath Chakravorty is the Prodhana Acharya and ex-officio President of the Society and the copies of the books which are shown to me are published by Shri Amarendra Nath Chakravorty and Satsang Publishing House, P. O. Satsang, Deoghar.

Although the rights of the parties would be decided finally in the suit, but I think that a prima facie case has been made out by the petitioners. The defendants do not claim to have any independent right but their case is that plaintiffs have no right, indeed nobody has any right and, therefore, the defendants can make publications as disciple of their Guru.

Admittedly, the publications of the works of Sri Sri Anukul Thakur have been made very recently by the defendants. The letters placed before me written on behalf of the plaintiff which is annexed to the petition show that sometimes in 1971 the plaintiffs came to know that the defendants Nos. 1 and 2 are infringing the copyright of the plaintiff

14. Now, I shall deal with the case reported in AIR 1970 Madh Pra 261 at p. 267, relied on by Mr. M. B. Sarkar.

With regard to the case reported in AIR 1970 Madh Pra 261 at p. 267, Mr. A. K. Sen pointed out that neither Section 13 nor Section 45 of the Copyright Act mentions that registration is compulsory, nor there is any section in 1957 Act, which provides, that unless there is registration the author of any works cannot bring an action for infringement of copyright. A plain reading of several sections of the Copyright Act, 1957 leaves no doubt in my mind that the contention of Mr. Sen is correct. Under the Copyright Act 1957 registration is not compulsory. There is no section in the Copyright Act 1957, to the effect that the author can have no right or remedy unless the work is registered. Section 13 of the Copyright Act provides that copyright shall subsist throughout India in certain classes of works which are enumerated in the section. Section 45 of the Act provides that the author or publisher of, or the owner of or other person interested in the copyright in any work may make an application in the prescribed form accompanied by the prescribed fee to the Registrar of Copyrights for entering particulars of the work in the Register of Copyrights. This section does not say that registration is compulsory. The learned Judges of Madhya Pradesh High Court at p. 267 stated as follows: "We are, however, concerned with the state of law prevalent under the Imperial Copyright Act 1911 enacted by the British Parliament, subject to such modifications as stated in the Indian Copyright Act, 1914. It is necessary for us to deal with this aspect because the learned counsel for the appellant, during the course of his arguments obliquely suggested that the copyright of the book in question 'Saral Middle School Ank Ganeet' not being registered, neither the author nor his assignee had any kind of right or remedy. The whole object of this discussion is to remove that misconception". The learned Judges further stated: "under the law relating to copyright, then prevalent to which we have already referred, namely, Imperial Copyright Act, 1911 as adopted and modified under the Indian conditions by the Indian Copyright Act, 1914 a person had an inherent copyright in an original composition or compilation without the necessity of its registration".

15. Mr. A. K. Sen also pointed out that the learned Judges of the Madhya Pradesh High Court referred to and accepted principles in (1914) 2 Ch 566 (567), (E. W. Savory Ltd. v. The World of Golf Ltd.). The head note of that case is:

"In the case of a picture assigned with all copyrights, but not registered under the Fine Arts Copyright Act 1911; the owner of the picture has such a 'copyright' as will enable him to receive the substituted and enlarged copyright given to owners of copyright in substitution for their existing rights by S. 5 and Sched. I of the Copyright Act, 1911".

It was argued in that case that the copyright in a picture was first created by the Act of 1862 and Section 4 of that Act provides that no proprietor of any copyright shall be entitled to the benefit of the Act until his copyright is registered. Artistic copyright was one of the benefits given by the Act of 1862 (25 and 26 Vict. C. 68). Until registration the plaintiffs had no copyright, but only an inchoate right to acquire it by registration. They could not therefore take the larger rights given by the Act of 1911.

At page 572 of the judgment Neville, J. said:

"Therefore we have to ascertain whether the plaintiffs at the date of the passing of that Act were entitled to copyright. That throws us back upon consideration of the Act of 1862. The Act of 1862 gives copyright to the author or the vendee or assignee of any original painting and so on, and by Section 4 it is provided that no proprietor of any such copyright shall be entitled to the benefit of the Act until registration — that is a reference to registration under the Act of 1862, which is there provided for and no action shall be sustainable or any penalty be recovered in respect of anything done before registration. It is argued that the result of that provision is that at the date of passing of the Act of 1911 the plaintiffs had no copyright in the picture, because undoubtedly they had not registered, and I have to consider whether they had copyright. In my opinion they had. I think it would be strange to hold otherwise, because if I did I should be holding that the Act of 1911 was taking away from them a right which at that time they possessed, because had they chosen at that date to have registered their copyright they could have immediately afterwards sued anybody who infringed it, whereas by the Act of 1911 the whole machinery of registration was swept away and it is impossible to register, and consequently, unless the Act of 1911 took something away from them they are entitled to something, and that something I take to be copyright".

16. Mr. A. K. Sen submitted that under Section 4 of the English Statute 25 and 26 Vic. C. A. P. LXVIII which was an Act amending the law relating to copyrights in works of the fine arts and for repressing the commission of fraud in the production and sale of such works,

there was a provision (mentioned in the said Act) that no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration. Mr. Sen submitted that there is no such provision in the Copyright Act 1957 and Section 45 of the Copyright Act 1957 merely makes registration of copyright optional.

17. In my view, the observations of the learned Judges in the Madhya Pradesh case to the effect; "under Copyright Act, 1957, unless copyright is registered the author will not acquire property right in the book and without it the author can have no rights and remedies are observations in the nature of 'obiter dictum'. I have already expressed my view in the matter. With respect to the learned Judges, I do not find any such provision in the Copyright Act, 1957.

The other case cited by Mr. Sarkar which is reported in AIR 1960 Andh Pra 415 can have no application under the facts of this case because, the Andhra Pradesh case deals with Hyderabad Copyright Act (2 of 1334F). In the Hyderabad Act, which is a different statute, there is clear provision that a copyright in a book or drawing is only secured if it is an original compilation and has been duly registered according to the provisions of the Act.

There is no such provision in the Copyright Act, 1957 (Act XIV of 1957), which is similar to Hyderabad Copyright Act, and, therefore, this decision cited by Mr. Sarkar has no application under the facts of this case.

18. With regard to the point taken by Mr. Sarkar that Shri Amarendra Nath Chakraborty should have been made a party, Mr. A. K. Sen has rightly pointed out that Shri Amarendra Nath Chakraborty is the Prodhán Acharya or the ex-officio President of Satsang. In any event, no suit shall be defeated by reason of misjoinder or non-joinder of parties. Parties may be added at any point of time if necessary or the plaint amended.

In the instant case, admittedly, 'Satyanusaran' is the work of Sri Sri Anukul Thakur. It was published by Satsang Publishing House. The other works are compilations made by Satsang or by a member of Satsang and, admittedly, the works were published by Satsang for a long time. Satsang claims to be the owner and/or exclusive licensee. If Satsang is the owner or exclusive licensee the matter ends. If Satsang is not the owner or exclusive licensee then the copyright of the author devolves on his death upon his heirs. These are matters which would be decided in the suit. In any event, the defendants who

are two of the disciples of Sri Sri Anukul Thakur did not prove that they have any right in respect of the aforesaid works. Their grievance is that there were distortions in the works and they were mentally shocked. Prima facie, I do not think that there is any right of the defendants to make separate publications and I cannot allow continuation of publications of the said works by the defendants.

19. In the premises, I shall grant interlocutory injunction as prayed in the petition. There will be order in terms of prayer (a) of the petition. I shall also appoint the defendants Nos. 1 and 2 receivers in terms of prayer (b) of the petition without remuneration and without security. They will hold all unpublished copies, keep an account of the same and produce all accounts relating to the same at the time of the trial.

20. Costs of this application will be the costs in the cause.

Rule made absolute.

AIR 1972 CALCUTTA 539 (V 59 C 115)

AJAY KUMAR BASU, J.

Electrical Industries Corporation,
Petitioner v. Union of India and others,
Respondents.

Matter No. 509 of 1969, D/- 4-2-1972.

Customs Act (1962), S. 131 — Revision by Central Government — Duty of revisional authority to give opportunity of personal hearing to petitioner.

The revisional proceeding before the Central Government is a quasi-judicial proceeding. The Commissioner (Revision Application) Govt. of India therefore, should have certainly given an opportunity of personal hearing to the petitioner, who had prayed for such hearing, specially when the grounds on which he rejected the revision were not identical as found by the appellate authority. Case Law Discussed. (Paras 16 and 17)

Cases Referred: Chronological Paras

AIR 1971 SC 862 = (1970) 3 SCR	
40. Travancore Rayons Ltd. v. Union of India	10
(1971) 75 Cal WN 102, University of Calcutta v. Rabindra Nath Adhikari	13
AIR 1970 SC 150 = (1970) 1 SCR	
457. A. K. Kraipak v. Union of India	12
AIR 1970 SC 1302 = (1971) 1 SCR	
201. Mahabir Prasad Santosh Kumar v. State of U. P.	11
AIR 1970 SC 1310, Jethmal v. Union of India	12
AIR 1966 SC 671 = (1966) 1 SCR	
466. M. P. Industries v. Union of India	9

FP/GP/D539/72/CWM

AIR 1966 Pat 248 = 1966 BLJR.
790, Hindusthan General Electrical
Corpn. Ltd. v. Supdt. of Central
Excise, Ranchi 14
AIR 1957 SC 648 = 1957 SCA 764
= 1957 Cri LJ 1026, F. N. Roy
v. Collector of Customs, Calcutta 8
M. Banerji for Petitioner; D. Sen
for the Govt. of India.

ORDER:— This is an application under Art. 226 of the Constitution taken out by the petitioner against the order passed by the Commissioner (Revision Application), Government of India and for issuance of appropriate writ.

2. The matter arises out of 'drawback of duties of customs' on the imported material, namely, copper used in the manufacture of super synthetic enamelled copper wire and subsequently exported. Mr. M. Banerji, appearing on behalf of the petitioner, contends that the Customs authorities have arbitrarily and illegally rejected his client's petition for the said drawback as contemplated under Section 75 of the New Customs Act. Mr. Banerji contends that he first claimed for the drawback before the Assistant Collector of Customs. But by the order dated the 31st December, 1965, the said Assistant Collector rejected the claim for drawback as inadmissible. From that order his client appealed to the Appellate Collector of Customs, Calcutta, for the said drawback of duties on 92 cases of super synthetic enamelled copper wire. But by an order dated the 29th September, 1966, the said Appellate Collector of Customs after giving personal hearing rejected the claim of the petitioner. From that order of the Appellate Collector, Mr. Banerji's client went up to the Central Government in revision and asked for personal hearing, but the said Commissioner of Revision Application without giving a hearing to the appellants rejected their application.

3. Mr. Banerji submits that firstly the reasons given by the Commissioner in his order, copy of which is annexure 'E' to the petition the Commissioner has rejected the appeal on different grounds and not on the grounds by which the said appeal was rejected by the Lower Appellate Collector of Customs as would be found in the order, being annexures 'C' and 'D' to the petition.

4. Mr. Banerji also submits that the revision applications being of quasi judicial nature, rule of natural justice should have been followed and the revision petition should not have been dismissed without giving a hearing to the appellant.

5. Mr. D. Sen appearing for the Central Government on the other hand, contends that the appellant cannot have a personal hearing as a matter of right

and secondly the contention of Mr. Banerji that his revision applications were rejected on different ground than the ground set forth by the Appellate Collector of Customs is not correct and he refers to the order of the Appellate Collector in annexure 'D' to the petition. Then he submits that there is not much difference in reasonings between annexure 'D' i.e. the order of the Appellate Collector and annexure 'E', i.e. the order of the Commissioner in revision.

6. But Mr. Banerji points out that annexure 'C' which is also an order of the Appellate Collector is entirely different from annexure 'E' which is the order of the Commissioner. Mr. Banerji contends that if proper hearing was given to his clients or his lawyers they could have satisfied the Commissioner.

7. I have myself considered both the orders in annexures 'C' and 'D' as also 'E' and I cannot say that the Commissioner has rejected the appeal on identical grounds as held by the Appellate Collector and there is some substance in Mr. Banerji's submissions.

8. Various cases were cited from the bar on the point of natural justice and personal hearing. Mr. Sen drew my attention to a case in 1957 SCA p. 764 = (AIR 1957 SC 648), (F. N. Roy v. Collector of Customs, Calcutta), where Sarkar, J. as he then was at page 771 held:—

"It was then stated that the petitioner had not been given personal hearing of the appeal that he preferred to the Central Board of Revenue and the application in revision to the Government. But there is no rule of natural justice that at every stage a person is entitled to a personal hearing. Furthermore, the appeal was out of time".

9. Similarly another case was cited by Mr. Sen, (1966) 1 SCR 466 = (AIR 1966 SC 671), (M. P. Industries v. Union of India). In the judgment Subba Rao, J., as he then was, stated:

"As regards the second contention, I do not think that the appellant is entitled as of right to a personal hearing. It is no doubt a principle of natural justice that quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. * * * The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal".

10. Mr. Banerji, on the other hand, cites several cases in support of his contentions. The latest case on the subject is in AIR 1971 SC 862 in (Travancore Rayons Ltd. v. Union of India). By deli-

vering judgment Shah, J., as he then was, said:

"It is true that the rules do not require that personal hearing shall be given, but, if in appropriate cases where complex and difficult questions requiring familiarity with technical problems are raised, personal hearing is given, it would conduce to better administration and more satisfactory disposal of the grievances of citizens".

11. Similarly in the case reported in AIR 1970 SC 1302, (Mahabir Prasad Santosh Kumar v. State of Uttar Pradesh), the Supreme Court laid down:

"Opportunity to a party interested in the dispute to present his case on questions of law as well as fact, ascertainment of facts from materials before the Tribunal after disclosing the materials to the party against whom it is intended to use them and adjudication by a reasoned judgment upon a finding of the facts in controversy and application of the law to the facts found are attributes of even a quasi-judicial determination".

12. Similarly in another case in AIR 1970 SC 1310, (Jethmal v. Union of India) G. K. Mitter, J. said:

"Our attention was also drawn to a recent decision of this Court in A. K. Kraipak v. Union of India, AIR 1970 SC 150 where some of the rules of natural justice were formulated in paragraph 20 of the judgment. One of these is the well known principle of audi alteram partem and it was argued that an ex parte hearing without notice violated this rule".

13. Mr. Banerji also cited a case reported in 75 Cal WN 102 where 'reasonable opportunity' has been discussed by their Lordships in the case of University of Calcutta v. Rabindra Nath Adhikari and it has been said,

"reasonable opportunity means that a person should be told all that have been found against him and should be given a reasonable opportunity to adduce any evidence either to contradict or to challenge that has been found against him".

14. In a case reported in AIR 1966 Pat 248 at p. 254, Para. 14, it has been stated:

"I have already held that even the assessing officer has to act quasi-judicially, and it necessarily follows that the appellate authority exercising powers under Section 35 and the Central Government exercising powers of revision under Section 36 must also act quasi-judicially and given the petitioner a reasonable opportunity of being heard".

15. In paragraph 9 of the petition the petitioner has stated:

"The petitioner prays that it should be granted a personal hearing and allow-

ed to place such other evidence either oral or documentary as may be relevant to the subject-matter of the case".

16. Needless to say, that in spite of this prayer, no opportunity was given to the petitioner appellant to appear before the Commissioner to place his case and the appeal was disposed of ex parte.

17. There is no doubt that this was a quasi-judicial proceeding. I have considered the facts and circumstances of this case and, in my opinion, the Commissioner should have certainly given an opportunity to the petitioner to appear before him specially as I find that the grounds on which he rejected the appeal are not identical as found by the Appellate Collector of Customs.

18. In that event of the matter I make the rule absolute. The matter will be re-heard by the Commissioner of Revision Government of India, after giving a reasonable opportunity to the appellant to appear personally and/or through lawyer before him.

19. There will be no order as to costs.

Rule made absolute.

AIR 1972 CALCUTTA 541 (V 59 C 116)

RANENDRA NATH DUTT, J.

Abdul Rahim and others, Appellants v. Kamalapati Mukherjee, Respondent.

A. F. A. D. No. 1277 of 1967, D/- 18-5-1972.

Index Note:— (A) Bengal Money Lenders Act (10 of 1940), S. 37-A as inserted by Bengal Money Lenders (Amendment) Act (21 of 1965)—S. 37-A applies to transactions entered into even prior to Amending Act of 1965.

Brief Note:— (A) Section 37-A is attracted to a transaction of sale and agreement to reconvey effected by two separate documents even previous to the Amendment Act, 1965. Where the defendants contested a suit on the ground that they had secured a loan and executed separate documents of sale and an agreement to reconvey and took the plea that the transaction in substance was loan transaction and not an out and out sale, the Court deciding the question as to the nature of the transaction, must consider the effect of Section 37-A which overrides the proviso to Section 58 (c) of T. P. Act (1882). It is therefore wrong to hold that in view of Section 58 (c) proviso T. P. Act the defendants are incompetent to take such plea. S. A. No. 1550 of 1960, D/- 10-6-1966 (Cal), Followed.

Cases Referred: Chronological Paras
(1966) S. A. No. 1550 of 1960, D/- 10-6-1966 (Cal), Ram Charan Sau v. Tarak Nath Coomar

GP/HP/E156/72/SGK/KSB

Ganga Narayan Chandra, for Appellants; Nilmani Goswami, for Respondent.

JUDGMENT:— This appeal arises out of a suit filed by the plaintiff-respondent against the defendants-appellants for declaration of title and confirmation of possession or, in the alternative, recovery of possession in respect of plots Nos. 1636, 1757 and 1758 of Mouza Maglampur.

2. The plaintiff's case was as follows:—

The defendants were the owners of the plots, but the defendants sold the plots to Gobordhan Sadhu Khan, Nirepada Sadhu Khan and Joygopal Sadhu Khan by three different kobalas in 1364-65 B. S. Since their purchase the Sadhu Khans were in possession of the lands. But in Bhadra 1370 B. S. they sold the lands to the plaintiff for Rs. 3,900/- and since his purchase the plaintiff has been in possession. The defendants threatened the plaintiff with dispossession and hence, this suit. The defendants contested the suit. Their defence was that they never sold the lands to the Sadhu Khans. They took loans from the Sadhu Khans, but the Sadhu Khans advanced the loans after obtaining out and out Kobalas from them. There were separate agreements to the effect that if the defendants paid certain sums within certain dates, the Sadhu Khans would re-transfer the properties to them. So, the defence in substance was that the transactions were not out and out sales but loan transactions.

3. The Subordinate Judge found that the transactions were not loan transactions but out and out sale. He, therefore, decreed the suit. The Additional District Judge, who heard the appeal, does not appear to have made any independent finding about the nature of the transactions on a consideration of the materials on record but he has said that in view of the proviso to Section 58 (c) of the Transfer of Property Act the defendants were not competent to take the plea that the transactions were not out and out sales but loan transactions. When the learned Judge made this finding, he did not consider the effect of S. 37-A of the Bengal Money Lenders Act as amended in 1965. True, the instant transactions took place earlier than that, that is, in 1958. But I have held in *Ram Charan Sau v. Tarak Nath Coomar*, (S. A. No. 1550 of 1960 (unreported) decided on 10-6-1966 (Cal)) that Section 37-A of the Bengal Money Lenders Act is attracted to transactions entered into even previous to the amendment Act of 1965. So, Section 37-A will be attracted to the instant case also and in view of S. 37-A of the Bengal Money Lenders Act it must be said that the learned Judge was wrong

when he said that because of the proviso to Section 58 (c) of the Transfer of Property Act, the defendants were not competent to take the plea that the transactions were not out and out sales but loan transactions. The learned Judge should, therefore, have made his own finding about the nature of the transactions on a consideration of the materials on record adduced by the parties. Mr. Goswami submits that the judgment of the learned Judge read as a whole would indicate that the learned Judge was also of the view that the transactions were not loan transactions. It is true that the learned Judge made some incidental findings about repayment and all that. But that is besides the point. Even if there is no repayment, unless it is out and out sale, title does not pass. Moreover, the most important question for decision of the final Court of fact was if the transactions were, in fact, out and out sales or loan transactions and, as I have said, the learned Judge has not made any clear finding in that respect on the evidence on record. The judgment and decree of the learned Judge should, therefore, be set aside.

4. In the result, the appeal is allowed. The judgment and decree of the learned Additional District Judge are set aside and the appeal sent back to him for re-hearing on merits in the light of the observations made above.

5. No order is made as to costs in this appeal in this Court.

Appeal allowed.

AIR 1972 CALCUTTA 542 (V 59 C 117)

S. C. GHOSE, J.

Arun General Industries Ltd., Petitioner v. Gunny Trading Co., Respondent.

Award No. 244 of 1969, D/- 18-4-1972.

Index Note:— Forward Contracts (Regulations) Act, 1952, S. 2(b)—Arbitration Act, 1940, S. 33 — Non-transferable specific delivery contract — Arbitration clause in contract — Assignment of contract — Assignee gets no rights — Reference to arbitration by assignee on basis of assignment — Can be challenged under S. 33, Arbitration Act. AIR 1962 SC 1810, Ref.; AIR 1962 Cal 441, Dist. (Para 12)

Cases Referred: Chronological Paras

AIR 1962 SC 1810 = (1963) 3 SCR

183, Khardah Co. Ltd. v. Raymon Co. Pvt. Ltd. 5, 7, 9

AIR 1962 Cal 441, Lotus Oil Co.

v. Calcutta Soap Works 5, 7, 8

1946 Ch 320 = (1946) 2 All ER

54, Shayler v. Woolf 11

GP/HP/E162/72/MNT

ORDER:— This is an application for determination of the existence or validity of 16 several contracts mentioned in paragraph 1 of the petition whereby and whereunder the petitioner agreed to sell to diverse persons various quantities of jute goods described in the said several contracts on the terms and conditions mentioned in the said contracts.

2. The said contracts were non-transferable specific delivery contracts within the meaning of the Forward Contract (Regulations) Act, 1952. Each of the said contracts contained an arbitration clause to the following effect to wit:

"15. All disputes between the parties shall be referred to the arbitration of Indian Chamber of Commerce, Calcutta, under the Arbitration Act, 1940, and Courts situated within the area of original side of Calcutta High Court shall have jurisdiction".

The buyers under the said contracts purported to assign the rights under the said contracts in favour of the respondents. The petitioner failed and neglected to deliver goods under the said contracts notwithstanding application therefor by the buyers and/or the respondents. Thus disputes and differences arose under the said contracts between the parties.

3. The respondents in terms of the arbitration clauses contained in the said contracts referred the said disputes to the arbitration of the Indian Chamber of Commerce, the named arbitrator. Hence the application under Section 33 of the Indian Arbitration Act has been made by the petitioner for the reliefs mentioned above.

The petitioner challenges the right of the respondent to refer the disputes between the parties to arbitration on two grounds:—

First, according to the petitioner, the contracts are non-transferable specific delivery contracts within the meaning of Forward Contract (Regulations) Act, 1952. Thus, the rights liabilities under the said contracts, under the express terms of the contracts, could not be transferred to the respondents.

Secondly, the petitioner submits that if the said contracts are held to be transferable specific delivery contracts, then, the same were and are void and illegal inasmuch as the said contracts had not been entered into by or between or through any member of a recognised Association. The said contracts also were not on the forms prescribed by any recognised Association and no permission of the Central Government was obtained to enter into the said contracts. Thus the said contracts were entered into in contravention of the provisions of the Forward Contract (Regulations) Act, 1952 and/or the notifications issued thereunder.

The same, therefore, were and/or illegal and void.

4. The respondent in paragraphs 6 and 9 of the affidavit of Jupudy Lakshmi Narasimha Rao affirmed on January 20, 1970, and filed in opposition to the petition herein has admitted that all the said contracts were non-transferable specific delivery contracts for jute goods. The respondents, however, has denied in the said affidavit that the said contracts were and are illegal or void.

5. Mr. Vyas appearing on behalf of the petitioner submitted that all the contracts in the instant case are admittedly non-transferable specific delivery contracts. By the very terms of the contracts, they were not transferable as the express terms thereof, prohibited the transfer of the said contracts. Mr. Vyas next submitted that there was no evidence or proof of assignment in the instant case. Lastly, Mr. Vyas contended that in any event, the arbitration agreement contained in the said contracts were and are not transferable. Mr. Vyas relied on the case of Khardah Co. Ltd. v. Raymon & Co. (Pvt.) Ltd., AIR 1962 SC 1810. Mr. Vyas submitted that in the case of Lotus Oil Co. v. Calcutta Soap Works, AIR 1962 Cal 441, it was held on the facts that the contract in that case was a transferable specific delivery contract.

6. Mr. Gautam Chakrabarty appearing on behalf of the respondent on the other hand contended that in an application under Section 33 of the Indian Arbitration Act challenging the legality of the contract, all the parties to the contract must be made parties to the proceedings. In the instant case the original parties to the contract i.e. the buyers have not been made parties and the application should be dismissed on the said ground. The petitioner cannot be allowed to claim any relief as prayed for in prayers (a), (b) and (c) to the petition in the absence of original purchasers. Then Mr. Chakrabarty submitted that the right of the purchaser under the contract has been stated in paragraph 7 in the affidavit-in-opposition. Monies according to Mr. Chakrabarty were advanced under the contracts and became refundable to the purchasers on the petitioner's default in delivering the goods under the contracts. The buyer's right to the said monies under the said contracts could be and have been assigned. The factum of assignment of the contract has not been challenged and so need not be proved.

7. Mr. Chakrabarty also relied on the case of AIR 1962 SC 1810 and specially on the observations of the Court in paragraph 24 of the said judgment appearing at page 1818 of the report. The Counsel relied on the case of AIR 1962

Cal 441, and submitted that the buyer's right to the price advanced could be assigned. According to Mr. Chakrabarty this application has no merit and should be dismissed.

8. In the case of AIR 1962 Cal 441, the contract, as appears from the Report, had no express term to the effect that the contract was a non-transferable specific delivery contract. On an analysis of the said contract it was found that although the buyer could not assign his rights under the contract, there was nothing in the said contract preventing the seller from transferring his right to the price of goods after effecting delivery thereof. Thus the contract involved in the said case was held to be a transferable specific delivery contract.

9. In AIR 1962 SC 1810 there was no express term prohibiting transfer by the parties of rights under the contract. It was held by the Supreme Court that absence of express words forbidding transfer in the contract itself was not conclusive. A contract might be non-transferable by necessary implication in view of the fact that the benefits conferred upon the parties by the contract were burdened with liabilities. On that ground the contract which was subject-matter of the proceedings in AIR 1962 SC 1810 was held to be non-transferable even in the absence to that effect.

10. In the instant case the contract is admittedly a non-transferable specific delivery contract. Clause 16 of the said contract, as appears from a sample form of the said contracts annexed to the petition contains a condition to the following effect, to wit:—

"16. This is a non-transferable specific delivery contract, within the meaning of the Forward Contracts (Regulations) Act, 1952, and as such the rights or liabilities under this contract or under any delivery order, Railway Receipt, Bill of

Lading, Warehouse Receipt, Lorry Receipt or any other documents of title relating thereto are not transferable."

Thus the buyers and the seller in the instant case expressly agreed that their rights under the contract were incapable of assignment.

11. Section 2 (f) of the Forward Contract (Regulations) Act, 1952, defines a non-transferable Specific Delivery Contract to be absolutely unassignable. In the instant case the parties have agreed that the contracts which are the subject-matter of the instant application would be non-transferable specific delivery contracts as defined by Section 2 (f) of the said Act.

The mere fact that a contract contains an arbitration clause does not by itself make the contract unassignable (See Shayler v. Woolfe, 1946 Ch 320. Mr. Vya's contention on this point cannot be accepted.

12. In the instant case it appears, therefore, that the rights of the parties under the contract were incapable of being assigned and the respondents acquired no right either under the contracts or under the arbitration clause contained therein. There was or is therefore, no arbitration agreement between the parties.

13. The assignors of the said contracts are not necessary parties to this application. They have not asserted any right under the contract.

14. For all the aforesaid reasons this application must succeed. There shall be orders in terms of prayers (d), (e) and (f) of the petition.

15. The respondents shall pay the costs of this application.

Application allowed.

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